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La Promesa Cumplida [The Promise Fulfilled]: How the U.S. Constitution

Erratum

corrected header

LA PROMESA CUMPLIDA [THE PROMISE FULFILLED]: HOW THE U.S. CONSTITUTION HAS ENABLED COLONIALISM

Dean Delasalas⁺

On June 30, 2016, President Barack Obama signed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) into law to address Puerto Rico's debt crisis.¹ The crisis began in 2006 when Puerto Rico entered a recession caused by a decade-long decline in manufacturing.² The Puerto Rican government subsequently laid off government employees, privatized public assets, and issued refinancing bonds to pay creditors.³ Those measures were ineffectual. Puerto Rico has approximately 120 billion dollars in bond and pension debt,⁴ defaults on that debt,⁵ junk status bonds⁶ and, now with PROMESA, a government stripped of much of its autonomy.

PROMESA was Congress's response to Puerto Rico's inability to resolve the debt crisis. On June 28, 2014, Puerto Rico passed the Recovery Act to prevent creditors from invoking contractual remedies to obtain payment from public entities.⁷ However, creditors holding two billion dollars in Puerto Rican bonds sued Puerto Rico in the U.S. District Court for the District of Puerto Rico, arguing that the Recovery Act encroached on Congress's power to set uniform

⁺ J.D., The Catholic University of America, Columbus School of Law 2018; B.A., University of Maryland, College Park, 2015.

1. Heather Long, *President Obama Signs Puerto Rico Rescue Bill*, CNN (June 30, 2016, 5:00 PM), <http://money.cnn.com/2016/06/29/investing/puerto-rico-debt-promesa/>.

2. See generally *Puerto Rico Debt Crisis: How Did We Get Here*, BBC (Jan. 21, 2016), <http://www.bbc.com/news/world-us-canada-35368786> (explaining that the 2006 recession in Puerto Rico was caused by the 1996 repeal of a federal tax provision that had incentivized manufacturers to do business in Puerto Rico).

3. *Pirates of the Caribbean: How Santander's Revolving Door with Puerto Rico's Development Bank Exacerbated a Fiscal Catastrophe for the Puerto Rican People*, HEDGE CLIPPERS (Dec. 13, 2016), http://hedgeclippers.org/pirates-of-the-caribbean-how-santanders-revolving-door-with-puerto-ricos-development-bank-exacerbated-a-fiscal-catastrophe-for-the-puerto-rican-people/#_ftnref2.

4. Nick Brown, *Puerto Rico Board Grills Officials on Found Money, Years of Accounting Woes*, REUTERS (Jan. 19, 2018), <https://www.reuters.com/article/uk-puertorico-debt-accounting/puerto-rico-board-grills-officials-on-found-money-years-of-accounting-woes-idUSKBN1F8294?il=0> (describing a two-hour hearing in which the Oversight Board excoriated Puerto Rican officials for failing to account for approximately seven billion dollars).

5. See *Pirates of the Caribbean*, *supra* note 3.

6. Claudia Assis, *Moody's Downgrades Puerto Rico's Bonds Further into Junk*, MARKETWATCH (Oct. 11, 2017, 3:51 PM), <https://www.marketwatch.com/story/moodys-downgrades-puerto-ricos-bonds-further-into-junk-2017-10-11>.

7. *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577, 583–84 (D.P.R. 2015).

bankruptcy laws.⁸ On February 6, 2015, the court found for the creditors and enjoined Puerto Rico from enforcing the Recovery Act.⁹ On June 13, 2016, the Supreme Court affirmed the district court's decision, thereby precluding Puerto Rico from accessing relief under federal bankruptcy laws and from passing measures to obtain similar relief.¹⁰ Two weeks later, President Obama signed PROMESA into law.¹¹

Congress enacted PROMESA in accordance with its power under the Territory Clause of the U.S. Constitution "to dispose of and make all needful rules and regulations for territories."¹² PROMESA's stated purpose is to help Puerto Rico "achieve fiscal responsibility and access to the capital markets"¹³ by permitting Puerto Rico to restructure its debt in an orderly fashion.¹⁴ For those purposes, the PROMESA created a Financial Oversight and Management Board (Oversight Board)¹⁵ and prohibited Puerto Rico from "exercis[ing] any control, supervision, oversight, or review over the Oversight Board or its activities"¹⁶ The Oversight Board can cut "nondebt expenditures,"¹⁷ prevent the enforcement of regulations it finds inconsistent with the fiscal plans it has approved,¹⁸ and crack down on protesting public sector employees.¹⁹

PROMESA has provoked mixed and often vehement reactions.²⁰ Then-Governor Alejandro García Padilla of Puerto Rico described PROMESA as

8. *Id.* at 584–85.

