The Puerto Rico Constitution at Seventy: A Failed Experiment in American Federalism?

RAFAEL COX-ALOMAR*

"The United States includes five Territories: American Samoa, Guam, the Northern Mariana Islands, the U. S. Virgin Islands, and Puerto Rico […] the Territory Clause permits Congress to 'treat Puerto Rico differently from States so long as there is a rational basis for its actions.'"[1]

"The answer to appellant's contention is that the constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. Public Law 600 offered to the people of Puerto Rico a 'compact' under which, if the people accepted it, as they did, they were authorized to 'organize a government pursuant to a constitution of their own adoption.'"[2]

I. Introduction: The Puerto Rico Constitution at Seventy

July 25, 1952, marks the beginning of one of the more contested experiments in American federalism. On that hot summer day, thousands of Puerto Ricans cheered jubilantly as they witnessed the inauguration of Puerto Rico's Constitution and saw Governor Luis Muñoz Marín raise the flag of Puerto Rico for the first time while a military band solemnly played the island's national anthem, *La Borinqueña*. Addressing the crowd gathered outside Puerto Rico's *Capitolio*, the island's first elected governor described the significance of the moment in a speech full of poetry and symbolism—unsurprising for a man who in his youth was first and foremost a writer and a poet.[3]

On that historic occasion, Governor Muñoz Marín proclaimed:

> I will now raise the flag of the people of Puerto Rico upon the foundation of the Commonwealth in voluntary association of citizenship and friendship with the United States of America. The people will see in their flag the symbol of their spirit against the

* Professor of Law at the University of the District of Columbia's David A. Clarke School of Law in Washington D.C. Visiting Professor at Harvard Law School (Winter 2022).

1 United States v. Vaello Madero, 142 S.Ct. 1539, 1541, 1543 (2022).

2 Figueroa v. Puerto Rico, 232 F. 2d 615, 620 (1st Cir. 1956).

3 *See generally* CARMELO ROSARIO NATAL, LA JUVENTUD DE LUIS MUÑOZ MARÍN: VIDA Y PENSAMIENTO, 1898-1932 (Río Piedras: Editorial Edil 1989).

> background of their own destiny and the Americas. Right next to the flag of the United States, the flag of the smallest country in the hemisphere stands as a reminder that to the eyes of democracy countries and men, alike, are equal in dignity. Puerto Rico is proud to see its flag float together with the flag of the great federal Union, and the Union for all its might, and democratic conscience, must feel satisfied that the flag of a people of such devoted spirit … bestows upon it the tribute of its company in the flag posts of liberty.[4]

President Harry Truman echoed Governor Muñoz Marín's lyricism:

> [T]he people of the United States and the people of Puerto Rico are about to enter into a relationship based on mutual consent and esteem. The Constitution of the Commonwealth of Puerto Rico and the procedures by which it has come into being are matters of which every American can be justly proud. They are in accordance with principles we proclaim as the right of free peoples everywhere.[5]

The date of July 25 was intentionally chosen to erase the memory of the American invasion of July 25, 1898. Having repudiated, in his 1949 inaugural speech, the "old imperialism"[6] and paying heed to the self-determination principles announced by his predecessor in the 1941 Atlantic Charter,[7] President Truman, along with Governor Muñoz Marín, appeared to suggest Puerto Rico had now ceased to be an American colony.

For Muñoz Marín, Puerto Rico was "contributing to the American political system a new form of federalism."[8] The governor indeed believed Puerto Rico had now acceded to a new dimension within American federalism,[9] neither state nor territory and certainly not an Indian tribe.

---

[4] *See generally* THE FOUNDING OF THE COMMONWEALTH OF PUERTO RICO: PROGRAM OF EVENTS (1952), https://perma.cc/46QZ-HBMT.

[5] Harry S. Truman, Statement by the President Upon Signing Bill Approving the Constitution of the Commonwealth of Puerto Rico (July 3, 1952) (transcript available at https://perma.cc/YR7P-QZLW).

[6] Harry S. Truman, Inaugural Address (Jan. 20, 1949) (transcript available at https://perma.cc/5YHX-7SX9).

[7] The Atlantic Charter, U.K.-U.S., Aug. 14, 1941 (transcript available at https://perma.cc/573B-MNKG).

[8] Luis Muñoz Marín, *Puerto Rico Does Not Want to Be a State*, N.Y. TIMES, Aug. 16, 1959.

[9] *See generally* Letter from Luis Muñoz Marín, to Senator Marlow Cook (June 6, 1974) (copy on file with the Luis Muñoz Marín's Foundation).

Puerto Rico, to his eyes, had become a new "kind of federal state."[10]

The fact that the inauguration of the Puerto Rico Constitution came at a time when the "crisis of decolonization"[11] was beginning to unfold with ever more momentum in Asia, Africa, the Pacific, and the Caribbean cannot go unheeded. The geopolitical jigsaw puzzle emerging in the postwar period turned out to be decisive. With the "iron curtain" descending across Eastern Europe,[12] and the Cold War at full throttle, fresh thinking was of the essence.

It was precisely about this time that the British Government, following the 1947 Montego Bay Conference, began to devolve political authority to its far-flung colonies in the Caribbean— first through the short-lived West Indies Federation and subsequently through a gradual process of individual disengagement.[13]

Coincidentally, this period also witnessed the Fourth French Republic's departmentalization of Guadeloupe, Martinique, and French Guiana,[14] as well as the reconfiguration of the Dutch Kingdom pursuant to a new charter devolving considerable political authority to the then-called Dutch Antilles (Surinam, Aruba, Curaçao, and Sint Marteen).[15]

Thus, the narrative woven both in Washington and San Juan was that Puerto Rico's constitution-making exercise was a new modality of decolonization—premised on "freedom, [and] mutual agreement."[16] The Puerto Rican narrative intended to draw a sharp contrast from the authoritarian tradition sweeping through most of Latin America, then at the mercy of Cuba's Fulgencia Batista, Dominican Republic's Rafael Leonidas Trujillo, Nicaragua's Anastasio Somoza, Venezuela's Marcos Pérez Jiménez, Perú's Manuel Odría, and Brazil's Getúlio Vargas, to name but a few.

On its face, the constitution inaugurated on July 25, 1952[17] departed in

---

[10] LUIS MUÑOZ MARÍN, MEMORIAS: 1940-1952, at 272–73 (San Germán: Editorial de la Universidad Interamericana 1992).

[11] This phrase was used by British Colonial Secretary Anthony Greenwood in a confidential memorandum to British Prime Minister Harold Wilson, dated August 10, 1965. *See* RAFAEL COX ALOMAR, REVISITING THE TRANSATLANTIC TRIANGLE: THE CONSTITUTIONAL DECOLONIZATION OF THE EASTERN CARIBBEAN at xxi (Ian Randle Publishers 2009).

[12] *See generally* Winston Churchill, Iron Curtain Speech (Mar. 5, 1946), (transcript available at https://perma.cc/KB98-VY4K).

[13] COX ALOMAR, *supra* note 11, at 25–37.

[14] *See generally* Nick Nesbitt, *Departmentalization and the Logic of Decolonization*, 47 L'ESPRIT CRÉATEUR 32, 32 (2007).

[15] Statute for the Kingdom of the Netherlands art. 3, Oct. 28, 1954, (available at https://perma.cc/R6PQ-M7F6).

[16] THE FOUNDING OF THE COMMONWEALTH OF PUERTO RICO, *supra* note 4.

[17] For a scholarly commentary analyzing each provision of the Puerto Rico Constitution, *see*

significant respects from the authoritarian tradition then in vogue across most of the region. Imbued in the human rights ideology emerging from the Nuremberg trials and, more specifically, superimposing on the Puerto Rican landscape some of the more significant principles found in the 1948 UN's Universal Declaration of Human Rights, the Puerto Rico Constitution brought to life a significant catalog of fundamental rights—some of which are still unavailable at the federal level.

