

12-30-2021

Broken PROMESA: Why the United States Should Abandon Its Use of the Territories Clause to Control the Local Affairs of Puerto Rico

Julia R. Cummings

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>



Part of the [Bankruptcy Law Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

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 (2021).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol87/iss1/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Broken PROMESA

WHY THE UNITED STATES SHOULD ABANDON ITS USE OF THE TERRITORIES CLAUSE TO CONTROL THE LOCAL AFFAIRS OF PUERTO RICO

INTRODUCTION

In the words of the 1976 Supreme Court, “Puerto Rico occupies a relationship to the United States that has no parallel in our history.”¹ Although the Court made this statement nearly half a century ago, the unique association between the United States and Puerto Rico continues to raise questions of authority, accountability, and sovereignty to this day.²

Puerto Rico became a US territory in 1898 pursuant to the Treaty of Paris, which ended the Spanish-American War.³ Since then, the United States has treated Puerto Rico differently compared to other territories.⁴ In fact, just prior to the ratification of the treaty, some US officials alleged “that Puerto Ricans were racially inferior” to US citizens and stated that the acquisition of Puerto Rico would constitute “a social and political threat to the United States.”⁵ Even after its acquisition of the island, the federal government refused to grant Puerto Ricans comprehensive political rights, including US citizenship, signaling that the United States still viewed Puerto Ricans as

¹ Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 596 (1976).

² See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1679 (2020) (Sotomayor, J., concurring) (questioning the authority of the federal government to control the local affairs of Puerto Rico); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1869 (2016) (analyzing whether the principle of double jeopardy applies in Puerto Rico); Victoria Zorovich, Note, *The Perfect Storm: Weathering Puerto Rico's Fiscal Crisis in the Wake of Hurricane Maria*, 46 HOFSTRA L. REV. 1067, 1068 (2018) (discussing uncertainty in the aftermath of Hurricane Maria as to whether Puerto Rico should receive federal aid).

³ JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 27 (1997).

⁴ See Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. INT'L L. 283, 288–90 (2007); TRÍAS MONGE, *supra* note 3, at 27–28.

⁵ CHARLES R. VENATOR-SANTIAGO, PUERTO RICO AND THE ORIGINS OF U.S. GLOBAL EMPIRE: THE DISEMBODIED SHADE 67 (Taylor & Francis Grp., 2015) (eBook).

inferior to US citizens.⁶ In 1917, just before the nation's entry into World War I,⁷ the United States finally granted citizenship to the people of Puerto Rico.⁸ However, although nearly twenty thousand Puerto Ricans fought for the United States during the War, they remained subordinate to US citizens of mainland states.⁹ Nonetheless, the United States gave more autonomy to Puerto Ricans over time.¹⁰ Most notably, Congress passed Public Law 600 in 1950, allowing Puerto Ricans to “embark on the project of constitutional self-governance.”¹¹ After this development, the United States disclaimed obligations established under the United Nations Charter relating to non-self-governing territories.¹²

Despite this apparent renouncement of federal power over Puerto Rican affairs, the United States continues to exercise control over Puerto Rico using the territories clause in Article IV of the US Constitution.¹³ Most relevant to this note is Congress's 2016 enactment of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)¹⁴ to restructure¹⁵ the island's

⁶ See HARRY FRANQUI-RIVERA, *SOLDIERS OF THE NATION: MILITARY SERVICE AND MODERN PUERTO RICO, 1868–1952* 66 (Kara Dixon Vuic et al. eds., 2018) (acknowledging War Department studies concluding that Puerto Ricans were not ready for citizenship or “full political rights”).

⁷ See Shannon Collins, *Puerto Ricans Represented Throughout U.S. Military History*, DEF. DEPT NEWS (Oct. 14, 2016), <https://www.defense.gov/Explore/News/Article/Article/974518/puerto-ricans-represented-throughout-us-military-history/> [<https://perma.cc/7J34-UE4Y>].

⁸ See Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 48 U.S.C. § 733a); *Balzac v. Porto Rico*, 258 U.S. 298, 306–07 (1922).

⁹ See Andrew Glass, *Puerto Ricans Gain U.S. Citizenship, March 2, 1917*, POLITICO (Mar. 3, 2017, 12:02 AM), <https://www.politico.com/story/2017/03/puerto-ricans-gain-us-citizenship-march-2-1917-235497> [<https://perma.cc/4U7Z-UJRK>]. Although Puerto Ricans gained US citizenship, they were not conferred the constitutional rights enjoyed by US citizens in mainland states. See discussion *infra* Section I.A.

¹⁰ *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1671 (2020) (Sotomayor, J., concurring).

¹¹ See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016).

¹² G.A. Res. 748 (VIII), ¶ 7 (Nov. 27, 1953); *Aurelius Inv.*, 140 S. Ct. at 1676 (Sotomayor, J., concurring). Article 73(e) of the United Nations Charter obliges nations that control territories “whose peoples have not yet attained a full measure of self-government” to prepare regular reports regarding the conditions of the territory. U.N. Charter art. 73.

¹³ See *Aurelius Inv.*, 140 S. Ct. at 1679 (Sotomayor, J., concurring). The territories clause states 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.” U.S. CONST. art. IV, § 3, cl. 2. This clause essentially gives the federal government unfettered control over US territories. See *Binns v. United States*, 194 U.S. 486, 491 (1904).

¹⁴ PROMESA, Pub. L. No. 114–187, 130 Stat. 549 (2016) (codified at 48 U.S.C. §§ 2101–2241 and in scattered sections of 15 U.S.C. and 29 U.S.C.).

¹⁵ Debt restructuring is a process whereby a person, business, or sovereignty implements strategies to avoid defaulting on their outstanding debt. Carol M. Kopp, *Debt Restructuring*, INVESTOPEDIA (Mar. 1, 2021), <https://rb.gy/zqj3w7> [<https://perma.cc/6J5J-KJKC>]. Sovereign-debt restructuring may involve tactics such as transferring debts from private to public entities or negotiating with bondholders to reduce the amount owed. *Id.*

mounting debts.¹⁶ PROMESA created a Financial Oversight and Management Board (FOMB) to supervise the debt restructuring process, made up of seven members appointed by the president of the United States, with the governor of Puerto Rico serving as a nonvoting member.¹⁷ The FOMB can control Puerto Rico's budgets as well as its government assets and offices, and can act to ensure reforms and fiscal plans are implemented.¹⁸ The FOMB may take considerable measures to ensure compliance with fiscal guidelines, such as mandating reductions of the island's public workforce.¹⁹

This note assesses the validity of the federal government's use of the territories clause to control local Puerto Rican affairs in light of the complex relationship between the United States and Puerto Rico. The federal government's exercise of such broad powers over Puerto Rico's local affairs appears to infringe on its prior grant of "constitutional self-governance" to the island.²⁰ In fact, the Supreme Court indicated that the enactment of Public Law 600 and the subsequent ratification of the Puerto Rican Constitution altered the relationship between the United States and Puerto Rico, and even likened the sovereignty enjoyed by Puerto Rican citizens to that of the citizens in mainland states.²¹ Thus, any solution to address the Puerto Rican debt crisis must be structured in a manner that respects the autonomy of Puerto Rican citizens—a principle reflected in Supreme Court jurisprudence and in Public Law 600 itself.

Currently, the US Bankruptcy Code allows states to authorize their municipalities to file Chapter 9 bankruptcy proceedings.²² Although Puerto Rico is considered a "state"

¹⁶ See 48 U.S.C. § 2101; Heather Long, *President Obama Signs Puerto Rico Rescue Bill*, CNN (June 30, 2016), <https://money.cnn.com/2016/06/29/investing/puerto-rico-debt-promesa/> [<https://perma.cc/3Y8N-MUDA>].

¹⁷ 48 U.S.C. § 2121(a)–(b), (e). See discussion *infra* Section II.B for more details on the FOMB's composition.

¹⁸ §§ 2141–2146.

¹⁹ See *id.* § 2145.

²⁰ See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016) (noting that "Congress enabled Puerto Rico to embark on the project of constitutional self-governance"); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (recognizing Puerto Rico as an "autonomous political entity, 'sovereign over matters not ruled by the [US] Constitution'"); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976) (stating that "Congress relinquished its control over the organization of the local affairs of the island"). *But cf.* *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1662–63 (2020) (acknowledging that the federally established FOMB is exercising local authority).

²¹ See *Sanchez Valle*, 136 S. Ct. at 1874; *Rodriguez*, 457 U.S. at 7–8; see also *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (determining that Puerto Rico is considered a state under the Bankruptcy Code).

²² 11 U.S.C. § 109(c)(2).

under the Code, it does not have this same right.²³ In order to provide a unique solution given the distinctive relationship between the United States and Puerto Rico, this note proposes a new scheme created under the Bankruptcy Code that would apply to political entities deemed “territories” under PROMESA. This solution would largely preserve the structure of PROMESA while giving Puerto Ricans democratic power over the debt restructuring process. In particular, this scheme would retain the FOMB to supervise the restructuring process, but its members would be elected by the people rather than appointed by the US president.

Part I of this note examines the relationship between the United States and Puerto Rico since the United States’ acquisition of the island in 1898. Part II provides background on the territories clause and studies Congress’s recent use of the clause to enact PROMESA in response to the current debt crisis in Puerto Rico. Part III scrutinizes the continued use of the territories clause to control Puerto Rican affairs and questions its current validity. Part IV explores possible but imperfect solutions to addressing the debt crisis without use of the territories clause. Finally, Part V proposes an ideal solution to addressing the debt crisis by outlining a new bankruptcy procedure for US territories that can be implemented pursuant to the bankruptcy clause of the Constitution.

I. THE HISTORY OF PUERTO RICO AND ITS RELATIONSHIP TO THE UNITED STATES

A. *Establishing a New Type of Territory*

Puerto Rico’s legal relationship with the United States began at the end of the Spanish-American War, four hundred years after Spain’s initial arrival to and colonization of the island.²⁴ In 1898, Spain ceded Puerto Rico to the United States along with other islands pursuant to Article II of the Treaty of Paris.²⁵ Since acquiring Puerto Rico, the United States has viewed the island as distinct compared to its other territories.²⁶ Notably, the Treaty of Paris conferred lesser rights to the newly acquired territories and their residents compared to prior US

²³ *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1946.

²⁴ Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 11, 23 (2000).

²⁵ TRÍAS MONGE, *supra* note 3, at 27.

²⁶ *See id.* at 27–28; Torruella, *supra* note 4, at 288–91.

treaties.²⁷ The treaty provided that Congress would decide “[t]he civil rights and political status of the territories.”²⁸ This text departs considerably from the language of the treaty between the United States and France effectuating the Louisiana Purchase, which specified:

[T]he inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of *all the rights, advantages and immunities of the citizens of the United States*, and in the meantime *they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.*²⁹

The United States’ differential treatment of Puerto Rico likely stemmed from the belief that Puerto Ricans were inferior compared to the people of the United States.³⁰ US leaders asserted that “Puerto Ricans were ignorant, uncivilized, morally bankrupt, and utterly incapable of self-rule.”³¹ Nonetheless, the United States saw promise in the rich, arable lands of Puerto Rico and sought to exploit the island for its resources.³²

The ratification of the Treaty of Paris led to considerable disagreement within Congress as to whether the United States had constitutional authority to acquire lands with the intention that they indefinitely remain colonies.³³ During congressional debates, some senators argued that such acquisition would be unconstitutional, while others believed that the United States did

²⁷ TRÍAS MONGE, *supra* note 3, at 27–28.