9. *Id.* at 614.

10. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016). During the litigation, Senator Richard Blumenthal and Representative Pedro Pierluisi of Puerto Rico introduced bills in Congress permitting Puerto Rican cities to access bankruptcy protection. *See* Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong. (2015) (noting Representative Pierluisi's Bill was referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law without further action taken); Puerto Rico Chapter 9 Uniformity Act of 2015, S. 1774, 114th Cong. (2015) (noting Senator Blumenthal's bill was read twice and referred to the Committee of the Judiciary without further action taken).

11. *See* Long, *supra* note 1 and accompanying text.

12. *See* Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101–2241, 2121(b)(2) (2012).

13. *Id.* § 2121(a).

14. Michelle Wilde Anderson, *The Fight to Relieve Puerto Rico's Debt Is in Congress's Hands*, STAN. L. SCH. (June 14, 2016), <https://law.stanford.edu/2016/06/14/the-fight-to-relieve-puerto-ricos-debt-crisis-in-congress-hands/>.

15. 48 U.S.C. § 2121(b)(1).

16. *Id.* § 2128(a)(1).

17. *Id.* § 2143(d)(1).

18. *Id.* § 2144(b)(5).

19. *Id.* § 2124(h).

20. *See, e.g., Ongoing Puerto Rico Protest Camp Blasts "Colonial" PROMESA Bill*, TELESUR (July 12, 2016), <http://www.telesurtv.net/english/news/Ongoing-Puerto-Rico-Protest-Camp-Blasts-Colonial-PROMESA-Bill-20160712-0016.html> (reporting on protesters against PROMESA who had set up tents around the U.S. Federal Court building in Hato Rey, Puerto Rico and called PROMESA an example of "colonial dictatorship"). *See also* Raul L. Reyes, *Experts: PROMESA Act Done, Job Now Is to Keep Puerto Rico Afloat Amid Debt*, NBC NEWS (Aug. 10,

Puerto Rico's opportunity "to take [the] island from creditors and return it to the people."²¹ In contrast, Padilla's successor Ricardo Rosselló in August 2017, defied the Oversight Board's demand to furlough government employees as a cost-saving measure and connected PROMESA back to Puerto Rico's "unfair colonial condition."²² Outside of Puerto Rico, PROMESA has alarmed officials in other U.S. territories who have had to assure their citizens that their own problems were not severe enough to warrant an oversight board.²³

On September 20, 2017, the situation worsened for Puerto Rico with the arrival of Hurricane Maria, the strongest hurricane to hit Puerto Rico in over eighty years.²⁴ Hurricane Maria covered more than half of the island, ripping electrical-transmission towers out of the ground, generating torrents necessitating the immediate evacuation of over 70,000 people, and killing approximately 2,975 people.²⁵ The death toll likely would have been higher but for Puerto Rico's fortune of not having too many low-lying areas.²⁶ In addition

2016, 10:41 AM), <http://www.nbcnews.com/news/latino/experts-promesa-act-done-job-now-keep-puerto-rico-afloat-n627181> (noting that, even in the best case scenario, PROMESA could fix the debt crisis, but not adequately address "overall economic growth" in Puerto Rico). Judge Juan Torruella of the First Circuit denounced PROMESA as "the 'most humiliating, contemptuous, undemocratic and colonial act ever seen throughout [Puerto Rico's] entire relationship with the United States . . .'" Cindy Burgos Alvarado, *Judge Torruella Calls for 'Economic Boycott' and 'Civil Resistance' Against Fiscal Board*, CARIBBEAN BUS. (Sept. 11, 2016), <http://caribbeanbusiness.com/judge-torruella-requests-economic-boycott-and-civil-resistance-against-fiscal-board/>. Judge Torruella himself faced intense criticism for also suggesting Puerto Ricans form a "civil resistance movement" against PROMESA's implementation. Eva Lloréns Vélez, *Judge Torruella Gains Controversy over 'Civil Resistance' Remarks*, CARIBBEAN BUS. (Sept. 11, 2016), <http://caribbeanbusiness.com/judge-torruella-gains-controversy-over-civil-resistance-encouragement/>.