The ideological compass of the constitution's bill of rights stands out in its first section, which in no uncertain terms proclaims that in Puerto Rico human dignity is inviolable.[18] Contrary to its federal counterpart, the Puerto Rico Bill of Rights explicitly establishes a right to privacy which is available *ex proprio vigore* even in the absence of state action.[19] And contrary to the First Amendment, where there is no textual reference to an individual's freedom of association, section 6 of the Puerto Rico Bill of Rights explicitly establishes it. Moreover, the Puerto Rico Bill of Rights provides that classifications made on account of race, color, sex, birth, social origin or condition, or political or religious ideas are all suspect and must be judicially reviewed on the basis of strict scrutiny.[20] And, contrary to the federal text, it provides in no uncertain terms a fundamental right to vote which is "equal, direct[, secret and universal]."[21]

Similarly, the rights of criminal defendants find important protections. The Puerto Rican Constitutional Convention elevated to the constitution the prohibition of wiretapping,[22] incorporated the rule suppressing the fruit of the poisonous tree,[23] prohibited the death penalty,[24] and constitutionalized the right to bail[25] while mandating that the incarceration of defendants unable to post bail cannot exceed 6 months.[26]

True to the ideals of the UN's Universal Declaration of Human Rights, the Puerto Rico Bill of Rights extends important safeguards to the island's labor force, such as the right to equal pay for equal work,[27] to a reasonable

---

generally RAFAEL COX ALOMAR, THE PUERTO RICO CONSTITUTION (Oxford University Press 2022).

[18] P.R. CONST. art. II, § 1.

[19] *Id.* art. II, § 8.

[20] *Id.* art. II, § 1.

[21] *Id.* art. II, § 2.

[22] *Id.* art. II, § 10.

[23] *Id.*

[24] P.R. CONST. art. II, § 7.

[25] *Id.* art. II, § 11.

[26] *Id.*

[27] *Id.* art. II, § 16.

minimum wage,[28] to extra compensation for work in excess of eight hours,[29] to organize,[30] to collectively bargain,[31] and to strike,[32] among others.

Structurally, the Puerto Rico Constitution diffuses power among three separate and indivisible branches of government.[33] Under the new constitutional arrangement, the legislature is a "continuous"[34] parliamentary body, with ample oversight authority. The functioning of the legislature is not interrupted during intrasession or intersession recesses. Its various committees, moreover, now enjoy constitutional protection in the exercise of their legislative roles. Decennial redistricting is now constitutionally required,[35] and minority political parties are guaranteed one-third of the seats in the House and Senate in case one of the majority parties wins over two-thirds of the vote.[36] The 1952 Constitution devolved to the legislature the power to override gubernatorial vetoes (except for the line-item-veto),[37] conduct impeachment trials, and trigger the constitutional amendment mechanism available under article 7.

Along similar lines, the newly minted constitution established a "unitary" executive branch under the exclusive aegis of a governor elected by the direct vote of the Puerto Rican electorate.[38] The Puerto Rican framers entrusted the governor with line-item veto authority (constitutionalizing a statutory prerogative initially found in the 1917 Jones Act),[39] the power of appointment and removal,[40] as well as complete control of the extraordinary session mechanism.[41] It is the governor who decides what issues the legislature ought to consider in an extraordinary session, which the governor alone can convene.[42]

Under the 1952 Constitution, the judicial branch was finally

---

[28] *Id.*

[29] *Id.*

[30] P.R. CONST. art. II, § 17.

[31] *Id.*

[32] *Id.* art. II, §18.

[33] *Id.* art. I, § 2.

[34] *Id.* art. III, § 10.

[35] *Id.* art. II, § 4.

[36] P.R. CONST. art. III, § 7.

[37] *Id.* art. III, § 21.

[38] *Id.* art. IV, § 1.

[39] *Id.* art. III, § 20.

[40] *Id.* art. IV, § 4.

[41] *Id.*

[42] P.R. CONST art. IV §4.

disentangled from the executive branch. No longer under the administrative control of the Puerto Rico Attorney General, the judiciary is now fully independent.[43] Its administration now lies in the hands of the justices of the Puerto Rico Supreme Court,[44] who for the first time since the inception of the Court in 1899 are nominated by the governor with the advice and consent of the local Senate.[45] In a significant addendum to the Puerto Rican institutional repertoire, the framers established in the constitution that the Supreme Court itself shall determine its own size.[46] If the Court wishes to increase or decrease its size (which can never be less than four associate justices and one chief justice) it must inform the legislature–which cannot unilaterally modify the Court's size without the latter's consent. Contrary to its federal opposite, the Puerto Rico Constitution explicitly grants the judiciary the power of judicial review while requiring that findings of unconstitutionality must be rendered by a majority of justices of which the court is composed according to the applicable local law.[47]

Not only did the 1952 Constitution provide for an ample catalog of enumerated rights, some of which are still unavailable at the federal level, but it also bound the government to provide services as seminal as public non-sectarian education.[48]

By far, the most problematic aspect of the 1952 constitution-making exercise was determining its true legal nature even after the island's removal in 1953 from the UN's list of dependent territories.[49] Was Puerto Rico now, having inaugurated its first and only constitution, a "new form of federal state"? Had Puerto Rico ceased to be a territory of the United States, subject to Congress's plenary powers under the federal Constitution's Territorial Clause? Was Puerto Rico now "sovereign" in the international sense? (With a capital "S"?) Had Congress divested itself in perpetuity of its plenary powers over Puerto Rico? Could Congress, in the future, unilaterally alter Puerto Rico's newly inaugurated constitution? Would doing so run afoul of Congress's "compact" with the people of Puerto Rico? Had Congress entered into a legally binding compact with the people of Puerto Rico, unalterable without the mutual consent of both contracting parties? Or did

---

[43] *See id.* art. V, § 1.

[44] *Id.* art. V, § 7.

[45] *Id.* art. V, § 8.

[46] *Id.* art. V, § 3.

[47] *Id.* art. V, §. 4.

[48] P.R. CONST art. II, § 5.

[49] G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., Supp. No. 17, vol. I, at 25–26, U.N. Doc. A/RES/748(VIII) (1953).

Puerto Rico, despite the anticolonial rhetoric embraced by President Truman and Governor Muñoz Marín, remain even after 1952 the "oldest colony in the world"?[50]

It is against the background of the 70th anniversary of the Puerto Rico Constitution, that this paper proposes to explore with rigor the constitutional, historical, and public policy issues embedded in the above-referenced corpus of questions. At a time when the U.S. Supreme Court in *United States v. Vaello Madero* (2022) has yet again confirmed Puerto Rico's colonial condition, and new congressional initiatives for disentangling Puerto Rico's political status conundrum have only recently been unveiled,[51] the time is ripe for reassessing the Puerto Rican labyrinth.[52]

II. Congress's Colonies Problem in the Caribbean[53]

Following its defeat at the hands of the United States in the so-called Spanish-American War of 1898,[54] the Spanish Crown transferred its title over Puerto Rico to the victors. The "little splendid war," in the words of Secretary of State John Hay, yielded handsome rewards to the United States. Pursuant to the Treaty of Paris, signed on December 10, 1898, the Spanish

---

[50] *See generally* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (Yale Univ. Press. 1997).