²⁸ *Id.* at 27 (quoting Treaty of Peace, Spain-U.S., art. IX, Dec. 10, 1898, 30 Stat. 1754).

²⁹ *Id.* at 27–28 (emphasis added) (quoting Treaty Between the United States of America and the French Republic, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200).

³⁰ See Eamon J.P. Riley et al., “*Yo Soy Boricua*”: *Tapping into the Strength of the Puerto Rican Community to Reclaim Control over its Political, Social, and Economic Future*, 87 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO [REV. JUR. U. P.R.] 972, 977–78 (2018).

³¹ *Id.* at 977 (quoting NELSON A. DENIS, WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA’S COLONY 17 (2015)). See generally Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai’i’s Plantations to Congress—Puerto Ricans’ Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353 (2011) (providing additional insight on the United States’ characterization of Puerto Ricans as inferior to US citizens).

³² Riley et al., *supra* note 30, at 977 (stating that the United States’ “ultimate goal” for acquiring Puerto Rico “was to exploit the colony for its resources and human capital”); see Marisabel Brás, *The Changing of the Guard: Puerto Rico in 1898*, LIBR. OF CONG.: HISP. DIV., <https://www.loc.gov/rr/hispanic/1898/bras.html> [https://perma.cc/W8GC-ZDND] (stating that “[t]he island’s value to US policy makers was as an outlet for excess manufactured goods, as well as a key naval station in the Caribbean”).

³³ TRÍAS MONGE, *supra* note 3, at 28.

not have to grant any rights of self-governance to “conquered” people until they were deemed capable of exercising those rights.³⁴

This debate culminated in a series of Supreme Court cases decided between 1901 and 1905, known as the *Insular Cases*.³⁵ The *Insular Cases* outlined the relationship between the United States and its newly acquired territories, detailing the power of Congress to exert control over the territories and their residents.³⁶ One of these cases, *Downes v. Bidwell*, was particularly critical in determining the legal status of Puerto Rico.³⁷ In *Downes*, the Court held that when the United States acquires new territories, the territory’s citizens do not automatically acquire US citizenship and are not entitled to the same rights as US citizens unless Congress explicitly grants them those rights.³⁸ Ultimately, the Court decided that Congress had not chosen to extend the Constitution to Puerto Rico.³⁹ Thus, Puerto Rico was labeled “a territory appurtenant and belonging to the United States,” but its people lacked the constitutional protections held by US citizens.⁴⁰

B. *Incremental Grants of Autonomy to Puerto Rico*

Puerto Rico remained in a precarious political state after the *Insular Cases*.⁴¹ US leaders contemplated granting citizenship

³⁴ *Id.* The former view was based on the belief “that inhabitants of a Territory belonging to the United States, no matter how acquired, are citizens of the United States[and] as such, they can not be held outside of the Constitution,” i.e., under a regime other than statehood. VENATOR-SANTIAGO, *supra* note 5, at 47 (quoting 32 CONG. REC. 436 (1899)).

³⁵ Malavet, *supra* note 24, at 12 n.32; TRÍAS MONGE, *supra* note 3, at 44. These cases are referred to as the *Insular Cases* because they contemplated the status of insular territories, territories that are not a part of any state or federal district. Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1034 n.13 (2008); *Definitions of Insular Area Political Organizations*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/oia/islands/politicatypes> [<https://perma.cc/XJE4-TJV6>]. Note that some sources consider cases as recent as 1922 as being included in the *Insular Cases* jurisprudence. See Perez, *supra* note 35.

³⁶ Malavet, *supra* note 24, at 12 n.32; TRÍAS MONGE, *supra* note 3, at 44.

³⁷ TRÍAS MONGE, *supra* note 3, at 45; *Downes v. Bidwell*, 182 U.S. 244 (1901) (plurality opinion).

³⁸ See *Downes*, 182 U.S. at 279–80; Adam W. McCall, Note, *Why Congress Cannot Unilaterally Repeal Puerto Rico’s Constitution*, 102 CORNELL L. REV. 1367, 1373–74 (2017).

³⁹ See *Downes*, 182 U.S. at 287.

⁴⁰ See *id.* In a widely cited concurring opinion, Justice White based his analysis on the doctrine of territorial incorporation. Perez, *supra* note 35, at 1038. This doctrine is based on the notion that Congress may choose to incorporate territories, or extend the rights enjoyed by US citizens to people in foreign countries. See *Downes*, 182 U.S. at 322–23 (White, J., concurring). While Congress could choose to incorporate territories immediately upon acquisition, it is not required to. See *id.* at 338–39. White found that Puerto Rico had not been incorporated into the United States by Congress, rendering the island “subject to the sovereignty of and . . . owned by the United States,” but “foreign to the United States in a domestic sense.” *Id.* at 341–42.

⁴¹ See TRÍAS MONGE, *supra* note 3, at 50; FRANQUI-RIVERA, *supra* note 6, at 66.

to Puerto Ricans as early as 1909, but these efforts were ultimately abandoned after preliminary studies by the War Department concluded that the people of Puerto Rico “were illiterate and unprepared for full political rights.”⁴² However, on the eve of World War I, President Woodrow Wilson signed the Jones-Shafroth Act,⁴³ which finally granted US citizenship to Puerto Ricans.⁴⁴ The Act also established a local Puerto Rican government with “executive, legislative, and judicial branches,” and granted Puerto Ricans many of the same rights afforded to citizens of mainland states.⁴⁵ However, while the passage of the Jones-Shafroth Act was a major step in recognizing the political rights of Puerto Ricans, the Supreme Court soon clarified that the Act did not transform Puerto Rico into a territory whose citizens enjoyed full rights as US citizens since Congress did not expressly provide for such a change.⁴⁶ Thus, the constitutional rights of Puerto Rican citizens were still not equivalent to those enjoyed by citizens of mainland states.⁴⁷

The era of decolonization commenced after World War II, as world leaders began to denounce imperialism and individuals

⁴² FRANQUI-RIVERA, *supra* note 6, at 66. Although these studies concluded that approximately 70–80 percent of Puerto Ricans were illiterate, former Secretary of War J.M. Dickinson testified before the Committee on Insular Affairs that “[t]here [were] no actual statistics” supporting this estimate, and that “some [sources] say [eighty] and some say [seventy].” See *Hearings upon the Bill Proposing to Amend the Present Organic Law of Porto Rico: Hearing Before the H. Comm. on Insular Affs.*, 61st Cong. 11–12 (1910) (statement of J.M. Dickinson, Secretary of War).

⁴³ Organic Act of Puerto Rico (Jones-Shafroth Act), ch. 145, 39 Stat. 951 (codified in scattered sections of 48 U.S.C.); see Collins, *supra* note 7. It has been speculated that the United States’ extension of citizenship to Puerto Ricans was motivated by strategic reasons related to World War I, including the need for more US soldiers. See FRANQUI-RIVERA, *supra* note 6. But see Harry Franqui-Rivera, *Why Puerto Ricans Did Not Receive U.S. Citizenship so They Could Fight in WWI*, CENTRO VOICES, <https://centropr.hunter.cuny.edu/centrovoices/chronicles/why-puerto-ricans-did-not-receive-us-citizenship-so-they-could-fight-wwi> [<https://perma.cc/V7DF-HUUD>] (refuting the claim that the granting of citizenship to Puerto Ricans was due to a need for soldiers).

⁴⁴ Organic Act of Puerto Rico, § 5.

⁴⁵ Elizabeth Whiting, Note, *Puerto Rico Debt Restructuring: Origins of a Constitutional and Humanitarian Crisis*, 50 U. MIA. INTER-AM. L. REV. 237, 242 (2019); see Organic Act of Puerto Rico, §§ 5, 12–49.

⁴⁶ *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922). See *supra* note 40 and accompanying text for a discussion of territorial incorporation.

⁴⁷ See *Balzac*, 258 U.S. at 306; see also Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 389–90 (2002) (describing Puerto Rico’s limited political rights as a “democratic deficit,” which makes Puerto Ricans “a political and economic underclass [of] the United States”). One of the most notable rights limited for Puerto Ricans is the right to participate in federal elections. See Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH. U. J.L. & POL’Y 215, 240 (2017). Puerto Ricans may not vote in the general election for US president and cannot elect senators. *Id.* at 240 n.140. While Puerto Ricans elect a delegate to the US House of Representatives, the representative is not authorized to vote on legislation once it reaches the floor of the House. *Id.*

subject to colonial rule demanded greater freedom from their colonizers.⁴⁸ Given the changing political climate, Puerto Ricans insisted on a structure of government that would afford them greater autonomy.⁴⁹ This movement culminated in the passage of Public Law 600,⁵⁰ which “recognized the right of self-government of the people of Puerto Rico.”⁵¹ The Act was adopted as a compact between the United States and Puerto Rico,⁵² authorizing Puerto Ricans to “organize a government pursuant to a constitution of their own adoption.”⁵³ As required by the Act, Public Law 600 was approved by the people of Puerto Rico through an island-wide referendum.⁵⁴

Puerto Rico held a constitutional convention after approving Public Law 600, and its Constitution was ratified by both Puerto Rico and the US Congress in 1952.⁵⁵ Under the new Constitution, Puerto Rico became a commonwealth.⁵⁶ It established a government “subordinate to the sovereignty of the people of Puerto Rico”⁵⁷ and affirmed that the island’s “political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.”⁵⁸ The United States further solidified this compact by informing the United Nations that it would no longer transmit information pertaining to Article 73(e) of the United Nations Charter,⁵⁹ which establishes reporting requirements for nations that control non-self-governing territories.⁶⁰ In a statement to the United Nations, one US representative assured the United Nations that the compact created “a relationship between two parties which *may not be amended or abrogated*

⁴⁸ See *Episode 78: The U.S. and Decolonization after World War II*, 15 MINUTE HIST. (Feb. 10, 2016), <https://15minutehistory.org/podcast/episode-78-the-u-s-and-decolonization-after-world-war-ii/> [<https://perma.cc/E72A-64T2>]; see also Atlantic Charter, Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom, U.K.-U.S. Aug. 14, 1941, 55 Stat. 1603.

⁴⁹ McCall, *supra* note 38, at 1374.

⁵⁰ Act of July 3, 1950, ch. 446, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b–731e, 737, 752).

⁵¹ *Id.* § 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1672 (2020) (Sotomayor, J., concurring).

⁵⁵ Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1868–69 (2016).

⁵⁶ P.R. CONST. art. I, § 1.

⁵⁷ *Id.* § 2.

⁵⁸ *Id.* § 1.

⁵⁹ See G.A. Res. 748, *supra* note 12, ¶ 7; *List of Former Trust and Non-Self-Governing Territories*, UNITED NATIONS, https://www.un.org/dppa/decolonization/en/history/former-trust-and-nsgts#_ednref11 [<https://perma.cc/T5ZE-MWLP>].

⁶⁰ U.N. Charter art. 73.