21. Patricia Guadalupe, *Here's How PROMESA Aims to Tackle Puerto Rico's Debt*, NBC NEWS LATINO, (June 30, 2016, 1:39 PM), <http://www.nbcnews.com/news/latino/here-s-how-promesa-aims-tackle-puerto-rico-s-debt-n601741> (translating the original quote); see *Reacciones a la Aprobación de PROMESA*, EL NUEVO DÍA (June 29, 2016, 8:51 PM), <http://www.elnuevodia.com/noticias/politica/nota/reaccionesalaaprobaciondepromesa-2216356/> ("Hoy estamos recuperando al país; con la aprobación de PROMESA comenzamos a quitárselo a los acreedores y a devolvérselo a los puertorriqueños." (original quote)).

22. *Puerto Rico Governor Delivers Defying Speech After Controversial Fiscal Board Meeting*, CARIBBEAN BUS. (Aug. 4, 2017), <http://caribbeanbusiness.com/puerto-rico-governor-delivers-speech-after-controversial-fiscal-board-meeting/>.

23. Ernice Gilbert, *VI Noosed to Bondholders as Senators Pass \$247 Million Debt Financing Bill*, THE V. I. CONSORTIUM (Nov. 4, 2016), <http://viconsortium.com/government-2/vi-noosed-to-bondholders-as-senators-pass-247-million-debt-financing-bill/>.

24. Robinson Meyer, *What's Happening with the Relief Effort in Puerto Rico?*, THE ATL. (Oct. 4, 2017), <https://www.theatlantic.com/science/archive/2017/10/what-happened-in-puerto-rico-a-timeline-of-hurricane-maria/541956/>.

25. See generally Matthias Schwartz, *Maria's Bodies*, N.Y. MAG. (Dec. 22, 2017, 5:00 AM), <http://nymag.com/daily/intelligencer/2017/12/hurricane-maria-man-made-disaster.html>; Leyla Santiago et al., *Puerto Rico Hurricane Maria's Death Toll Is 46 Times Higher than the Government's Previous Count*, CNN (Aug. 28, 2018, 6:25 PM), <https://www.cnn.com/2018/08/28/health/puerto-rico-gw-report-excess-deaths/index.html>.

26. See Schwartz, *supra* note 25.

to the tragic loss in human life and dramatic increase in human suffering, Hurricane Maria has been estimated to cost the Puerto Rican people between forty-five billion and ninety-five billion dollars in damages.²⁷

Given the looming presence of the Oversight Board in Puerto Rico as Puerto Rico attempts to recover from both its crippling debt and the devastation of Hurricane Maria, it is worth examining PROMESA. Despite the reactions PROMESA has provoked, PROMESA is not an aberration in constitutional law. Rather, PROMESA highlights a major problem in the Constitution: the virtually limitless power granted to Congress to regulate the Territories of the United States. PROMESA is one of many examples of how Congress has wielded that power to treat the U.S. Territories as colonies and thereby betray the United States' democratic values.²⁸ Therefore, PROMESA is as much a warning to the other U.S. Territories about the constitutionality of such action as it is a wake-up call to those who reside in the United States proper. This concern is independent of PROMESA's merits. Perhaps PROMESA's debt restricting provisions are necessary for Puerto Rico's long-term economic survival and recovery. Nonetheless, the American people should avoid exclusively focusing on expediency when determining what remedies to use.

This Note will first survey the case law regarding the Territory Clause, focusing on two periods: the founding of the United States to the Spanish-American War in 1898 and the Spanish-American War to the present. Then, the Note will explain the current status of the territorial governments. Afterward, the Note will examine the terms of PROMESA in light of the previous sections and connect them to precedent and current events. Finally, the Note will discuss what PROMESA portends for the other U.S. Territories.