[51] For a general overview of a new procedural proposal for jumpstarting Puerto Rico's decolonization movement, *see generally* Rafael Cox-Alomar & Christina D. Ponsa-Kraus, *Two Bills Aim to Fix Puerto Rico's Status. Here's How Congress Can End the Deadlock*, MIA. HERALD (Aug. 2, 2021, 3:59 PM), https://perma.cc/HR64-BSP6. As this article was finalized, the U.S. House of Representatives passed the "Puerto Rico Status Act" (H.R. 8393) on December 15, 2022.

[52] The topics discussed in the next section of this article are fully explored in RAFAEL COX ALOMAR, THE PUERTO RICO CONSTITUTION (Oxford University Press 2022).

[53] Note that besides Puerto Rico, the United States also holds title over the Caribbean archipelago made up of St. Thomas, St. Croix, and St. John (collectively known as the United States Virgin Islands) pursuant to the treaty of cession signed with the Kingdom of Denmark in 1916. Convention Between the United States and Denmark for Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706.

[54] Revisionist historians have begun to challenge conventional historiography's inclination to describe this war as "Spanish-American" since that leaves out the fundamental role played by the colonial societies. The description "Spanish-American" has been described as problematic since it distorts and ignores the fact that the war was not fought on either American or Spanish soil, but rather in the Caribbean and the Pacific. Some have chosen to call this conflict the 1898 Spanish-Cuban-Filipino-American War. For a seminal work on the impact the War and the Paris Treaty had on the colonial societies, *see generally* CONSUELO NARANJO ET AL., LA NACIÓN SOÑADA: CUBA, PUERTO RICO Y LAS FILIPINAS ANTE EL 98 (1995). For an interesting discussion on the possible illegality of the Paris Treaty, *see generally* José López Baralt, *Is the Paris Treaty Null "Ab Initio" as to the Cession of Puerto Rico?*, 7 REV. JUR. U.P.R. 75, 77 (1937).

handed over to the United States, not only Puerto Rico and the other islands then under Spanish sovereignty in the West Indies, but also the island of Guam in the Marianas Archipelago,[55] and the Philippines.[56] Interestingly, article IX of the Paris Treaty read, "the civil rights and political status of the territories hereby ceded to the United States shall be determined by the Congress." As some observers have pointed out, this provision represented a significant departure from the statutory language used by the United States in previous acquisition treaties. For instance, article III of the 1803 treaty with France for the Louisiana Purchase provided that the 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 these rights, advantages and immunities of the citizens of the United States."[57] Both the federal government and the newly acquired territories were navigating along uncharted waters.

From the time of the American invasion until the signing of the Foraker Act on May 1, 1900, Puerto Rico was ruled by military commanders.[58] The enactment of the Foraker Act put an end to the military period.[59] A civilian governor, appointed by the president, now controlled the executive,[60] and an executive committee made up of six Americans and five Puerto Ricans functioned as the equivalent of an upper legislative chamber, with the caveat that some of its members would also sit in the governor's cabinet.[61] A house of delegates, elected every other year and made up of thirty-five members,

---

[55] Paris Treaty, Spain-U.S., art. II, Dec. 10, 1898, 30 Stat. 1755. For the reaction of Puerto Rican society to the American invasion, *see generally* FERNANDO PICÓ, LA GUERRA DESPUÉS DE LA GUERRA (2d ed. 1998). For an overview of the Puerto Rican historiography on the 1898 War, *see generally* CARMELO ROSARIO NATAL, EL 1898 PUERTORRIQUEÑO EN LA HISTORIOGRAFÍA: ENSAYO Y BIBLIOGRAFÍA CRÍTICA (1998).

[56] *Paris Treaty supra* note 55, at art. III. For the reaction of the Filipinos to the arrival of the new colonizer, *see generally* ALICIA CASTELLANOS ESCUDIER, FILIPINAS: DE LA INSURRECCIÓN A LA INTERVENCIÓN DE EE.UU. 1896-98 (Sílex Ediciones, S.L. prtg. 1998); BENITO J. LEGARDA, JR., THE HILLS OF SAMPALOC: THE OPENING ACTIONS OF THE PHILIPPINE-AMERICAN WAR, FEBRUARY 4-5, 1899 (2001).

[57] Louisiana Purchase Treaty, Fr.-U.S., Apr. 30, 1803, 8 Stat. 200.

[58] For the military general orders governing Puerto Rico during this period, *see* H.R. Doc. No. 60-1484, at 2177 (1900). For some of the disputes that arose over the military government's legal authority to rule the island, *see generally* Ochoa v. Hernández, 230 U.S. 139 (1913); Santiago v. Nogueras, 214 U.S. 260 (1909); Dooley v. United States, 182 U.S. 222 (1901).

[59] Foraker Act of 1900, Pub. L. No. 191, 31 Stat. 77 (1900) (codified as 48 U.S.C. § 731 (2022)).

[60] *Id.* § 17.

[61] *Id.* § 18. The governor's cabinet was made up of a secretary, a district attorney, a treasurer, an accountant, an interior commissioner and an education commissioner.

together with the executive committee comprised the local legislative assembly.[62] This first organic act, moreover, established a federal court for the district of Puerto Rico as a so-called "territorial" or "legislative" court under U.S. Const. art. I, §8, cl. 9.[63] This first organic act also called for the election, every other year, of a commissioner or delegate to represent the island before the federal government.[64]

A year after the establishment of the Foraker Act, the U.S. Supreme Court finally laid down the normative legal framework that would regulate the relationship between the federal government and the new insular possessions.[65] In a series of cases handed down on the same day and commonly referred to as the "Insular Cases,"[66] the Court held that Puerto Rico was an "unincorporated" territory of the U.S. and that as such was not to undergo a process for incorporation into the Union. In these cases the Court established a doctrine, not explicitly found in the Constitution, which differentiated between incorporated and unincorporated territories. An incorporated territory, for instance, was said to be in the process of becoming a state, and all applicable rights under the Constitution applied to its citizens. An unincorporated territory, in contrast, was granted only fundamental constitutional rights (as defined by the U.S. Supreme Court). The cardinal legal question addressed in *Downes v. Bidwell*, and its progeny was whether the Constitution applied *ex proprio vigore* to these far-flung

---

[62] *Id*. § 27.

[63] *See id*. § 34; *see also* CARMELO DELGADO CINTRÓN, DERECHO Y COLONIALISMO: LA TRAYECTORIA HISTÓRICA DEL DERECHO PUERTORRIQUEÑO 221-77 (1988). *See generally* Carmelo Delgado Cintrón, *El Tribunal Federal como factor de Transculturación en Puerto Rico*, 34 REV. COL. ABO. P.R. 5 (1973) (discussing the historical resistance to the presence of this court, which did not acquire the attributes of an Article III court until 1966).

[64] 48 U.S.C. § 39.

[65] For the constitutional defects of the so-called Insular Cases, *see* Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows To Be True: Why Stare Decisis Is Not an Obstacle to Overruling the Insular Cases*, 53 COLUM. HUM. RTS. L. REV. 721, 727, 737 (2022). *See generally* EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001); FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985); I JOSÉ TRÍAS MONGES, HISTORIA CONSTITUCIONAL DE PUERTO RICO (1980).

[66] *E.g.*, Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 300 (2007) (serving as an example of a source referring to the following as the 'Insular Cases': Huus v. New York & P.R. S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. U.S., 182 U.S. 243 (1901); Dooley v. U.S., 182 U.S. 222 (1901); Goetze v. U.S., 182 U.S. 221 (1901); and De Lima v. Bidwell, 182 U.S. 1 (1901)).

territories: does the Constitution always follow the flag? In *Downes*, the Court, in a 5-4 decision, said no.