*unilaterally.*⁶¹ She went on to note that the agreement vested Puerto Rico with political authority comparable to that of the states, and that, as a consequence, “the Federal Government . . . [would] not interfere in any matter not normally reserved to a federal government in a federal system.”⁶²

II. THE TERRITORIES CLAUSE AND ITS MODERN APPLICATION TO THE PUERTO RICAN DEBT CRISIS

The territories clause provides 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.”⁶³ The Supreme Court has held that the clause grants Congress plenary powers over US territories and the District of Columbia.⁶⁴ In *Binns v. United States*, the Court described the political structure of territories as “*quasi* state government[s].”⁶⁵ Although Congress can enact legislation controlling the local affairs of US territories, it can alternatively cede this power to local legislatures.⁶⁶

A. *The Debt Crisis in Puerto Rico*

US economic policy has played a key role in Puerto Rico’s current financial crisis.⁶⁷ After a post-World War II recession in the 1970s, Congress enacted Section 936 of the Internal Revenue

⁶¹ Press Release, Statement by the Hon. Mrs. Frances P. Bolton, U.S. Rep., in Comm. IV on Puerto Rico to the Gen. Assembly, U.N. Press Release No. 1970 (Oct. 27, 1953) [hereinafter Statement by the Hon. Mrs. Frances P. Bolton] (emphasis added), <http://dspace.cai.sg.inter.edu/xmlui/bitstream/handle/123456789/14771/B50c006d001.pdf?sequence=1> [<https://perma.cc/R3UH-8Y34>].

⁶² *Id.*

⁶³ U.S. CONST. art. IV, § 3, cl. 2.

⁶⁴ *Binns v. United States*, 194 U.S. 486, 491 (1904). The term “United States territory” is commonly used to include Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the US Virgin Islands. See *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1617 (2017). The notion of federal plenary control over territories is in stark contrast with the principles of federalism underlying the Tenth Amendment, which reserves to the states any powers not delegated to the federal government by the Constitution. U.S. CONST. amend. X; see *Reno v. Condon*, 528 U.S. 141, 147–49 (2000) (explaining the notion of federalism). Federalism essentially involves the joint exercise of power between two sovereign political entities. *Developments in the Law—The U.S. Territories*, *supra* note 64, at 1632. Since US territories are assumed to lack sovereign independence, principles of federalism are generally absent from territorial relationships. *Id.*

⁶⁵ *Binns*, 194 U.S. at 491. The Court described a “*quasi* state government” as one with legislative, executive, and judicial branches, as well as “a legislature endowed with the power of local taxation and local expenditures.” *Id.*

⁶⁶ *Id.*

⁶⁷ See Edwin Meléndez & Charles R. Venator-Santiago, *Introduction to Puerto Rico Post-Maria: Origins and Consequences of a Crisis*, CENTRO J., Fall 2018, at 5, 10.

Code to stimulate the Puerto Rican economy.⁶⁸ Section 936 incentivized US corporations to establish a presence on the island by allowing federal tax exemption for corporate income earned in Puerto Rico.⁶⁹ Consequently, many manufacturers and pharmaceutical companies set up offices on the island, leading to steady growth in the Puerto Rican economy.⁷⁰ However, in 1996, the Clinton Administration decided to phase out the tax exemption and the provision ultimately became void in 2005.⁷¹ Many corporations left the island after the repeal of Section 936, which led to significant declines in employment.⁷² Globalization and technological changes only further exacerbated the island's economic decline.⁷³ Recent events, such as Hurricane Maria, a series of earthquakes beginning in January of 2020, and the COVID-19 pandemic, have been particularly devastating for Puerto Rican people and the local economy.⁷⁴

The local government is also partially responsible for Puerto Rico's current economic situation.⁷⁵ Significant infrastructure projects initiated by former Governor Pedro Rosselló after the phaseout of Section 936 increased the island's debt by over \$24 billion.⁷⁶ A large share of the government's debt also stems from the creation and issuance of COFINA bonds,⁷⁷ which allowed Puerto Rico to continue borrowing from investors despite the fact that it had exceeded constitutionally imposed limitations on borrowing.⁷⁸

⁶⁸ *Id.* at 7–9.

⁶⁹ *See id.* at 9; 26 U.S.C. § 936(a) (repealed 2018).

⁷⁰ Meléndez & Venator-Santiago, *supra* note 67, at 9.

⁷¹ DAVID L. BRUMBAUGH, CONG. RESEARCH SERV., RS20695, THE PUERTO RICAN ECONOMIC ACTIVITY TAX CREDIT: CURRENT PROPOSALS AND SCHEDULED PHASEOUT 4 (2000).

⁷² *See* Meléndez & Venator-Santiago, *supra* note 67, at 10.

⁷³ *Id.* In addition, the Merchant Marine Act of 1920 imposes higher shipping costs on goods being sent from Puerto Rico to the mainland United States, raising costs for producers, and thus making it difficult for Puerto Rican goods to compete with goods produced in the mainland United States. Stephen Kim Park & Tim R. Samples, *Puerto Rico's Debt Dilemma and Pathways Toward Sovereign Solvency*, 54 AM. BUS. L.J. 9, 16 (2017).

⁷⁴ Alejandra Rosa & Frances Robles, *Pandemic Plunges Puerto Rico into Yet Another Dire Emergency*, N.Y. TIMES (Apr. 8, 2021), <https://www.nytimes.com/2020/07/08/us/coronavirus-puerto-rico-economy-unemployment.html> [<https://perma.cc/VS4Z-WFHN>].

⁷⁵ *See* Meléndez & Venator-Santiago, *supra* note 67, at 10–11.

⁷⁶ *Id.* at 10.

⁷⁷ *Id.* at 11.

⁷⁸ *See* Emmett A. Egger, *Emergency Refinancing: Puerto Rico's Municipal Bonds and the Contract Clause*, 53 REVISTA JURÍDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO [REV. JUR. U. INTER. P.R.] 679, 687–88 (2018–2019). The Puerto Rican Constitution gives Puerto Rico the authority to issue municipal debt. *See* P.R. CONST. art. VI, § 2. However, the constitution also places a cap on the amount of debt that the island can accrue. *See id.* Puerto Rico's municipal bonds were particularly attractive to investors because they are exempt from federal, state, and local

By 2014, Puerto Rico's debt surpassed \$74 billion, in addition to almost \$49 billion in pensions liability.⁷⁹ That same year, Puerto Rico attempted to respond to the growing debt crisis by enacting the Puerto Rico Corporation Debt Enforcement and Recovery Act (Recovery Act), which would have allowed the island's public entities to restructure their debts using procedures that largely mirrored those contained in the US Bankruptcy Code.⁸⁰ However, investment fund creditors challenged the Recovery Act, arguing that the US Bankruptcy Code barred Puerto Rico from fashioning a distinct, local bankruptcy procedure.⁸¹ Chapter 9 of the Code provides a general framework for reorganizing a state's municipal debts,⁸² expressly preempting contrary state laws that attempt to bind creditors without their consent.⁸³ Puerto Rico argued that the use of the word "state" in the preemption provision did not apply to the island.⁸⁴ This argument was bolstered by the fact that the Code defines a "state" as inclusive of Puerto Rico "except for the purpose of defining who may be a debtor under [C]hapter 9."⁸⁵ Nonetheless, in *Puerto Rico v. Franklin California Tax-Free Trust*, the Supreme Court held that Puerto Rico was preempted, just as states were, from creating municipal bankruptcy schemes in conflict with Chapter 9, but that unlike states, Puerto Rico could not authorize its municipalities to declare bankruptcy.⁸⁶ Puerto Rico would have to search elsewhere for a solution to its growing debt problem.

taxation. Egger, *supra* note 78, at 682. Although Puerto Rico's debt had reached the constitutionally imposed limit in 2007, the island found a way to continue issuing debt beyond this cap—by creation of a separate entity called COFINA (an abbreviation of the Spanish title, Corporación del Fondo de Interés Apremiante). *Id.* at 685–87; Meléndez & Venator-Santiago, *supra* note 67, at 11.

⁷⁹ See Meléndez & Venator-Santiago, *supra* note 67, at 12–13.

⁸⁰ *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942–43 (2016).

⁸¹ *Id.* at 1943.

⁸² See generally 11 U.S.C. §§ 921–946 (requirements for filing under Chapter 9 of the Bankruptcy Code). A municipality is a "political subdivision or public agency or instrumentality of a [s]tate," such as a city, school district, or public improvement district. § 101(40); *Chapter 9 - Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-9-bankruptcy-basics> [<https://perma.cc/B2B5-C97M>].

⁸³ 11 U.S.C. § 903(1).

⁸⁴ *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1945–46.

⁸⁵ See 11 U.S.C. § 101(52).

⁸⁶ *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1946. Prior to 1984, Puerto Rico was considered a state under the Bankruptcy Code. *Id.* at 1945. The above definition of the term "state" was then added to the Code, and the Court had to determine whether the definition completely excluded Puerto Rico as a state under Chapter 9, or alternatively, whether the definition only excluded Puerto Rico "for the purpose of defining who may be a debtor under [C]hapter 9." *Id.* at 1945–46. The Court relied primarily on principles of statutory interpretation to choose the latter interpretation as correct. See *id.* at 1946–49.

B. Puerto Rico Oversight, Management, and Economic Stability Act

On June 30, 2016, shortly after the Court's decision in *Franklin California Tax-Free Trust*, Congress enacted PROMESA, which created a framework to restructure Puerto Rico's debt.⁸⁷

Title I of PROMESA establishes the FOMB composed of seven members appointed by the president of the United States, with the governor of Puerto Rico or the governor's designee acting as an ex officio member with no voting rights in the FOMB's decisions.⁸⁸ The president has sole discretion to choose one of the appointees, and must then appoint the remaining six members from a list of candidates chosen by specified members of Congress.⁸⁹ As long as the president selects appointees from these lists, "the Advice and Consent of the Senate"—a prerequisite for appointments of "Officers of the United States" under the appointments clause of the Constitution⁹⁰—is not required to confirm their appointment.⁹¹

The authority of the FOMB derives from the territories clause of the Constitution.⁹² Members are required to have relevant technical expertise in "finance, municipal bond markets, management, law, or the organization or operation of business or government."⁹³ Only one member is required to have a primary residence or primary place of business within Puerto Rico.⁹⁴ In addition, current or former local government officials are not eligible to serve on the FOMB.⁹⁵

The FOMB has the power to approve fiscal plans and budgets developed by the governor, issue restructuring certifications, and provide recommendations to the governor or the Puerto Rican legislature to ensure compliance with fiscal plans or to "otherwise promote the financial stability, economic growth, management responsibility, and service delivery efficiency of the territorial government."⁹⁶ If the FOMB finds that the local government's budget is not in compliance with the approved budget in effect, it may force expenditure reductions, institute

⁸⁷ See Park & Samples, *supra* note 73, at 32; Zorovich, *supra* note 2, at 1077.

⁸⁸ PROMESA § 101(e)(1)–(3), 48 U.S.C. § 2121(e)(1)–(3).

⁸⁹ See *id.* § 2121(e)(2).

⁹⁰ U.S. CONST. art. II, § 2, cl. 2.

⁹¹ See 48 U.S.C. § 2121(e)(2)(E).