I. PRIOR LAW: THE GROUNDWORK FOR PROMESA

A. *The Territory Clause Enables United States Colonialism*

The Territory Clause enables Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”²⁹ Though the Territory Clause's text distinguishes between “Territory” and “property,” those terms are used interchangeably.³⁰ Theoretically, this interchangeability permits Congress to treat U.S. Territories

27. Jill Disis, *Hurricane Maria Could Be a \$95 Billion Storm for Puerto Rico*, CNN MONEY (Sept. 28, 2017, 3:04 PM), <http://money.cnn.com/2017/09/28/news/economy/puerto-rico-hurricane-maria-damage-estimate/index.html>.

28. This Article uses the word “colony” the same way José Trías Monge, former Chief Justice of the Supreme Court of Puerto Rico, used the word “colony”: “to denote that the United States unnecessarily holds excessive powers over Puerto Rico, thoughtlessly preventing it from attaining a respected place on earth” JOSÉ TRÍAS MONGE, *INJUSTICE ACCORDING TO LAW: THE INSULAR CASES AND OTHER ODDITIES* 233 (Christina Duffy Burnett & Burke Marshall eds., 2001).

29. U.S. CONST. art. IV, § 3, cl. 2.

30. Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1225–26 (2011).

such as Puerto Rico as it would Howland Island,³¹ an uninhabited island with a climate the CIA describes as “scant rainfall, constant wind, [and] burning sun.”³²

As Professor Gary Lawson has noted, the Territory Clause appears “structured to facilitate the[] treatment [of the territories] as colonies” because it lumps the territories in with other U.S. property.³³ The words of Gouverneur Morris, the drafter of the Territory Clause, lend credence to that conclusion.³⁴ Morris claimed to have written the Territory Clause to enable Congress to treat the Territories as “provinces” with “no voice” in the federal government.³⁵ Though Morris’s view may be an outlier, the Territory Clause does “place territorial self-governance at the mercy of the national political branches”³⁶

In his analysis of the Territory Clause, Justice Joseph Story reaches a similar conclusion. In *Commentaries on the Constitution of the United States*, Justice Story likens Congress’s power under the Territory Clause to the conqueror’s right to rule over acquired territory.³⁷ He argues that, until Congress admits a territory into the Union, treaty terms and congressional action determine whether people in the Territories can have “the privileges, rights, and immunities” of United States citizens.³⁸ Justice Story presciently wonders whether people in the Territories would receive such liberties “without any express stipulation,” but avoids answering his own question because he thought the question would never arise.³⁹

In *A Familiar Exposition of the Constitution*, Justice Story argues that Congress can impose “general regulation” over newly acquired territory.⁴⁰ He illustrates this regulatory power with his explanation of the Northwest Ordinance of 1787.⁴¹ Described as a “masterly display of the fundamental principles of civil and religious and political liberty,”⁴² the Northwest Ordinance enabled

31. *Id.* at 1229.

32. *The World Factbook Australia-Oceania: Howland Island*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/hq.html> (last updated Oct. 16, 2017).

33. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 908–09 (1990) (quoting a letter from Gouverneur Morris to Henry W. Livingston on December 4, 1803).

34. *Id.* at 908–09; see generally William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 1000–01 (2009).

35. Lawson, *supra* note 33, at 908.

36. *Id.* at 909.

37. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 227 (3d ed 1858) [hereinafter STORY I].

38. *Id.* at 227–28.

39. *Id.* at 228.

40. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: CONTAINING A BRIEF COMMENTARY ON EVERY CLAUSE, EXPLAINING THE TRUE NATURE, REASONS, AND OBJECTS THEREOF; DESIGNED FOR THE USE OF SCHOOL LIBRARIES AND GENERAL READERS 138–39 (The Lawbook Exchange, 1999) [hereinafter STORY II].

41. *Id.* at 139. Regrettably, Justice Story spends more time on the Northwest Ordinance than he does on the actual text of the Territory Clause. See *id.* at 139–41.