[T]he power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest… It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the Territory northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution,) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments.[67]

In terms of Puerto Rico's international identity, the *Downes* Court held that,

[W]hilst in an international sense Puerto Rico is not a foreign country, since it is subject to the sovereignty of and is owned by the United States, *it* [*wa*]*s foreign to the United States in a domestic sense*, because the island ha[s] not been incorporated into the United States, but [i]s merely appurtenant thereto as a possession.[68]

Close to two decades later, the 1917 Jones Act effected some minor administrative modifications.[69] Contrary to the Foraker Act, this second organic act included a limited bill of rights,[70] and conferred upon Puerto Ricans U.S. citizenship.[71] The local legislature, moreover, was reconfigured: the executive committee was abolished and replaced with a locally elected senate. The house of delegates was now styled house of representatives and its members were elected for four-year terms.[72] The veto power, however, remained with the federal authorities.[73] Along these lines, all appointments, including the governorship, cabinet positions, judgeships in the local Supreme Court, and even the chancellorship of the University of Puerto

---

[67] *Downes*, 182 U.S. at 268–69.

[68] *Id.* at 341–42 (emphasis added). Over a hundred years later, Puerto Rico remains foreign in a domestic sense. For an evaluation of how the Washington apparatus still views the island as foreign in a domestic sense, *see, e.g.*, CHRISTINA DUFFY BURNETT & BURKE MARSHALL, BETWEEN THE FOREIGN AND THE DOMESTIC: THE DOCTRINE OF TERRITORIAL INCORPORATION, INVENTED AND REINVENTED 1, 1–36 (2001).

[69] Jones Act of 1917, Pub. L. 64–368, 39 Stat. 951 (1917) (codified as 48 U.S.C. § 771 (1917) (repealed 1950).

[70] *See id.* §§ 2–11.

[71] *Id.* § 5.

[72] *Id.* §§ 25–39.

[73] *Id.* § 34. In the event both houses of the local legislature overrode the governor's veto, the bill would go to the president who then had the last word.

Rico, still came from Washington. As some have argued, by granting Puerto Ricans a limited type of citizenship the Jones Act relegated the island to a status of indefinite colonialism granting few of the civil and political rights normally associated with U.S. citizenship.[74] This new organic act, as the Taft Court soon held in *People of Puerto Rico v. Balzac*, left the island's status as an unincorporated territory of the United States untouched. Puerto Rico was not to be treated as Louisiana or Alaska. Writing for the majority, Chief Justice Taft found that:

> Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by plain declaration, and would not have left it to mere inference.[75] It is true that, in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union . . . . *But Alaska was a very different case from that of Porto Rico.* It was an enormous territory, very sparsely settled and *offering opportunity for immigration and settlement by American citizens.* It was on the American Continent and within easy reach of the then United States. *It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents . . .*[76]

Twenty years later, on August 5, 1947, Congress passed Public Law No. 362,[77] amending section twelve of the Jones Act granting Puerto Ricans the

---

[74] Note that the U.S. Nationality Act of 1940, 8 U.S.C. § 1402, made all persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, citizens of the United States by birth not just by statute. For the legislative history of the 1917 Jones Act, *see, e.g.*, José A. Cabranes, *Citizenship and The American Empire*, 127 U. PA. L. REV. 391, 395–96 (1979). For a fuller treatment of the citizenship question, *see generally* ANTONIO FERNÓS LÓPEZ-CEPERO, LA CIUDADANÍA NACIONAL DE LOS PUERTORRIQUEÑOS (1996); José Julián Álvarez Gonzalez, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans,* 27 HARV. J. ON LEGIS. 309 (1990).

[75] Balzac v. Porto Rico, 258 U.S. 298, 306 (1922).

[76] *Id.* For an in-depth discussion of *Balzac*, *see generally* RIVERA RAMOS, *supra* note 65; TORRUELLA, *supra* note 65.

[77] An Act to Amend the Organic Act of Puerto Rico, Pub. L. No 80-362, Ch. 490, 61 Stat. 770,

right to elect their own governor.[78] And soon thereafter, on July 3, 1950, President Truman signed U.S. Public Law 600, providing "for the organization of a constitutional government by the people of Puerto Rico."[79] Congress adopted this statute "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."[80] U.S. Public Law 600 was ratified by the people of Puerto Rico in a referendum held on June 4, 1951, after which delegates to the constitutional convention were selected by the local electorate on August 27, 1951, to draft the constitution.[81] The people of Puerto Rico approved the new constitution in a referendum held on March 3, 1952, and it was subsequently transmitted to Congress for definitive approval.[82] On July 1, 1952, Congress sanctioned the new constitution, not without first modifying several of its provisions.[83] President Truman's signature of U.S. Public Law 447[84] on July 3, 1952, cleared the way for Governor Muñoz Marín's inauguration of the constitution on July 25, 1952.

The new internal constitutional framework came to life under the name "Commonwealth," intentionally translated to Spanish as *Estado Libre Asociado*, on July 25, 1952.[85] Meanwhile, the provisions of the Foraker and Jones Acts perpetuating the island's political and economic subordination to the United States continued in full force and effect under a new statutory instrument known as the 1950 Federal Relations Act.[86] Nevertheless, Puerto

---

770 (1947) (codified as 48 U.S.C. § 771).

[78] For the reaction of Governor Muñoz Marín, first elected governor of the island, to the enactment of this statute, *see* MUÑOZ MARÍN, *supra* note 10, at 188–89.

[79] An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico, Pub. L. No. 81-600, 64 Stat. 319, 319 (1950) (codified as 48 U.S.C. §§ 731 et seq.).

[80] *Id.*

[81] *Id.*

[82] The Constitution of Puerto Rico was approved by 80 percent of the voters participating in the referendum. *See generally* Constitutional Convention, Res. No. 34 of July 10, 1952 (1952) (P.R.) (codified as P.R. Laws Ann. tit. 1, at 144–146 (1952)).

[83] For the congressional act approving the 1952 Constitution, *see* Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico Which Was Adopted by the People of Puerto Rico on March 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (1952). Congress eliminated Article II's Section 20, which, modeled after the Universal Declaration of Human Rights, elevated free education, work, and adequate living standards, among others, to the rank of constitutional rights. *See generally* TRÍAS MONGES, *supra* note 65. Refer to discussion under Article VII's Section 1.

[84] *See generally* P.R. CONST. art. IX, § 10.

[85] *See* Constitutional Convention, Resolution No. 22 of February 4, 1952 (1952) (P.R.) (referring to discussion under Article IX's Section 4).

[86] *See* 48 U.S.C. § 731(b) (2013).

Rico's governmental authorities, emboldened by the island's removal from the United Nations' list of non-self-governing territories in 1953,[87] characterized the overall political relationship between the people of Puerto Rico and Congress as one premised on a bilateral compact, unalterable unless by mutual consent, following "the precedent established by the Northwest Ordinance."[88]

In this way, the compact mythology was born,[89] notwithstanding that

---

[87] *See* G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., Supp. No. 17, vol. I, at 25—26, U.N. Doc. A/RES/748(VIII) (1953). The representations made by the U.S. delegation with respect to Puerto Rico's new constitutional arrangement at the United Nations must be seen in light of the acute imperatives of the Cold War. These geopolitical considerations were not lost on the Puerto Rican leadership. In a letter to Henry Cabot Lodge, Jr., U.S. ambassador to the United Nations, Governor Muñoz Marín made it abundantly clear that "Puerto Rico can be a weapon of some significance in the psychological warfare in which the free world under American leadership is engaged in the defense of human freedom." Letter from Luis Muñoz Marín, Governor of P.R., to Henry Cabot Lodge, Jr., Ambassador, (May 25, 1953). For a historical account of the process leading to U.N. Resolution 748, *see* Rafael Cox Alomar, *Fernós Isern y la Jornada Puertorriqueña Ante la ONU de 1953*, *in Dr. Antonio Fernós Isern: De Médico a Constituyente [Fernós Isern and the Puerto Rican Journey Before the UN in 1953*, in *From the Doctor to the Constituent]* 493–531 (Héctor Luis Acevedo ed. San Juan: Editorial de la Universidad Interamericana, 2014).