⁹² See *id.* § 2121(b)(2) ("The Congress enacts this chapter 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 *Id.* § 2121(f)(1).

⁹⁴ *Id.* § 2121(e)(2).

⁹⁵ *Id.* § 2121(f)(2).

⁹⁶ *Id.* §§ 2141–2142, 2145(a), 2146.

hiring freezes, and prohibit the government from entering into contracts or otherwise engaging in financial transactions.⁹⁷

The framework of PROMESA is largely adapted from Chapter 9 of the Bankruptcy Code.⁹⁸ However, many of the rights and obligations given to states or municipalities under Chapter 9 are given to the FOMB rather than to Puerto Rico itself.⁹⁹ The FOMB initiates a proceeding under PROMESA by filing a Title III petition¹⁰⁰ with the district court.¹⁰¹ The FOMB is also required to file a plan of adjustment for the island's debts, and is the only entity able to do so.¹⁰² The district court plays a minimal role in the proceeding, although it may deny the FOMB's petition or plan of adjustment if, for example, such filing does not comply with the requirements of PROMESA, among other specific reasons enumerated in the Act.¹⁰³ In fact, PROMESA expressly prohibits the court from interfering with the political powers, property, and revenues of the island, or "the use or enjoyment by the [island] of any income-producing property."¹⁰⁴

Some Puerto Ricans have resisted PROMESA and are angered by the level of local power given to the FOMB.¹⁰⁵ The Center for a New Economy in Puerto Rico, an independent, nonpartisan policy organization,¹⁰⁶ has called the Act "[a] legal

⁹⁷ *Id.* § 2143(d).

⁹⁸ Edward J. Janger, *Towards a Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOK. J. CORP., FIN. & COM. L. 39, 46 (2017).

⁹⁹ See David R. Doyle, *The Puerto Rico "Bankruptcy": A Cheat Sheet*, AM. BANKR. INST., <https://www.abi.org/feed-item/the-puerto-rico-bankruptcy-a-cheat-sheet> [<https://perma.cc/ZZU7-HXAP>].

¹⁰⁰ A Title III proceeding is a judicial process in which stakeholders attempt to agree upon "a consensual plan of reorganization" for the island. *Id.*

¹⁰¹ 48 U.S.C. § 2164. Under PROMESA, proper venue lies with the territory's district court, which, for Puerto Rico, is the US District Court for the District of Puerto Rico. See *id.* § 2167(a). While the FOMB has discretion to determine that venue is proper in the district court of the jurisdiction where its office is located, *id.* § 2167(b), the FOMB overseeing Puerto Rico's restructuring opted to file in the District of Puerto Rico. See generally Title III Petition for Covered Territory of Covered Instrumentality, *In re* Commonwealth of Puerto Rico, No. 17-cv-01578-LTS (D.P.R. filed May 3, 2017) [hereinafter FOMB's Title III Petition].

¹⁰² 48 U.S.C. § 2172.

¹⁰³ See *id.* §§ 2164, 2174. The court could also deny the plan of adjustment if "the debtor is . . . prohibited by law from taking any action necessary to carry out the plan" or if "the plan is [not] feasible" or is not "in the best interests of creditors." See *id.* § 2174(b).

¹⁰⁴ *Id.* § 2165.

¹⁰⁵ See Luis Vega-Ramos, Opinion, *Time to Undo the United States' Failed Promesa to Puerto Rico*, HILL (May 3, 2019, 9:15 AM), <https://thehill.com/blogs/congress-blog/politics/441945-time-to-undo-the-united-states-failed-promesa-to-puerto-rico> [<https://perma.cc/FS37-2BL5>]; see also Michael Deibert, *Puerto Rico Board's Proposed Pension Cuts Spark Anger*, BLOOMBERG (Oct. 7, 2019, 4:20 PM), <https://www.bloomberg.com/news/articles/2019-10-07/puerto-rico-board-s-proposed-pension-cuts-spark-anger> [<https://perma.cc/C5WH-45J2>].

¹⁰⁶ CTR. FOR A NEW ECON., <https://grupocne.org> [<https://perma.cc/ZFN6-B2R4>].

experiment inflicted on . . . Puerto Ric[o] . . . that was possible only because of Puerto Rico's colonial status."¹⁰⁷ People have also critiqued the FOMB's actions as damaging and ineffective.¹⁰⁸ For example, the FOMB has proposed cutting individual public pension plan obligations by up to 8.5 percent—a measure that sparked protests in Puerto Rico.¹⁰⁹ Other proposals involve “crippling” budget cuts to public programs, including the island's educational and healthcare services.¹¹⁰ In fact, Puerto Rico has closed hundreds of public schools since the FOMB's inception.¹¹¹ Some past and present FOMB members have also had ties to bondholders and other institutions that were instrumental in the creation of Puerto Rico's debt.¹¹² Relatedly, critics have speculated that the FOMB is choosing to cut social programs, worker protections, and taxes in an effort to promote cheap labor and attract business to the island.¹¹³ The FOMB is “largely unaccountable to the island's residents”¹¹⁴ because of limitations such as the prohibition on appointment of past or present government officials to the FOMB and, as such, “[n]o individual within Puerto Rico's government plays any part in determining which seven members . . . decide matters critical to the island's financial fate.”¹¹⁵

In addition to negative public sentiment surrounding the FOMB and its proposed fiscal plan, bondholders that invested in

¹⁰⁷ Deepak Lamba-Nieves et al., *PROMESA: A Failed Colonial Experiment?*, CTR. FOR A NEW ECON. (June 29, 2021), <https://grupocne.org/2021/06/29/promesa-a-failed-colonial-experiment/> [<https://perma.cc/VF7G-ZH65>].

¹⁰⁸ *Id.*

¹⁰⁹ Deibert, *supra* note 105.

¹¹⁰ Kate Aronoff & Alleen Brown, *Sanders and Ocasio-Cortez Call for Reversal of Puerto Rico Austerity Measures*, INTERCEPT (Sept. 24, 2019, 1:39 PM), <https://theintercept.com/2019/09/24/puerto-rico-austerity-congress/> [<https://perma.cc/TX2H-MZA2>].

¹¹¹ Ed Morales, *Privatizing Puerto Rico*, NATION (Dec. 1, 2020), <https://www.thenation.com/article/world/puerto-rico-privatization-prepa/> [<https://perma.cc/2JBT-5UXY>]. Other factors, in addition to austerity measures imposed by the FOMB, have contributed to school closures as well. OTHERING & BELONGING INST. & CENTRO PARA LA RECONSTRUCCIÓN DEL HÁBITAT, *PUERTO RICO'S PUBLIC SCHOOL CLOSURES 22–25* (2020). For example, many families left Puerto Rico after Hurricanes Irma and Maria caused widespread devastation and damage on the island, leading to a sharp decline in school enrollment. JENNIFER HINOJOSA ET AL., *CENTRO CTR. FOR PUERTO RICAN STUD., POPULATION DECLINE AND SCHOOL CLOSURE IN PUERTO RICO 10–12* (2019).

¹¹² Rosario Fajardo, *FOMB Welcomes Controversial Peterson Nomination*, WKLY. J. (Oct. 9, 2020), https://www.theweeklyjournal.com/politics/fomb-welcomes-controversial-peterson-nomination/article_460357c0-0a61-11eb-96f2-0b7051fc1208.html [<https://perma.cc/UGY3-C269>]; Morales, *supra* note 111.

¹¹³ Aronoff & Brown, *supra* note 110.

¹¹⁴ Morales, *supra* note 111.

¹¹⁵ Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1674 (2020) (Sotomayor, J., concurring).

Puerto Rico also opposed the proposed cuts.¹¹⁶ Investors complained that the FOMB's proposal would harm the municipal bond market and would make potential investors wary of funding future government projects.¹¹⁷ On May 3, 2017, the FOMB took a significant step in the restructuring process by filing a Title III petition in the US District Court for the District of Puerto Rico.¹¹⁸ With the substantial financial consequences of the FOMB proposals looming, it was almost inevitable that litigation would ensue.¹¹⁹

III. THE LEGITIMACY OF TERRITORIAL AUTHORITY OVER PUERTO RICAN AFFAIRS

A. *A Constitutional Challenge to PROMESA*

As predicted, stakeholders quickly brought suit challenging the authority of the FOMB to initiate Title III proceedings on behalf of Puerto Rico.¹²⁰ In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, creditors filed suit in the US District Court of Puerto Rico seeking to dismiss actions taken by the FOMB, arguing that the appointment scheme of its members violated the appointments clause of the US Constitution.¹²¹ Specifically, the plaintiffs contended that FOMB members were “Officers of the United States” and, as a consequence, they could only be validly appointed “by [the] President with advice and consent of the Senate.”¹²²

The case ultimately reached the Supreme Court.¹²³ In its decision, the Court noted that PROMESA gave the FOMB considerable power, such as investigatory authority, oversight over fiscal plans, and control over bankruptcy proceedings.¹²⁴ Nonetheless, it held that the appointment scheme established under PROMESA did not violate the appointments clause

¹¹⁶ Mary Williams Walsh, *Puerto Rico's Bankruptcy Plan is Almost Done, and It Could Start a Fight*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/business/puerto-rico-bankruptcy-promesa.html> [<https://perma.cc/73SB-TYDG>].

¹¹⁷ *Id.*

¹¹⁸ See generally FOMB's Title III Petition, *supra* note 101.

¹¹⁹ See Williams Walsh, *supra* note 116.

¹²⁰ See *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d 537, 543–44 (D.P.R. 2018), *aff'd in part, rev'd in part sub nom. Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838 (1st Cir. 2019), *rev'd and remanded sub nom. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

¹²¹ *Aurelius Inv.*, 140 S. Ct. at 1655–56.

¹²² *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d at 544–45.

¹²³ See generally *Aurelius Inv.*, 140 S. Ct. 1649.

¹²⁴ *Id.* at 1662.

because these powers were “primarily local in nature.”¹²⁵ The Court distinguished federal officers “exercising power of the National Government” from nonfederal officials “exercising power of some other government.”¹²⁶ It found that, unlike for federal officers, the appointments clause did not apply to the appointment of nonfederal officers.¹²⁷ In the Court’s view, PROMESA was implemented to “substitute[] a different process for determining certain local policies.”¹²⁸

The Court did not question Congress’s authority to enact PROMESA pursuant to the territories clause.¹²⁹ Yet, in holding that the FOMB’s duties were local in nature, the Court implicitly recognized that the FOMB was not exercising federal powers.¹³⁰ As Justice Sotomayor pointed out in her concurring opinion, this holding raised the question of whether the United States can claim authority to control local Puerto Rican affairs using the territories clause, or to what extent it may do so.¹³¹

B. The Unresolved Issue of Congress’s Purported Authority Under the Territories Clause

While Congress may have had plenary power to control the local affairs of Puerto Rico in the past, it seemingly relinquished such control when it enacted Public Law 600.¹³² The United States confirmed this grant of sovereignty by declaring that Puerto Rico had achieved a “full measure of self-government” and by consequently renouncing any reporting obligations under the United Nations Charter.¹³³ In fact, the Supreme Court has recognized that, with the ratification of the Puerto Rican Constitution, “Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States”¹³⁴ The United Nations has also recognized that Puerto Ricans have an “inalienable right to self-determination and independence,” and has called upon the United States several

¹²⁵ *Id.* at 1662–63.