[88] Harry Franqui Rivera, *War Among All Puerto Ricans: The Nationalist Revolt and the Creation of the Estado Libre Asociado of Puerto Rico (Part One)*, USSO (June 10, 2015), https://perma.cc/CC2L-YMTB (referring to *A Bill to Provide for the Organization of a Constitutional Government by the People of Puerto Rico:* H*earing on S. 3336 Before the Subcomm. of the Comm. on Interior & Insular Affs.*, 81st Cong. (2d Sess. 1950)).

[89] Under the intellectual leadership of Chief Judge Calvert Magruder, the U.S. Court of Appeals for the First Circuit infused the compact mythology with life. In Mora v. Mejías, 206 F.2d 377, 387 (1st Cir. 1953), Chief Judge Magruder suggested that the Commonwealth or *Estado Libre Asociado* was now "a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact." Three years later, in Figueroa v. Puerto Rico, 232 F.2d 615, 620 (1st Cir. 1956), Magruder concluded that "the constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. [U.S.] Public Law 600 offered to the people of Puerto Rico a 'compact.'" In First Fed.l Sav. & Loan Ass'n v. Ruiz de Jesús, 644 F.2d 910, 911 (1st Cir. 1981), Judge Levin Campbell followed Chief Judge Magruder's thesis declaring, in no uncertain terms, that "Puerto Rico's territorial status ended, of course, in 1952." Judge Stephen Breyer arrived at the same conclusion in Ezratty v. Puerto Rico, 648 F.2d 770, 776, n.7 (1st Cir. 1981) ("The principles of the Eleventh Amendment . . . are fully applicable to the Commonwealth of Puerto Rico."). Similarly, in Córdova & Simonpietri Ins. Agency v. Chase Manhattan Bank, 649 F.2d 36, 41 (1st Cir. 1981), Breyer found that "Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth." In United States v. López Andino, 831 F.2d 1164, 1168 (1st Cir. 1987), Judge Hugh Bownes held that "Puerto Rico is to be treated as a state for purposes of the [D]ouble [J]eopardy [C]lause." Despite this history, the First Circuit's compact mythology has

U.S. Public Law 600 neither modified "the status of the island of Puerto Rico relative to the United States,"[90] nor altered "the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris,"[91] as Resident Commissioner Antonio Fernós Isern had clearly forewarned during the congressional hearings that preceded the passing of U.S. Public Law 600.[92] Congress's unilateral authority over Puerto Rico, even after the inauguration of the 1952 Constitution, remained plenary.

The compact mythology, however, raised more questions than answers. Had Congress permanently divested itself of its plenary authority over Puerto Rico under the Territorial Clause?[93] Was Congress now unable to unilaterally modify the newly established Puerto Rico Constitution? Was the Puerto Rico Constitution simply another organic act of Congress? What was the proper scope of Congress's power with respect to Puerto Rico in the post-1952 context? Did Puerto Rico remain an unincorporated territory, and therefore a colony even after 1952?

The U.S. Supreme Court had seldom addressed the Puerto Rican status question after the Insular Cases. On the few occasions that the federal high court had referred to it, the justices approached the issue mostly through dicta. For instance, in *Rodríguez v. Popular Democratic Party*,[94] Chief Justice Warren Burger observed that "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'"[95] In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*,[96] Justice Harry Blackmun noted that "Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a

---

died a public and rather unceremonious death at the hands of Congress and the U.S. Supreme Court.

[90] A Bill to Provide for the Organization of a Constitutional Government by the People of Puerto Rico, *supra* note 88, at 4 (statement of Hon. Antonio Fernós-Isern, Resident Comm'r of P.R.).

[91] A Bill to Provide for the Organization of a Constitutional Government by the People of Puerto Rico, *supra* note 88, at 4 (statement of Hon. Antonio Fernós-Isern, Resident Comm'r of P.R.).

[92] The Federal House's report on U.S. Public Law 600, consistent with the resident commissioner's proposition, stated that "[i]t is important that the nature and general scope of S. 3336 be made absolutely clear. The bill under consideration would not change Puerto Rico's fundamental political, social and economic relationship to the United States." H.R. REP. NO. 81–2275 (1950).

[93] U.S. CONST. art. IV, § 3, cl. 2.

[94] 457 U.S. at 1.

[95] *Id.* at 8 (holding that the voting rights of Puerto Ricans are constitutionally protected to the same extent as those of all other citizens of the United States).

[96] 426 U.S. at 597.

measure of autonomy comparable to that possessed by the States."[97] In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[98] Justice William Brennan, writing for the court, suggested that "[Puerto Rico] is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact."[99]

None of these dicta, however, altered the Supreme Court's decision in *Harris v. Rosario*,[100] in which the federal high court held that Congress, empowered under the Territorial Clause of the Constitution to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,"[101] may treat Puerto Rico differently from the states so long as there is a rational basis for its actions.[102] The *Harris* decision, arguably, was a regurgitation of the Court's holding in *Califano v. Torres*, where it held that treating Puerto Rico differently from the several states was rationally grounded.[103] Although the *Harris* and *Califano* holdings were specifically tailored to address disparate treatment under federal assistance programs, the legal nature of Puerto Rico's status remained fraught with confusion and uncertainty.

It was Puerto Rico's bankruptcy crisis *circa* 2015–2016 that finally—and decisively—pierced the colonial veil.[104] In quick succession, the political branches in Washington and the U.S. Supreme Court made it clear that nothing stood in the way of Congress's plenary authority to unilaterally impinge on the people of Puerto Rico's collective political right to internal self-government.[105] The compact mythology was thereafter put to rest.

---

[97] *Id.* (holding that Puerto Rico is a state rather than a territory for purposes of Section 1983 jurisdiction).

[98] 416 U.S. at 672.

[99] *Id.* (holding that the statutes of Puerto Rico are state statutes for purposes of the Three Judge Court Act (28 U.S.C. § 2281)).

[100] 446 U.S. at 651.

[101] U.S. CONST. art. IV, § 3, cl. 2.

[102] 446 U.S. at 651.

[103] *See* 435 U.S. at 1.

[104] According to figures from the (now defunct) Puerto Rico Government Development Bank (GDB), as of May 31, 2014, the total outstanding debt of the island's government (including its instrumentalities and municipalities) was $72.602 billion, "equivalent to approximately 103% of the Commonwealth's gross national product for fiscal year 2013." COMMONWEALTH OF P.R. QUARTERLY REP. 6 (2014). By then, the deficits had become so pervasive, short-term financing and liquidity sources so scarce, and the possibility of a default so real, that the credit ratings had lowered to non-investment grade ("junk status") the Commonwealth's general obligation bonds and guaranteed bonds. The writing was on the wall. Soon thereafter, in June 2015, Governor Alejandro García Padilla finally declared Puerto Rico's insolvency.

[105] All attempts at enhancing the commonwealth relationship have blatantly foundered. Therein

Puerto Rico remained, in the words of Chief Justice José Trías Monge, "the oldest colony in the world."[106]

---

lies the failed experiences of the 1959 Fernós-Murray bill (*A Bill to Provide for Amendments to the Compact Between the People of Puerto Rico and the United States: Hearing on S. 2023 Before the Comm. on Interior and Insular Aff. of U.S. Senate*, 86th Cong. (1959)); the 1963 Aspinall bill (*A Bill to Establish a Procedure for the Prompt Settlement, in a Democratic Manner, of the Political Status of Puerto Rico, Hearing on* H.R. 5945 *Before the H.R., Subcomm. on Territorial & Insular Affs. of the Comm. on Interior & Insular Affs.*, 88th Cong. (1963)); leading President Lyndon Johnson to appoint the failed status commission of 1966 (UNITED STATES-PUERTO RICO COMM., STATUS OF PUERTO RICO, S. DOC. NO. 108 (1966)); the 1973 Ad Hoc Advisory Group on Puerto Rico's Status appointed by President Richard Nixon (*see* THE COMPACT OF PERMANENT UNION: RECORDS OF THE U.S. AD HOC ADVISORY GROUP ON PUERTO RICO (1975)); and the 1989–1991 Johnson–De Lugo bills (Puerto Rico Status Referendum Act, S. 712, 101st Cong. (1989)); Puerto Rico Status Referendum Act, S. 244, 102d Cong. (1991); Puerto Rico Self-Determination Act, H.R. 4765, 101st Cong. (1990)). A closer look at the various legal opinions rendered by the Department of Justice's ("DOJ") Office of Legal Counsel between the introduction of the Fernós-Murray bill in 1959 and the 1990s reveals that the DOJ's legal position concerning the nature of the commonwealth relationship has also changed. Since the early 1990s, the DOJ has become a consistent detractor of any enhancement proposition premised on a bilateral compact of mutual consent. Contrary to its earlier, more pragmatic reading of the proprietary rights doctrine and its extension to the political status field—as evidenced in the legal opinions rendered by the Office of Legal Counsel in 1963, 1971, and 1975—the DOJ's more recent opinions have embraced the view that proprietary rights protected under the Due Process Clause of the Fifth Amendment do not vest in political status arrangements. Under this view, a compact between the people of Puerto Rico and Congress that cannot be modified without the consent of both contracting parties is unavailable as a matter of federal constitutional law. *See* Memorandum from Teresa Wynn Roseborough, Deputy Assistant Att'y Gen., to the Special Representative for Guam Commonwealth, Mutual Consent Provisions in the Proposed Guam Commonwealth Act (July 28, 1994), https://perma.cc/N5Q4-C9WQ; Letter from Robert Raben, Assistant Att'y Gen., to Frank Murkowski, Chairman, Comm. on Energy and Nat. Res. 8–9 (Jan. 18, 2001), https://perma.cc/PM5A-SK6T. For the contrarian view, *see* Memorandum from Just. Dep't Off. of Legal Couns., Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact Which Could Be Modified Only by Mutual Consent (July 23, 1963), https://perma.cc/P9EA-YCTL; Memorandum from William H. Rehnquist, Assistant Att'y Gen., Micronesian Negotiations (Aug. 13, 1971); Letter from Mitchell McConnell, to Marlow Cook (May 12, 1975). *See also* Memorandum from Edward Levy, Att'y Gen., to James E. Connor, Sec'y to the Cabinet, Report of the Ad Hoc Advisory Group on Puerto Rico (Nov. 21, 1975) (copy on file with Ford Presidential Library). In recent times, the DOJ has invariably adhered to the position that any mutual consent arrangement is constitutionally unviable. Refer to the legal conclusions of the 2005, 2007, and 2011 reports of the President's Task Force on Puerto Rico's Status. *See* Report by the President's Task Force on Puerto Rico's Status, 1, 6–7 (Dec. 2005), https://perma.cc/4B62-L4B2; Report by the President's Task Force on Puerto Rico's Status, 26 (Dec. 2011), https://perma.cc/9BJE-R5G9.

[106] JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 161 (1997).

In *Puerto Rico v. Sánchez Valle*,[107] the Supreme Court parted ways with the First Circuit's long-held view that, following the inauguration of the 1952 Constitution, Puerto Rico had become a separate sovereign for purposes of the Double Jeopardy Clause.[108] While readily admitting that, in "1952, Puerto Rico became a new kind of political entity,"[109] the majority in *Sánchez Valle* nonetheless held that, contrary to the states and Indian tribes, the ultimate source of Puerto Rico's prosecutorial powers still derived from Congress.

The more nuanced thesis adopted by Justices Stephen Breyer and Sonia Sotomayor in their dissent, premised on the idea that in 1952 Congress had entered into a compact with Puerto Rico whereby "the 'source' of Puerto Rico's criminal law ceased to be the U.S. Congress and [had become] Puerto Rico itself, its people, and its constitution,"[110] was rejected by the majority. This is why circumscribing *Sánchez Valle* to the Double Jeopardy inquiry is misguided. *Sánchez Valle* transcends the narrow confines of the "dual-sovereignty carve-out from the Double Jeopardy Clause."[111] Rather than embracing the compact mythology expounded upon in the dissent, the U.S. Supreme Court chose to discard it, treating Puerto Rico like a non-sovereign municipal entity, rather than a state.[112]

Less than a week later, in *Puerto Rico v. Franklin California Tax-Free Trust*,[113] the high court found that Puerto Rico was preempted under the Federal Bankruptcy Code from enacting "its own municipal bankruptcy scheme,"[114] even though a 1984 amendment to the federal statute had eliminated Puerto Rico from the definition of "State" "for the purpose of defining who may be a debtor under Chapter 9."[115] While *Franklin* mostly concerned the statutory construction of various provisions of the Federal Bankruptcy Code, its constitutional underpinnings should not be overlooked.

---

[107] 579 U.S. at 59.

[108] *Id.* at 90–91.

[109] *Id.* at 73.

[110] *Id.* at 90–91.

[111] *Id.* at 66; Brief for the United States as Amicus Curiae Supporting Respondents at 1, Puerto Rico v. Sánchez Valle, 579 U.S. 59 (2016) (No. 15-108), 2015 WL 9412680. The position adopted by the United States, through the Office of the Solicitor General, is illuminating. "This case. . . also may affect the federal government's defense of federal legislation and policies related to Puerto Rico across a broad range of substantive areas, including congressional representation, federal benefits, federal income taxes, bankruptcy, and defense."

[112] *Sánchez Valle*, 579 U.S. at 75.

[113] 579 U.S. at 115.

[114] *Id.* at 124.

[115] U.S. CONST. art. I, § 8, cl. 4.

Franklin, perhaps more so than *Sánchez Valle*, uncovered the colonial dimension of Puerto Rico's asymmetric relationship with Congress. It is *Franklin* that lays bare Congress's absolute authority under the Territorial Clause. In *Franklin*, the court validated Congress's arbitrary exclusion of Puerto Rico from the definition of "State" under the Federal Bankruptcy Code's "gateway" provision,[116] despite the uniformity requirement found in the U.S. Constitution's Bankruptcy Uniformity Clause.[117] In so doing, the *Franklin* court also sanctioned Congress's contradictory inclusion of Puerto Rico in the definition of "State" for purposes of the Federal Bankruptcy Code's preemption provision.[118] The majority in *Franklin* reproduced, without saying, the same analytical framework concocted by Justice Brown in *Downes v. Bidwell*,[119] which survived to this day alongside the Insular Cases. Because Puerto Rico, unlike a state, is not a "part" of the United States, Congress is not constitutionally required to extend to the island the structural safeguards emanating from the Bankruptcy Uniformity Clause.[120] The *Franklin* court left Puerto Rico, yet again, in the hands of an indifferent Congress, excluded from the protections of Chapter 9, and preempted from enacting its own insolvency statute.

On June 13, 2016, the same day the U.S. Supreme Court announced its decision in *Franklin*, Congress passed the highly contested Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA").[121] PROMESA is a federal *lex specialis* specifically regulating territorial insolvency. Tailored to fill the statutory void the *Franklin* court found in the Federal Bankruptcy Code, PROMESA enables Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Marianas, the U.S. Virgin Islands, and their territorial instrumentalities, "to file for federal bankruptcy protection."[122] Anchored on an expansive reading of Congress's plenary powers under the Territorial Clause, PROMESA effectively eviscerated the remaining vestiges of the compact mythology.