¹²⁶ *Id.* at 1658.

¹²⁷ *Id.* at 1661.

¹²⁸ *Id.* at 1662–63.

¹²⁹ *Id.* at 1671, 1679 (Sotomayor, J., concurring).

¹³⁰ *See id.* at 1662–63 (majority opinion).

¹³¹ *See id.* at 1679 (Sotomayor, J., concurring).

¹³² *See* Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319, 319 (codified at 48 U.S.C. § 731b).

¹³³ Statement by the Hon. Mrs. Frances P. Bolton, *supra* note 61.

¹³⁴ *See* Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976).

times to take actions that will allow Puerto Ricans to fully exercise these rights,¹³⁵ most recently in June of 2021.¹³⁶

One commonly cited counterargument to the notion that Public Law 600 fundamentally changed the relationship between the United States and Puerto Rico is the “truism that ‘one Congress cannot bind a later Congress.’”¹³⁷ It is true that Congress is free to repeal or modify a statute enacted by a prior Congress.¹³⁸ However, as noted above, Public Law 600 was a compact between the United States and Puerto Rico.¹³⁹ The United States asserted that the compact could not be repealed unilaterally in its representations to the United Nations.¹⁴⁰ Moreover, while courts have recognized that “a general law” can be repealed or modified by any future legislature, the notion of an absolute authority to do so has been questioned.¹⁴¹ In *United States v. Winstar Corp.*, for example, the Supreme Court stated that there was clear authority for the US government “to make agreements binding future Congresses by creating vested rights.”¹⁴²

Because Public Law 600 vested Puerto Rico with the right of self-governance, it should be understood as a law that entrenches future Congresses.¹⁴³ PROMESA impaired this right and thus seemingly modified or implicitly repealed Public Law 600. Any argument that Congress may repeal or modify Public Law 600 without Puerto Rico’s consent may also call into question similar acts of Congress, such as the Philippine Independence Act, which provided complete independence to the Philippines.¹⁴⁴ In other words, justifying Congress’s enactment of PROMESA after the ratification of Public Law 600 would cast doubt on the independence of sovereign nations around the world that were formerly held by the United States.

¹³⁵ Press Release, Special Comm. on Decolonization, Special Committee on Decolonization Approves Text Supporting Puerto Rico’s ‘Inalienable Right to Self-Determination,’ U.N. Press Release GA/COL/3269 (June 23, 2014).

¹³⁶ Press Release, Special Comm. on Decolonization, Special Committee on Decolonization Approves Text Calling upon United States to Promote Puerto Rico’s Self-Determination, Eventual Independence, U.N. Press Release GA/COL/3346 (June 18, 2021).

¹³⁷ See, e.g., Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1677–78 (2020) (Sotomayor, J., concurring) (quoting *Dorsey v. United States*, 567 U.S. 260, 274 (2012)).

¹³⁸ *Dorsey*, 567 U.S. at 274.

¹³⁹ Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319, 319 (codified at 48 U.S.C. § 731b).

¹⁴⁰ Statement by the Hon. Mrs. Frances P. Bolton, *supra* note 61.

¹⁴¹ *United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996).

¹⁴² *Id.* at 873.

¹⁴³ See McCall, *supra* note 38, at 1382–85, 1399.

¹⁴⁴ Philippine Independence Act, ch. 84, 48 Stat. 456 (1934) (codified in scattered sections of 22 U.S.C.).

The political process doctrine may also prevent Congress from taking unilateral action to renege Public Law 600.¹⁴⁵ The doctrine looks critically at government reforms that limit the political participation of minoritized groups.¹⁴⁶ The enactment of PROMESA, which authorized federally appointed officials to control the local affairs of Puerto Rico, ostensibly usurps the power to do so from Puerto Ricans.¹⁴⁷ Given the historical power imbalance between the United States and Puerto Rico,¹⁴⁸ Puerto Ricans could arguably be construed as a minoritized group entitled to additional protection under the law pursuant to the political process doctrine.

IV. CURRENT AND SUGGESTED METHODS TO ADDRESS STATE DEBTS AND THEIR POSSIBLE APPLICATION TO PUERTO RICO

The history of relations between the United States and Puerto Rico and the problematic implications of considering prior grants of sovereignty revokable by future legislatures supports the notion that the United States cannot unilaterally rescind the right to self-governance it previously granted to Puerto Rico.¹⁴⁹ Thus, the federal government's continued use of the territories clause, particularly the enactment and enforcement of PROMESA, displaces the Puerto Rican government's power and dispossesses Puerto Ricans of their autonomy and the right to self-governance vested by Public Law 600. Acceptance of this view necessitates changes to the federal government's approach to mitigating the Puerto Rican debt crisis.¹⁵⁰ Tactics currently used by states to address the debts of their localities and those suggested to handle state debts can be instructive in developing a revised restructuring framework for Puerto Rico, although direct application of these methods may not provide the best solution to the island's debt crisis.

¹⁴⁵ McCall, *supra* note 38, at 1372.

¹⁴⁶ See Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015, 1020 (2016). Although the Supreme Court has only explicitly invoked the political process doctrine in cases involving racially discriminatory policies, lower courts have applied the doctrine in instances where policies create special burdens on other minoritized groups that are not considered "protected classes under the Fourteenth Amendment." Alexis M. Johnson, Note, *Intersectionality Squared: Intrastate Minimum Wage Preemption & Schuette's Second-Class Citizens*, 37 COLUM. J. GENDER & L. 36, 40–41 (2018).

¹⁴⁷ See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1662–63 (2020).

¹⁴⁸ See discussion *supra* Part I.

¹⁴⁹ See discussion *supra* Section III.B.

¹⁵⁰ While this note recognizes that other aspects of the relationship between the United States and Puerto Rico would undoubtedly require review, they are outside the scope of this note.

A. Chapter 9 Proceedings

Chapter 9 of the Bankruptcy Code creates a scheme for handling municipal debts that is rooted in federalism principles.¹⁵¹ Because the Tenth Amendment limits federal intervention in state affairs,¹⁵² federal bankruptcy statutes are carefully crafted to avoid impermissible interference with municipalities, which are, by definition, subdivisions or instrumentalities of a state.¹⁵³ Accordingly, municipalities must obtain authorization from their state before they may file for bankruptcy.¹⁵⁴ States may create their own requirements for authorization, and may also decide their level of involvement in municipal affairs throughout the process.¹⁵⁵ For example, some states have receivership or emergency manager statutes, which allow the state to appoint an official to replace a municipality's elected officials and give that official the power to decide whether to request authorization to file a petition under Chapter 9.¹⁵⁶

Like PROMESA, Chapter 9 restricts the judiciary's ability to interfere with a debtor's political powers.¹⁵⁷ While courts may dismiss a municipality's bankruptcy petition if it was not filed in good faith or does not meet the requirements of the Bankruptcy Code,¹⁵⁸ the courts' power is primarily limited to the ability to "coordinate and coax" parties into reaching a final plan.¹⁵⁹ However, despite the judiciary's minimal involvement, judges may still play a critical role in Chapter 9 proceedings.¹⁶⁰

The 2013 Detroit bankruptcy is the most prominent illustration of the critical role that judges maintain in Chapter 9 proceedings.¹⁶¹ Judge Steven Rhodes, selected to preside over the Detroit bankruptcy proceeding, used creative solutions to manage the case while also recognizing the court's limited role

¹⁵¹ Juliet M. Moringiello, *Decision-Making and the Shaky Property Foundations of Municipal Bankruptcy Law*, 12 BROOK. J. CORP., FIN. & COM. L. 5, 6 (2017).

¹⁵² The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

¹⁵³ See 11 U.S.C. § 101(40); Moringiello, *supra* note 151, at 6–7.

¹⁵⁴ 11 U.S.C. § 109(c).

¹⁵⁵ See *id.* § 903; Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH. & LEE L. REV. 403, 462–63 (2014).

¹⁵⁶ See Moringiello, *supra* note 155, at 469.

¹⁵⁷ Compare 11 U.S.C. § 904, with 48 U.S.C. § 2168 (both providing limits on judicial interference).

¹⁵⁸ 11 U.S.C. § 921.

¹⁵⁹ Janger, *supra* note 98, at 46–47.

¹⁶⁰ See Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 81 (2016).

¹⁶¹ See Melissa B. Jacoby, *The Detroit Bankruptcy Blueprint*, CLS BLUE SKY BLOG (Sept. 7, 2015), <https://clsbluesky.law.columbia.edu/2015/09/07/the-detroit-bankruptcy-blueprint/> [<https://perma.cc/C2L5-JEZW>].

in Chapter 9 proceedings.¹⁶² He used judicial powers such as the ability to lift stay motions, examine witnesses, and resolve procedural disputes to move the proceeding along.¹⁶³ For example, when Detroit was not making progress in establishing a process to handle tort claims, Judge Rhodes wielded his power to lift the automatic stay on such claims and ruled that he would allow tort claimants to proceed if the city did not make “substantial progress” in developing a plan to address tort claims within thirty-five days.¹⁶⁴ Judge Rhodes also acknowledged his duty to “recognize and appreciate the enormous public interest” involved in the proceeding.¹⁶⁵ In furtherance of this responsibility, he adopted inclusive courtroom procedures that ensured participation by residents, individual retirees, and creditors.¹⁶⁶ Within eighteen months, the city of Detroit had, among other achievements, decreased its financial obligations, established and funded investment plans, and made considerable administrative changes.¹⁶⁷

The bankruptcy clause of the Constitution provides Congress with a source of federal authority separate from the territories clause by which it may intervene in Puerto Rico’s debt

¹⁶² See Jacoby, *supra* note 160, at 73–76.

¹⁶³ See *id.* at 75–80; see also Janger, *supra* note 98, at 47–48.

¹⁶⁴ Jacoby, *supra* note 160, at 76–77.

¹⁶⁵ *Id.* at 95 (quoting Transcript of Hearing Re. Status Conference at 8–9, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Aug. 2, 2013), ECF No. 316).