Born on the heels of *Sánchez Valle* and *Franklin*, PROMESA placed an automatic stay on all debt-related litigation against Puerto Rico and its

---

[116] 579 U.S. at 125.

[117] U.S. CONST. art. I, § 8, cl. 4.

[118] 579 U.S. at 125.

[119] *See* 182 U.S. at 244.

[120] For a thoughtful analysis, *see, e.g.*, Efrén Rivera Ramos, A Discussion of Recent Supreme Court Decisions Regarding Puerto Rico at the 2016 First Circuit Judges' Workshop (Oct. 20, 2016); s*ee also* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of 'Territorial Federalism*, 131 HARV. L. REV. 65, 89 (2018).

[121] The Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 (2016).

[122] Fin. Oversight & Mgmt. Bd. for P. R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1655 (2020).

instrumentalities, while disfiguring the island's constitutional topography.[123] More specifically, PROMESA turned upside down the proposition that in 1952 Congress entered into a compact with the people of Puerto Rico, whereby it permanently relinquished "its territorial powers over Puerto Rico's internal affairs."[124] It is precisely in the exercise of its unbridled authority under the Territorial Clause that Congress placed Puerto Rico's local governance in the hands of an unelected Financial Oversight and Management Board (henceforth the Oversight Board) without any consent from its people. Section 2103 of PROMESA explicitly identifies the Territorial Clause as the source of Congress's constitutional authority to enact this far-reaching insolvency regime. PROMESA is supreme in every respect "over any general or specific provisions of territory law." Pursuant to Section 2128(a), the governor and the legislature have no authority to "exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or to enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board." Section 2141(c)(1) precludes the governor from submitting to the legislature the budget "unless the Oversight Board has certified the Territory Fiscal Plan for that fiscal year," severely limiting the governor's powers under Article IV's Section 4 of the Puerto Rico Constitution. In the event the Oversight Board makes a finding of budgetary noncompliance by the island's governmental authorities, it is empowered under Section 2143(d)(1) to unilaterally "make appropriate reductions in nondebt expenditures to ensure that the actual quarterly revenues and expenditures for the territorial government are in compliance with the applicable certified Territory Budget." Not only does Section 2144(a)(2) commandeer the governor to submit to the Oversight Board for its review, "not later than 7 business days" after their enactment, all laws passed by the legislature "during any fiscal year in which the Oversight Board is in operation,"[125] it also empowers the Board to suspend in its sole discretion "the enforcement or application" of any law "adversely affecting the territorial government's compliance with the Fiscal Plan."[126] It

---

[123] 48 U.S.C. § 2194.

[124] Rafael Hernández Colón, *The Evolution of Democratic Governance under the Territorial Clause of the U.S. Constitutio*n, 50 SUFFOLK U. L. REV. 587, 605 (2017).

[125] Of significance is the fact that Congress has no commensurate authority under Article I Section 8's enumerated powers to commandeer the political branches of the states as it does the political branches of the territories (including Puerto Rico) pursuant to its plenary powers under Article IV Section 3 Clause 2's Territorial Clause. 48 U.S.C. § 2144(a)(1); U.S. CONST. art. IV, § 3, cl. 2. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

[126] Note that the Oversight Board has suspended, among others, P.R. Law No. 47 of April 28,

is the Oversight Board alone that certifies the island's fiscal plan and all debt-restructuring filings.[127] If the local political branches fail to present to the Board a fiscal plan amenable to it, Section 2141(d)(2) vests in the Oversight Board plenary authority to "develop and submit" to the governor and the legislature a fiscal plan of its own making. The Oversight Board's fiscal plan would then be final, enforceable, and fully binding on Puerto Rico despite its emasculation of the legislative process required under Article III of the Puerto Rico Constitution. PROMESA also shuts the door to the local judiciary; Section 2126(a) provides that "any action against the Oversight Board, and any action otherwise arising out of this chapter, in whole or in part, shall be brought in a United States district court for the covered territory."

PROMESA, moreover, vests in the Oversight Board exclusive authority for determining when to terminate its oversight of Puerto Rico. Under Section 2149, the Oversight Board shall terminate only when it certifies that Puerto Rico "has adequate access to short-term and long-term credit markets at reasonable interest rates," and that "for at least 4 consecutive fiscal years," it "has developed its budgets in accordance with modified accrual accounting standards" while keeping its expenditures during each fiscal year below its revenues for that year. Absent future amendment(s) passed by Congress, there is no end in sight, especially if seen in light of Puerto Rico's fiscal woes, magnified by such public emergencies as the COVID-19 pandemic, the lethal path of Hurricane María in 2017, and the 2020 earthquakes.

PROMESA, through its Board, may rule Puerto Rico's life for the foreseeable future. Not surprisingly, the constitutionality of PROMESA has been the subject of intense debate since its signing by President Barack Obama in 2016. More specifically, the question of whether Congress's enactment of PROMESA breached the self-government compact it purportedly entered into with the people of Puerto Rico under U.S. Public Law 600, has elicited a wide-ranging universe of contending opinions. While this issue was not squarely before the U.S. Supreme Court in *Financial*

2020 (amending the Puerto Rico Code of Tax Incentives), P.R. Law No. 181 of December 26, 2019 (adjusting compensation for firefighters), P.R. Law No. 176 of December 16, 2019 (reinstating governmental employees' sick and vacation leaves), P.R. Law No. 138 of August 1, 2019 (amending the Puerto Rico Insurance Code), and P.R. Law No. 82 of July 30, 2019 (regulating pharmacy benefit administrators). The Oversight Board's actions were fully ratified by U.S. District Judge Laura Taylor Swain on December 23, 2020. In re Fin. Oversight & Mgmt. Bd. for P.R., 511 F. Supp. 3d 90 (D.P.R. 2020), *aff'd*, 37 F.4th 746 (1st Cir. 2022).

[127] 48 U.S.C. § 2124(j)(1).

Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC,[128] the Court's resolution of the Appointments Clause controversy presented therein leaves little room for equivocation.[129]

In *Aurelius*, the sole question before the Court was the constitutionality of PROMESA's Section 2121(e), which vests in the president exclusive authority to appoint the Oversight Board's seven members "without the advice and consent of the Senate."[130] Finding that the members of the Oversight Board are not "Officers of the United States" in the constitutional sense, but rather territorial officers exercising "the power of the local government, not the Federal Government,"[131] a unanimous Court held that the strictures of the Appointments Clause did not govern how the Oversight Board members are designated.

On a closer look, the high Court's posture in *Aurelius* is highly problematic. Far from infusing constitutional coherence and stability into its highly dysfunctional territorial jurisprudence, an internally fractured court exacerbated even further the asymmetrical relationship between Congress and the territorial periphery. The contention that "the Appointments Clause governs the appointment of all officers of the United States, including those located in Puerto Rico,"[132] while openly opposed by Justice Clarence Thomas in his concurrence,[133] fizzled away at the hands of the "amorphous test"[134]

---

[128] 140 S. Ct. at 1649.

[129] In *Aurelius*, the U.S. Supreme Court suggested, without saying, that Congress's unilateral imposition of the Oversight Board is far from unconstitutional due to its plenary powers under the Territorial Clause "to create local offices" for Puerto Rico and the remaining territories. 140 S. Ct. at 1654. *See also* Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J. 284 (2020); Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J. 101 (2020).