¹⁶⁶ See *id.*

¹⁶⁷ *Id.* at 70. The Detroit bankruptcy, however, was not perfect. See *id.* at 71. Critics of the proceeding have stated that the emergency manager’s plan had disproportionate adverse effects on Black residents, who make up 83 percent of the city’s population. Ross Eisenbrey, *Detroit’s Bankruptcy Reflects a History of Racism*, ECON. POL’Y INST. (Feb. 25, 2014, 2:29 PM), <https://www.epi.org/blog/detroits-bankruptcy-reflects-history-racism/> [<https://perma.cc/8CMS-A4AY>]; see also Ben Eisen, *Dearth of Credit Starves Detroit’s Housing Market*, WALL ST. J. (Oct. 29, 2020, 11:10 AM), <https://www.wsj.com/articles/a-broken-mortgage-market-strands-detroits-black-residents-11603984218> [<https://perma.cc/ZK9P-2MWM>] (noting that “large swaths of the city”—particularly Black communities—are being forgotten in Detroit’s post-bankruptcy growth due to a lack of access to housing credit); Joseph P. Williams, *A Tale of Two Motor Cities*, U.S. NEWS & WORLD REP. (Jan. 22, 2020, 12:01 AM), <https://www.usnews.com/news/cities/articles/2020-01-22/amid-detroits-rebirth-many-african-americans-feel-left-behind> [<https://perma.cc/3QHD-MGAQ>] (asserting that, following the Detroit bankruptcy, predominately Black areas of the city lacked the reinvestment or redevelopment opportunities seen in other parts of the city). Drastic cuts in retiree health benefits and pension plans severely impacted the city’s majority-Black workforce. Eisenbrey, *supra* note 167. These actions compounded effects of historical racism, outmigration of white residents, the related outmigration of manufacturing jobs, and government-endorsed racial segregation in the city. *Id.* As the Detroit bankruptcy demonstrated, legislators and other individuals involved in addressing Puerto Rico’s debt must listen to the people that will be affected by their policies and be conscious to avoid widening existing social inequities.

crisis.¹⁶⁸ Using this authority, Congress could amend the US Bankruptcy Code, permitting Puerto Rico to authorize its municipalities to declare bankruptcy under Chapter 9.¹⁶⁹ This would essentially replicate the process already in place for states.¹⁷⁰ Under this scheme, Puerto Rico would be able to authorize government-controlled entities, such as the island's public utilities, to declare bankruptcy under the US Bankruptcy Code.¹⁷¹ Puerto Rico's public utilities are currently responsible for approximately one-third of the island's debt.¹⁷² Thus, this solution would help lessen the financial stress felt by the island. However, the remainder of Puerto Rico's debt is largely owed by the Puerto Rican government itself.¹⁷³ Therefore, a congressional amendment simply allowing Puerto Rico's municipalities to file for bankruptcy would fail to address a significant portion of the island's debt.¹⁷⁴

B. State Oversight Boards

While Chapter 9 may provide an avenue for restructuring financially distressed municipalities, most states prefer to rehabilitate their localities using other means.¹⁷⁵ This typically involves the state creating a board to resolve the municipality's

¹⁶⁸ U.S. CONST. art. I, § 8, cl. 4. Since the bankruptcy clause vests Congress with plenary power to enact bankruptcy laws, *see id.*, Congress would not need to rely on the territories clause to implement this solution.

¹⁶⁹ José A. Cabranes, Opinion, *Let Puerto Rico Declare Bankruptcy*, WASH. POST (July 21, 2015), https://www.washingtonpost.com/opinions/let-puerto-rico-declare-bankruptcy/2015/07/21/28a490f8-2f11-11e5-8f36-18d1d501920d_story.html [<https://perma.cc/VPK6-ZLYW>].

¹⁷⁰ *Id.*

¹⁷¹ *See id.* The term “public utilities” refers to the island's public corporations, such as its Aqueducts and Sewers Authority, Highways and Transportation Authority, and Electric Power Authority. Michael Corkery, *In Puerto Rico, a Proposal for Revamping Debt*, N.Y. TIMES (June 25, 2014), <https://dealbook.nytimes.com/2014/06/25/puerto-rico-governor-aims-to-revamp-debt-of-public-corporations/> [<https://perma.cc/ZLW9-SM9C>]. While the operations of one of Puerto Rico's largest debtors—the Puerto Rico Electric Power Authority—were recently privatized, the public utility company still owns its infrastructure and assets, and most importantly for this note, must still address its \$9 billion debt load. Michelle Kaske & Jim Wyss, *Puerto Rico's Wrecked Utility Goes Private in Bid to Save Island*, BLOOMBERG (May 26, 2021), <https://www.bloomberg.com/news/articles/2021-05-26/puerto-rico-s-wrecked-utility-goes-private-in-bid-to-save-island> [<https://perma.cc/2GYT-LRFC>].

¹⁷² *See* Cabranes, *supra* note 169.

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See* Omer Kimhi, *A Tale of Four Cities—Models of State Intervention in Distressed Localities Fiscal Affairs*, 80 U. CIN. L. REV. 881, 883 (2012) [hereinafter Kimhi, *A Tale of Four Cities*]. Oftentimes, states are opposed to allowing their municipalities to declare bankruptcy because it could generate more harm than benefit. *Id.* For example, a municipal bankruptcy could deter potential residents and businesses from establishing themselves in the area, further stifling the locality's development. Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 382 (2010). A bankruptcy filing may also make it hard for the locality to secure credit in the future or place strain on the state and its other localities. *Id.* at 382–83.

financial difficulties.¹⁷⁶ For example, when New York City was on the brink of bankruptcy in the 1970s, New York State established the Emergency Financial Control Board to manage the city's financial situation and work towards rehabilitation.¹⁷⁷ The creation of a board is often accompanied by the provision of state funds to assist the locality during its rehabilitation.¹⁷⁸ Although boards can have varying levels of control over municipalities based on state law, they can generally be divided into "three categories: (1) advisory, (2) oversight, and (3) takeover."¹⁷⁹

First, the advisory scheme provides municipalities with the greatest amount of autonomy.¹⁸⁰ An advisory board may only review the locality's financial situation and suggest possible ways to rehabilitate the locality.¹⁸¹ Thus, the board cannot demand compliance with its suggestions by threatening sanctions or using other methods of coercion.¹⁸² Although this model results in the least intrusion into municipal affairs, an advisory board's inability to enforce its recommendations, which often require local officials to implement unpopular policies, could render the board ineffective if it lacks political support.¹⁸³

In contrast, the takeover scheme seizes the most power from municipalities through the state's appointment of a receiver.¹⁸⁴ Since receivers take over the duties of local officials, they do not need government authorization to implement any actions they deem appropriate.¹⁸⁵ The lack of political considerations under this scheme allows the receiver to take drastic steps to improve a municipality's finances by, for instance, reducing the municipal workforce or taking similar

¹⁷⁶ See Kimhi, *A Tale of Four Cities*, *supra* note 175, at 883. State boards may also be incorporated into the Chapter 9 eligibility process required by a state. See Juliet M. Moringiello, *Dispossessing Resident Voice: Municipal Receiverships and the Public Trust*, 53 U. MICH. J.L. REFORM 733, 742 (2020).

¹⁷⁷ Kim Phillips-Fein, *The Legacy of the 1970s Fiscal Crisis*, NATION (Apr. 16, 2013), <https://www.thenation.com/article/archive/legacy-1970s-fiscal-crisis/> [<https://perma.cc/U765-KAFV>].

¹⁷⁸ Kimhi, *A Tale of Four Cities*, *supra* note 175, at 888–89. State funds may be provided as a donation or "bail out," or may instead be given in the form of state-backed securities, which require repayment. *Id.* at 889.

¹⁷⁹ *Id.* at 892. For examples of financial control boards implemented in various US cities, see *id.* at 892–905 and *Financial Control Boards in Other U.S. Cities*, WASH. POST (Mar. 3, 1995), <https://www.washingtonpost.com/archive/local/1995/03/03/financial-control-boards-in-other-us-cities/963a0ae5-ecc7-4134-8960-8598f044a938/> [<https://perma.cc/8M8B-KF4E>].

¹⁸⁰ Kimhi, *A Tale of Four Cities*, *supra* note 175, at 892.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 897. Receivers are given the power to act on the municipalities' behalf. *Id.* This scheme allows the receiver to take actions that would normally have to be carried out by the municipalities' local officials. *Id.* However, when a receiver is appointed, such officials are usually discharged from their positions. *Id.*

¹⁸⁵ *Id.*

politically unfavorable actions that impact local public workers.¹⁸⁶ Despite its possible efficiency, the takeover model is controversial.¹⁸⁷ In particular, this model disenfranchises the locality's residents by replacing the officials that they elected to office—whom they have presumably entrusted to make decisions about the locality's property interests—with individuals chosen by the state.¹⁸⁸ The takeover model also fails to recognize that the locality's residents will be the group that ultimately feels the lasting effects of any restructuring plan.¹⁸⁹

Lastly, the oversight model is settled between the two extremes of the advisory and takeover models.¹⁹⁰ Under this scheme, an oversight board establishes financial guidelines that the municipality implements in ways it sees fit.¹⁹¹ Unlike an advisory board, an oversight board can set expenditure limits for certain categories of public goods and can sanction a municipality for not complying with set limits.¹⁹² At the same time, the oversight model provides a decent measure of local autonomy, unlike the takeover model, while also giving the state the power to influence the locality's actions.¹⁹³

However, these models do not fit easily within the structure of Puerto Rico's government. Except for the advisory board, state boards rely on state intervention into the affairs of one of its localities.¹⁹⁴ However, territories are not merely a subset of a local government, so any upper-level intervention would necessarily be by the federal government. This is essentially the current structure of PROMESA.¹⁹⁵ While the FOMB does not take over the functions of the Puerto Rican government, its ability to deny fiscal plans and budgets, file Title III petitions, and sanction deviation from approved budgets allows significant federal intrusion into local government affairs.¹⁹⁶ Although this scheme fits into the oversight model, the replacement of state officials with federal officials is a critical difference, as “[t]here is no right more basic in our democracy

¹⁸⁶ Kimhi, *A Tale of Four Cities*, *supra* note 175, at 897.

¹⁸⁷ *See* Moringiello, *supra* note 176, at 743–44.

¹⁸⁸ *See id.* at 735.

¹⁸⁹ *See id.* at 752.

¹⁹⁰ *See* Kimhi, *A Tale of Four Cities*, *supra* note 175, at 901.

¹⁹¹ *See id.*

¹⁹² *See id.* at 901–02, 904.

¹⁹³ *See id.* at 905.

¹⁹⁴ *See id.* at 892–905.

¹⁹⁵ *See* PROMESA §§ 101–212, 48 U.S.C. §§ 2121–2152 (outlining the structure and powers of the FOMB).

¹⁹⁶ *See* 48 U.S.C. §§ 2141–2144, 2164; *see also* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1662–63 (2020).

than the right to participate in electing our political leaders.”¹⁹⁷ In the state context, while residents of a locality presumably do not elect their state officials to control the direct affairs of the locality,¹⁹⁸ they still elect their state officials to perform duties related to the state’s operation.¹⁹⁹ Accordingly, although a complete takeover is often frowned upon, some level of state influence may be seen as appropriate or even necessary to rehabilitate the locality.²⁰⁰ By contrast, federal intervention in territorial affairs not only raises federalism concerns, but also leads to federal control over residents who are not permitted to fully participate in the federal election process.²⁰¹ Thus, while state boards may offer creative ways to address municipal debt, Puerto Rico’s designation as a US territory renders such boards unsuitable to solve the island’s debt crisis.

C. *Debts Owned Directly by States*

Although states may authorize their municipalities to declare bankruptcy, they may not file for bankruptcy themselves.²⁰² However, some individuals have proposed that states should be allowed to declare bankruptcy.²⁰³ Under this scheme, a state would propose its own plan to restructure its debt, and the assigned judge would determine whether the plan conforms with the requirements of the Code.²⁰⁴ Professor David Skeel argues that creating a bankruptcy procedure for states would allow for more equitable distribution of budget cuts.²⁰⁵ Discussions of such an amendment to the Code became especially salient during the COVID-19 pandemic due to the dire financial consequences of the pandemic on state governments.²⁰⁶

¹⁹⁷ *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 191 (2014) (plurality opinion).