[130] Pursuant to § 2121(e)(2), the president alone appoints the individual members of the Oversight Board, "of which (i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives; (ii) the Category B member should be selected from a separate, non-overlapping list of individuals submitted by the Speaker of the House of Representatives; (iii) the Category C members should be selected from a list submitted by the Majority Leader of the Senate; (iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives; (v) the Category E member should be selected from a list submitted by the Minority Leader of the Senate; and (vi) the Category F member may be selected in the sole discretion of the President of the United States." 48 U.S.C. § 2121(e)(2).

[131] *Aurelius*, 140 S. Ct. at 1659.

[132] *Id.* at 1654.

[133] *Id.* at 1666.

[134] *Id.* at 1670.

for determining when the Appointments Clause "restricts"[135] the appointment of "Officers of the United States" undertaking duties related to the territories. Under the *Aurelius* test, distinguishing between an "Officer of the United States with duties in or related to" an "Article IV entity" and a territorial officer whose appointment is unrestrained by the Appointments Clause hinges on whether Congress, in its sole discretion, has vested the above-referenced officer with federal responsibilities or "primarily local duties."[136]

Far from heeding Justice Anthony Kennedy's admonition in *Boumediene v. Bush*[137] that neither the president of the United States nor Congress possesses "the power to switch the Constitution on or off at will,"[138] *Aurelius* seems to suggest that such dictum is wholly irrelevant in the territorial topography.

Shortly thereafter, in *United States v. Vaello Madero* (2022),[139] the Supreme Court held that Congress is not constitutionally required to extend Supplemental Security Income (SSI) to residents of Puerto Rico on an equal footing with residents of the States, despite their shared American citizenship. The Roberts Court, thus, concluded that Congress's unequal treatment of American citizens domiciled in Puerto Rico, for purposes of SSI benefits, does not run afoul of the equal protection component of the Fifth Amendment's Due Process Clause.

The *Vaello Madero* Court did not break new ground, but rather followed the precedent established in *Califano v. Torres* (1978) and *Harris v. Rosario* (1980). In so doing, the high Court embraced yet again an overly expansive reading of Congress's plenary powers under the Territorial Clause—anchored to the proposition that the Territorial Clause "permits Congress to treat Puerto Rico differently from States so long as there is a rational basis

---

[135] *Id.* at 1661.

[136] *Id.*

[137] 553 U.S. at 723.

[138] *Id.* at 765.

[139] 142 S. Ct. at 1539 [hereinafter *Vaello Madero II*]. In *Vaello Madero II*, the U.S. Supreme Court reversed the U.S. Court of Appeals for the First Circuit, which by voice of Judge Juan Torruella had found that "the categorical exclusion of otherwise eligible Puerto Rico residents from SSI is not rationally related to a legitimate government interest." 956 F.3d 12, 32 (1st Cir. 2020) [hereinafter *Vaello Madero I*]. The U.S. Supreme Court granted certiorari in *Vaello Madero I* on March 1, 2021. *See also* Asociación Hosp. Del Maestro, Inc. v. Becerra, 10 F.4th 11 (1st Cir. 2021), where the First Circuit found that the unequal treatment of Puerto Rican hospitals, for purposes of the distribution of Medicare's "disproportionate share hospital payments" (DSH), did not run afoul of the equal protection component of the Fifth Amendment's Due Process Clause.

for its actions."[140]

While making no distinction between the political entity known as "Puerto Rico" and the "residents of Puerto Rico," who are American citizens, the *Vaello Madero* Court conflated these two distinct legal concepts, adding credence to the problematic argument that heightened scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause is unavailable to protect the American citizens residing in Puerto Rico from legislative discrimination so long as Congress acts pursuant to the Territorial Clause.[141]

At its core, *Vaello Madero*, like *Aurelius*, *Sánchez Valle*, and *Franklin*, is a byproduct of the same territorial powers doctrine that since the founding of the American Republic has led to an absolutist reading of Congress's authority under the Territorial Clause—a reading that is at odds with the founders' anticolonial values.[142]

III. Conclusion: A Failed Experiment in American Federalism?

Born in the postwar period during the waning days of the Truman administration, Puerto Rico's internal *Magna Carta* belongs to another time and place. Admittedly, the 1952 Constitution is by far Puerto Rico's most significant legal instrument since the proclamation in 1897 of the short-lived Autonomic Charter. Imbued with the postwar values of the 1948 Universal Declaration of Human Rights, the 1952 Constitution devolved to the island a significant quantum of political authority over its internal governance while endowing its people with a robust catalog of fundamental rights.

Seven decades on, however, the constitutional experiment of 1952 is exhausted—not least because Puerto Rican society has undergone since then significant and irreversible changes in all orders, compounded by a technological revolution with multiple consequences. The island's unprecedented bankruptcy, the demise of its traditional political structures resulting from the ineptitude and corruption of the local political leadership, together with the rise of a cadre of new movements and individual actors demanding honesty, transparency, and competency, have irrevocably

---

[140] *Vaello Madero II*, 142 S. Ct. at 1543 (citing Harris v. Rosario, 446 U.S. 651, 661 (1980)).

[141] *See Harris*, 446 U.S. at 654-56 (Marshall, J., dissenting).

[142] Note that the Commerce Clause also empowers Congress to regulate activities undertaken in Puerto Rico that "substantially affect interstate commerce." Congress's commerce power as applied to Puerto Rico is ample indeed. *See, e.g.*, Hernández-Gotay v. United States, 985 F.3d. 71, 75 (2021) (holding that Section 12616 of the Agriculture Improvement Act of 2018, banning the sponsorship and exhibition of cockfighting matches in Puerto Rico, is a legitimate exercise of the Commerce Clause power).

redrawn Puerto Rico's political topography. The time may be ripe for embarking on a process of constitutional restructuring that infuses democratic legitimacy and normative vitality to a worn-out constitutional arrangement.

For Puerto Rico today, the challenge is twofold: on the one hand, decolonizing its endogenous constitutional repertoire; on the other, engaging Congress in the complex task of charting a clear path for its exogenous decolonization even with the sword of Damocles still hanging over its head, embodied by the debt restructuring process PROMESA has placed, for the foreseeable future, in the hands of the Oversight Board. Far from mutually exclusive propositions, the restructuring of Puerto Rico's internal constitutional infrastructure is closely intertwined with the resolution of its political status. Because Article VII Section 3 of the Puerto Rico Constitution commands that all amendments must be compatible with U.S. Public Laws 600 and 447, as well as to the 1950 Federal Relations Act, far-reaching restructuring at the local level might require restructuring at the external level as well.

While exploring the far reaches of Puerto Rico's status conundrum is beyond the scope of this article, some concluding observations are appropriate. First, decolonizing Puerto Rico is far from a purely legal matter. Decolonizing Puerto Rico is, above all else, a political matter requiring a bilateral dialogue between the people of Puerto Rico and the political branches in Washington. Deciding how to disentangle Puerto Rico's colonial knot is not a question for the U.S. Supreme Court, but for Congress.

Second, engaging Congress requires a new procedural mechanism. The time for nonbinding local plebiscites and denying independence and free association access to the ballot should come to an end. From a procedural perspective, only a federal plebiscite including detailed definitions already agreed upon with Congress or a status convention elected by the people of Puerto Rico with the sole task of defining, together with Congress, the self-determination formulas to be put to the people for a definitive vote, would meet Puerto Rico's unique needs.

Third, Puerto Rico's fiscal implosion, along with its effect on the United States' municipal bond market and Washington's overall global interests in today's world (dis)order, will no doubt shape Congress's response (or lack thereof) to Puerto Rico's demands for decolonization.

Fourth, perhaps no other moment in Puerto Rico's long history has offered as fertile a terrain for transformative change as this one.

Against this background, promoting Puerto Rico's endogenous and exogenous decolonizing agenda is of the essence.