¹⁹⁸ See Moringiello, *supra* note 176, at 735, 743.

¹⁹⁹ See *United States: State and Local Government*, ENCYC. BRITANNICA, <https://www.britannica.com/place/United-States/State-and-local-government> [<https://perma.cc/55C4-GV6M>].

²⁰⁰ See Kimhi, *A Tale of Four Cities*, *supra* note 175, at 905–06.

²⁰¹ See Block, *supra* note 47, at 235–42.

²⁰² See 11 U.S.C. § 109.

²⁰³ See Ryland Barton, *Should States Be Allowed to Declare Bankruptcy?*, NPR (May 3, 2020, 8:00 AM) [hereinafter NPR], <https://www.npr.org/2020/05/03/849732520/should-states-be-allowed-to-declare-bankruptcy> [<https://perma.cc/7CDA-ZY6H>].

²⁰⁴ Louis Jacobson, *Can States File for Bankruptcy? Should They? What You Need to Know*, POLITIFACT (Apr. 24, 2020), <https://www.politifact.com/article/2020/apr/24/can-states-file-bankruptcy-should-they-what-you-ne/> [<https://perma.cc/7E8E-M3F9>].

²⁰⁵ NPR, *supra* note 203. Professor David Skeel is also a member of the FOMB. David A. Skeel, FIN. OVERSIGHT & MGMT. BD. FOR P.R., <https://oversightboard.pr.gov/david-a-skeel/> [<https://perma.cc/28EB-YNH6>].

²⁰⁶ See NPR, *supra* note 203.

Given that the term “state” currently encompasses Puerto Rico under the US Bankruptcy Code,²⁰⁷ Congress could create an alternative to PROMESA by amending the Code to create a process for states to declare bankruptcy. This solution would create a clear path for federal intervention under the Bankruptcy Code, allowing Congress to avoid use of the territories clause.²⁰⁸ Since Chapter 9 of the Code was drafted to respect federalism principles and allow considerable state involvement, it may be largely adapted to allow for state filings.²⁰⁹ However, this idea has been heavily criticized by state representatives and financial analysts, particularly because allowing states to declare bankruptcy may increase interest rates and operating costs for state governments and cause investors to be wary of investing in state initiatives.²¹⁰ Therefore, despite the possible benefits of allowing state bankruptcy filings, this solution is commonly dismissed as impracticable.²¹¹

V. PROPOSED SOLUTION: A NEW FRAMEWORK UNDER THE BANKRUPTCY CODE

Directly applying either the methods currently used to address municipal debt or suggested methods to handle state-owned debt may alleviate some of Puerto Rico’s debt burden. However, as noted above, these methods would not allow for complete financial recovery and may have potentially dangerous consequences.

²⁰⁷ See 11 U.S.C. § 101(52).

²⁰⁸ See Moringiello, *supra* note 155, at 461 (describing a state’s authorization of a municipal bankruptcy filing as “invi[t]ing the power of federal law to remedy financial problems that the states, on their own, could not remedy”).

²⁰⁹ See Moringiello, *supra* note 176, at 736–38; Jacobson, *supra* note 204.

²¹⁰ See Jacobson, *supra* note 204; see also Jennifer Burnett, *3 Questions on State Bankruptcy*, COUNCIL ST. GOV’TS KNOWLEDGE CTR. (Feb. 17, 2011, 12:00 AM), <https://knowledgecenter.csg.org/kc/content/3-questions-state-bankruptcy> [<https://perma.cc/AWD7-N97F>]. New Jersey Governor Phil Murphy stated that allowing states to declare bankruptcy would be “completely and utterly irresponsible,” claiming that it would “gut the living daylights out of every state of America,’ slash[] budgets[,] and eliminat[e] the services people need.” Steven T. Dennis & William Selway, *McConnell Says He Favors Letting States Declare Bankruptcy*, BLOOMBERG (Apr. 22, 2020, 6:25 PM), <https://www.bloomberg.com/news/articles/2020-04-22/mcconnell-says-he-favors-allowing-states-to-declare-bankruptcy> [<https://perma.cc/8866-LWN3>]. Professor Samir Parikh worries that “[s]tates . . . could get locked out of credit markets [to obtain] funds . . . necessary to fill large gaps in budgets.” Jacobson, *supra* note 204. Former New York Governor Andrew Cuomo offered an even more candid response to the idea, calling it “one of the really dumb ideas of all time.” *Id.*

²¹¹ See Joseph Zeballos-Roig, *McConnell Says Giving Aid to States to Help Ease the Pain from the Pandemic Would be a ‘Blue State Bailout.’ But Most States Were Doing the Right Thing Before the Coronavirus Hit*, BUS. INSIDER (Apr. 23, 2020, 5:01 PM), <https://www.businessinsider.com/mcconnell-blue-state-bailout-coronavirus-cash-reserves-levels-recession-aid-2020-4> [<https://perma.cc/67B9-VPG5>]; Jacobson, *supra* note 204.

Congress's creation of a distinct proceeding under the US Bankruptcy Code for political entities termed "territories" under PROMESA would provide the best solution to restructuring Puerto Rico's debt while avoiding the use of the territories clause.²¹² Similar to the deference given to state authority under Chapter 9, this new scheme must respect the authority of territorial governments.²¹³ Because of the unique history between the United States and Puerto Rico, and the fact that PROMESA applies exclusively to Puerto Rico as it was ultimately enacted,²¹⁴ this analysis will focus on Puerto Rico. However, the framework discussed remains broadly applicable to other territories.

A. *The Structure of a New Proceeding Under the Bankruptcy Code*

This proposed solution should not be seen as a radical departure from what is already in place. Congress created a unique procedure to restructure Puerto Rico's debts by enacting PROMESA.²¹⁵ This action recognized the federal government's responsibility to actively intervene in and create a process for handling the debts of US territories.²¹⁶ Furthermore, the Bankruptcy Code already differentiates between different entities, such as municipalities, individuals, and corporations.²¹⁷ Given that these entities must invoke different processes for filing under the Code,²¹⁸ it would be reasonable to create a distinct filing process for territories as well.

²¹² PROMESA's definition of a territory encompasses Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the US Virgin Islands. PROMESA § 5(20), 48 U.S.C. § 2104(20). While the bankruptcy clause requires that Congress establish "uniform [l]aws on the subject of Bankruptcies throughout the United States," U.S. CONST. art. I, § 8, cl. 4, Congress may consider differences between different areas of the country, and "fashion legislation to resolve geographically isolated problems." Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 159 (1974); see also Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP., FIN. & COM. L. 53, 71 (2017) (suggesting that extending PROMESA to other territories might make uniformity issues disappear).

²¹³ While this note will refer to these entities collectively as "territories" because of their designation as such under PROMESA, this is not meant to ascribe any particular political status to them. In particular, the use of this term is not meant to suggest that they may be subject to the plenary powers of the federal government under the territories clause. Relatedly, although this note suggests creating a distinct bankruptcy proceeding for territories, it does not take a position on the preservation of territory status.

²¹⁴ Lubben, *supra* note 212, at 64.

²¹⁵ See 48 U.S.C. § 2121.

²¹⁶ See *id.*

²¹⁷ See 11 U.S.C. § 109.

²¹⁸ See *id.*

Since PROMESA was largely adapted from Chapter 9 of the Bankruptcy Code, which was carefully crafted to avoid impermissible federal intrusion into state affairs,²¹⁹ many provisions of PROMESA could simply be incorporated into a new territorial proceeding created under the Code. For example, the judiciary could retain its powers to approve or reject a petition or plan for restructuring a territory.²²⁰ Although the courts' role is limited, the Detroit bankruptcy demonstrates the possibility of meaningful judicial oversight over such proceedings.²²¹

The new procedures established under the Code should also adopt the requirement from PROMESA that the FOMB be established to ensure a necessary level of oversight over the restructuring process. However, efforts to reform PROMESA should focus on the appointment of members to the FOMB. Since the Court in *Aurelius Investment, LLC* expressly stated that FOMB members are not acting as "Officer[s] of the United States," its holding relies on the belief that Congress retains power over the local affairs of Puerto Rico under the territories clause.²²² Accordingly, the formation of the FOMB must be updated to provide for local control. The state models of board formation are helpful to formulate an appropriate framework in this case, although, as discussed above, these models cannot be directly applied to Puerto Rico or other territories as there is no higher level of local government to oversee the process.²²³

In order to address concerns over federal intervention while also creating a sense of external pressure over the local government, a distinct process should be established for local residents to elect members to the FOMB. Just as Puerto Ricans elect their local officials, this scheme would allow them to elect FOMB members to represent their interests in the debt rehabilitation process. Once FOMB members are elected under this structure, they would have the same ability as the current FOMB to influence the actions of local officials.²²⁴ Because FOMB members would be elected by the people of Puerto Rico, federalism concerns would disappear and the FOMB could retain the exclusive

²¹⁹ See Moringiello, *supra* note 176, at 736–38.

²²⁰ See *supra* note 103 and accompanying text.

²²¹ See discussion *supra* Section IV.A. As the Detroit bankruptcy demonstrates, those overseeing the proceeding must take extreme precautions to ensure that minoritized groups are not disproportionately burdened by the ultimate outcome. These precautions may involve seeking additional input from groups that traditionally possess less bargaining and political power.

²²² See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1662–63 (2020).

²²³ See discussion *supra* Section IV.B.

²²⁴ For discussion of the current FOMB's powers to influence local government affairs, see *supra* note 196 and accompanying text.

power to file petitions and proposed plans with the court.²²⁵ This scheme would place limited constraints on the local government while also respecting the autonomy of Puerto Ricans. When implementing this solution under the Code, Congress may retain some of the eligibility criteria for FOMB membership, such as technical expertise, to ensure that prospective members have sufficient experience to participate in the restructuring process.²²⁶

Congress should create a broadly drafted statute under the Code, similar to Chapter 9, to allow this scheme to apply to all territories. Territories should be able to create additional qualifications for FOMB eligibility, such as requiring knowledge in other subject areas that they deem relevant based on their unique circumstances. Likewise, territorial governments should be permitted to impose additional residency requirements as they see fit. This approach would establish a minimal level of deference to territorial governments, similar to the deference afforded to states under the Code.²²⁷ Congress should also seek input from those who will be impacted by the statute—namely, the residents of the territories—to ensure that it is creating a workable framework.²²⁸

B. Addressing Critiques Related to Effective Public Participation

This solution depends on voter participation and sufficient election integrity measures. Although Puerto Rico has had relatively high percentages of voter turnout in the past, participation has waned in recent years.²²⁹ This change has been

²²⁵ See 48 U.S.C. § 2164.

²²⁶ See *id.* § 2121.

²²⁷ See Moringiello, *supra* note 176 at 736, 742–43.

²²⁸ Resident engagement is something that the Natural Resources Committee has already been promoting through its #ListenToPuertoRico tour. See Natural Resources Committee (@NRDems), TWITTER (May 22, 2020, 12:22 PM), <https://twitter.com/NRDems/status/1263867744304410627> (last visited Dec. 30, 2021); Press Release, Hous. Comm. on Nat. Res., Chair Grijalva Leads Introduction of “Amendments to PROMESA Act” to Stabilize Puerto Rican Economy, Stop Austerity Cuts, Guarantee Services Funding (May 22, 2020) [hereinafter Press Release, Hous. Comm. on Nat. Res.], <https://naturalresources.house.gov/media/press-releases/chair-grijalva-leads-introduction-of-amendments-to-promesa-act-to-stabilize-puerto-rican-economy-stop-austerity-cuts-guarantee-services-funding> [<https://perma.cc/6CNB-77PR>].

²²⁹ Nicole Acevedo, *In Puerto Rico, Voters Reeling from Political Upheavals and Crises Face a Crucial Election*, NBC NEWS (Oct. 30, 2020, 11:49 AM), <https://www.nbcnews.com/news/latino/puerto-rico-voters-reeling-political-upheavals-crises-face-crucial-election-n1245316> [<https://perma.cc/T85V-PZQU>] (noting historic rates of voter turnout at 73–89 percent relative to a new low of 55 percent voter turnout in 2016); see also Patricia Guadalupe, *Amid Historically Low Turnout, Puerto Ricans Vote for Statehood*, NBC NEWS (June 11, 2017, 6:00 PM), <https://www.nbcnews.com/news/latino/amid-historically-low-turnout-puerto-ricans-vote-statehood-n770801> [<https://perma.cc/C642-UFEX>] (nearly eight out of every ten eligible voters did not vote in 2017).

partially credited to mistrust of government institutions.²³⁰ Members of the public have also alleged that the election system is vulnerable to fraud.²³¹ Moreover, recent election mishaps, such as the discovery of missing ballots during the 2020 general election and delayed delivery of ballots during the 2020 primary election, have caused voters to doubt the integrity of the system.²³²

However, these concerns are not completely unique to Puerto Rico.²³³ The mainland United States has recently contended with the same issues, albeit due to different political and cultural concerns.²³⁴ In response, advocacy organizations have become invested in addressing these issues and have suggested ways that they can be mitigated. For example, the Center for American Progress has suggested the use of more convenient voting processes, such as “vote-at-home” or “no-excuse absentee voting,” as well as heightened focus on civics education to increase voter participation.²³⁵ The Brennan Center for Justice has similarly made recommendations to address election integrity issues, including “post-election audits,” segmented responsibilities for election workers, and independent reviews of the actions of senior officials in the election process.²³⁶ Arguably, Congress could incentivize Puerto Rico’s adoption of these suggestions or similar measures to ensure that FOMB elections are fair and inclusive.²³⁷

²³⁰ Acevedo, *supra* note 229.

²³¹ See Isabel Sierra Velázquez, *Análisis del Escrutinio Electrónico en Puerto Rico: Un Paso Hacia la Modernización Democrática*, 85 REV. JUR. U. P.R. 1305, 1313 (2016).

²³² Dánica Coto, *Puerto Rico Finds Uncounted Ballots in Vault Week After Election*, USA TODAY (Nov. 11, 2020, 5:20 PM), <https://rb.gy/etr588> [<https://perma.cc/PM5Y-B2AW>].

²³³ See MYRNA PÉREZ, BRENNAN CTR. FOR JUST., ELECTION INTEGRITY: A PRO-VOTER AGENDA 1–3 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Election_Integrity.pdf [<https://perma.cc/VY2Z-6JCQ>]; see also German Lopez, *Trump was Elected by a Little More than a Quarter of Eligible Voters*, VOX (Nov. 10, 2016, 3:20 PM), <https://www.vox.com/policy-and-politics/2016/11/10/13587462/trump-election-2016-voter-turnout> [<https://perma.cc/9NMX-NQXB>].

²³⁴ See PÉREZ, *supra* note 233; see also Lopez, *supra* note 233.

²³⁵ See Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR. FOR AM. PROGRESS (July 11, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/> [<https://perma.cc/Z89X-HG99>].

²³⁶ See PÉREZ, *supra* note 233, at 8–9, 17.

²³⁷ The spending clause of the Constitution allows Congress to condition receipt of federal funds in order to incentivize states to adopt favorable policies. *New York v. United States*, 505 U.S. 144, 166–67 (1992); see also U.S. CONST. art. I, § 8, cl. 1. Although Puerto Rico is not a “state,” Congress and the Court have, in many cases, equated the status of Puerto Rico with that of states. See, e.g., 11 U.S.C. § 101(52) (defining “State” to include Puerto Rico in the Bankruptcy Code except when determining debtors under Chapter 9); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (noting that “Puerto Rico, like a state, is an autonomous political entity”); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976) (stating that Congress “granted Puerto Rico a measure of autonomy comparable to that possessed by the States” when it “relinquished its control over the organization of the local affairs of the island”). Thus,

Critics of the proposed solution may also argue that electing FOMB members would make them beholden to particular interest groups or constituents.²³⁸ While elections may cause candidates to seek out donations or support from particular groups,²³⁹ similar forms of influence have already been alleged to control the current FOMB.²⁴⁰ As discussed above, some claim that the FOMB has focused on the interests of wealthy investors at the expense of Puerto Ricans.²⁴¹ Imposing contribution restrictions on candidates and requiring detailed disclosure of any funds received could help to mitigate funding issues.²⁴² Establishing longer terms of service for FOMB members may help reduce political pressures and make members more responsive to the public.²⁴³ Moreover, meaningful judicial review of the process, as discussed above, would prevent any particular group from receiving unfair advantages.²⁴⁴ Under the current structure of PROMESA, the presiding judge must review the FOMB's plan of adjustment to determine if "the plan is feasible and in the best interests of creditors."²⁴⁵ Thus, if tactics are employed similar to those used by Judge Rhodes in the Detroit bankruptcy proceeding, the court may decline to confirm a proposed plan if it feels that not all stakeholders are being treated appropriately.²⁴⁶

This solution is not merely technical. Although an elected FOMB would essentially perform the same functions permitted under the current structure of PROMESA, changing the manner in which FOMB members are appointed is a key difference because it democratizes the restructuring process. The current appointment structure is completely devoid of Puerto Rican

Congress could offer funds to assist Puerto Rico in running its elections and condition receipt of those funds on adoption of measures to ensure maximum voter participation and election integrity. See U.S. GEN. ACCT. OFF., GAO-01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION (2001); Emily Viola et al., *Congress Can Provide Mail Voting for the Presidential Election*, FORDHAM L. NEWS (Aug. 11, 2020), <https://news.law.fordham.edu/blog/2020/08/11/congress-can-provide-mail-voting-for-the-presidential-election/> [<https://perma.cc/V754-C683>].

²³⁸ See Kimhi, *A Tale of Four Cities*, *supra* note 175, at 917–19.

²³⁹ See *id.*; CTR FOR AM. PROGRESS, FIGHTING SPECIAL INTEREST LOBBYIST POWER OVER PUBLIC POLICY 1 (2017).

²⁴⁰ Aronoff & Brown, *supra* note 110; see also Press Release, Hous. Comm. on Nat. Res., *supra* note 228.

²⁴¹ See discussion *supra* Section II.B.

²⁴² See CTR FOR AM. PROGRESS, *supra* note 239, at 2.

²⁴³ See Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1403–04 (2010) (suggesting that elected judges with longer terms may be more responsive to the public interest).

²⁴⁴ See Jacoby, *supra* note 161.

²⁴⁵ PROMESA § 314(b)(6), 48 U.S.C. § 2174(b)(6).

²⁴⁶ This note also envisions nonpartisan elections of FOMB members to reduce concerns that the restructuring process will be politicized.

participation.²⁴⁷ Given the power that the FOMB has in influencing local government and impacting the long-term financial situation of the island, this is a serious infringement on Puerto Rico's right to self-governance.²⁴⁸ Even if the current appointment structure is easier to implement compared to the proposed structure, it should not be employed at the cost of Puerto Rican sovereignty. The people of Puerto Rico deserve a voice in the restructuring process that should not be overlooked.²⁴⁹

CONCLUSION

For over a century, the United States has treated Puerto Ricans as second-class citizens and has exploited the island's people and resources to bolster its own power and success.²⁵⁰ Although the "weighty issue" of the federal government's authority to control Puerto Rican affairs under the territories clause requires serious rethinking of the relationship between the United States and Puerto Rico,²⁵¹ this is not a problem that should be avoided. The federal government explicitly granted Puerto Ricans the right of self-governance through the enactment of Public Law 600.²⁵² However, it continues to renege

²⁴⁷ See *supra* text accompanying notes 88–95.

²⁴⁸ See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1662 (2020) (noting that the FOMB was given the power to substitute the judgment of local elected officials with "its own judgment").

²⁴⁹ While outside the scope of this note, it should be mentioned that the colonial relationship between the United States and Puerto Rico has had severe economic implications for the island. See *The Colonial Case of Puerto Rico*, N. AM. CONG. ON LATIN AM. (Sept. 25, 2007), <https://nacla.org/article/colonial-case-puerto-rico> [<https://perma.cc/F6SG-7EBS>]. Further, economic stimuli from states are often a critical part of the restructuring process for municipalities. Kimhi, *A Tale of Four Cities*, *supra* note 175, at 889. Thus, while the proposed scheme for appointment of FOMB members creates an avenue for federal action without use of the territories clause, the federal government should also provide economic support to ensure success in the restructuring process. In May of 2020, US Representative Raúl M. Grijalva introduced the Amendments to PROMESA Act of 2020, which would have provided, among other things, federal funding for operations of the FOMB and Title III proceedings as well as authorization for Puerto Rico to discharge certain debt obligations. Amendments to PROMESA Act of 2020, H.R. 6975, 116th Cong. (2020). A 2018 bill introduced in the Senate also would have allowed cancellation of certain debt obligations and proposed the establishment of a Puerto Rico Debt Restructuring Compensation Fund, which would have allocated \$15 billion to compensate creditors whose debt was discharged. United States Territorial Relief Act of 2018, S. 3262, 115th Cong. (2018). Congress should consider similar financial measures in addition to the solution proposed in the body of this note.

²⁵⁰ See Riley et al., *supra* note 30, at 974; see also Antonio Weiss & Brad Setser, *America's Forgotten Colony: Ending Puerto Rico's Perpetual Crisis*, FOREIGN AFFS., July/Aug. 2019, at 158, 158–59.

²⁵¹ *Aurelius Inv.*, 140 S. Ct. at 1671 (Sotomayor, J., concurring); see *supra* Section III.A.

²⁵² See Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319, 319 (codified at 48 U.S.C. § 731b); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1874 (2016).

on this guarantee by using the territories clause to control the local affairs of the island. The federal government should honor its prior commitments by relinquishing such control. The first step in this process is to create an alternative method for addressing the Puerto Rican debt crisis that allows for meaningful participation by the people of Puerto Rico. Final resolution of this issue not only impacts the island's debt restructuring process, but the dignity and autonomy of Puerto Rican people. After 123 years of colonial rule, the United States must begin to right its wrongs.

Julia R. Cummings[†]

[†] J.D. Candidate, Brooklyn Law School, 2022; B.S. State University of New York, College at Geneseo, 2017. I thank Crystal Cummings, Danika Gallup, Kellie Van Beck, and the entire *Brooklyn Law Review* staff for their guidance and diligence throughout the editing process. Thank you to my parents, my sisters, and the rest of my family for your constant support. Lastly, thank you to my friends and mentors that helped me along the way.