42. *Id.* at 139.

Congress to micromanage the northwestern Territories.⁴³ Under it, Congress granted the people of the territory religious freedom, a right to trial by jury, freedom from cruel and unusual punishment, and procedural due process.⁴⁴ However, Congress appointed “all [the territorial governor’s] general officers,” commissioned all five members of the legislative council, and reserved the right to invalidate territorial laws it “disapproved of.”⁴⁵

B. The Supreme Court Has Consistently Held that Congress Has Plenary Regulatory Power over the Territories of the United States

1. Pre-Spanish-American War Territory Clause Jurisprudence: Absolutism Toward the Territories.

Following the path of the Northwest Ordinance of 1787, Territory Clause jurisprudence gave the federal government increasing latitude to ignore, when regulating the Territories, the ordinary constitutional limits on congressional power.⁴⁶

In 1810, in *Sere v. Pitot*, the Supreme Court stated the Territory Clause gave Congress “absolute and undisputed power of governing and legislating . . .” for the Territories.⁴⁷ Debtors to French creditors claimed the District Court of the territory of Orleans could not have jurisdiction over them because they were citizens of a territory and therefore not citizens of a state.⁴⁸ They further argued finding jurisdiction in the Orleans District Court would violate the Constitution’s restriction on Congress’s ability to extend jurisdiction to cases brought against the citizens of Territories.⁴⁹ Unanimously, the Supreme Court rejected the debtors’ arguments because the Orleans District Court “must be considered as having such jurisdiction as [C]ongress intended to give it[.]” the Constitution’s limitations on jurisdiction notwithstanding.⁵⁰

In 1828, the Supreme Court deepened the dissonance between the normal constitutional limitations on Congress and the Territory Clause’s plenary power grant with its decision in *American Insurance Co. v. 356 Bales of Cotton*.⁵¹ The

43. This level of micromanagement is consistent with Justice Story’s belief that territories were not meant to “participate in political power” or “share in the powers of the general government until they became a state . . .” STORY I, *supra* note 37, at 228.

44. See *Northwest Ordinance; July 13, 1787*, YALE L. SCH. art. I–III, http://avalon.law.yale.edu/18th_century/nworder.asp (last visited Aug. 8, 2018).

45. *Id.* § 5–6. As will be explained later in this Note, many have disputed Congress’s ability to appoint territorial officials in this manner. See *infra* notes 133–135 and accompanying text.

46. *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336–37 (1810).

47. *Id.* at 337.

48. *Id.* at 334.

49. *Id.* at 337.

50. *Id.* at 337–38.

51. 26 U.S. (1 Pet.) 511, 512 (1828); see STORY I, *supra* note 37, at 228 (stating that territorial courts were “in no just sense constitutional courts” and therefore “incapable of receiving [the Constitution’s judicial power].”). But see GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION*

plaintiff insurance companies argued the Key West District Court in the then-territory of Florida did not have jurisdiction over the parties because the Constitution prohibited Congress from “vest[ing] admiralty-jurisdiction in Courts created by territorial legislature.”⁵² However, the Supreme Court held the Key West District Court had jurisdiction because territorial courts, as “legislative Courts, created in virtue of [the Territory Clause],” did not have to follow the Constitution’s limits on jurisdiction.⁵³ More importantly, the Supreme Court stated that “[i]n legislating for [the Territories], Congress exercises the combined power of the general, and of a state government.”⁵⁴

From *356 Bales of Cotton* onward—with the exception of some aberrations⁵⁵—the Supreme Court expanded the Territory Clause’s applications.⁵⁶ In 1879, in *National Bank v. County of Yankton*, the Supreme Court held a territory’s county could donate bonds to a railroad company, not because the act authorizing the donation was passed by the territorial legislature, signed by the governor, and voted on by the county’s citizens, but rather because Congress approved the act.⁵⁷ In dicta, Justice Morrison Waite wrote Congress had “full and complete legislative authority over the people of the Territories . . .” and could nullify the county’s acts.⁵⁸ However, he added that, regarding the

OF EMPIRE 146, 149 (2004) (arguing Chief Justice Marshall’s ruling on the status of territorial courts “respond[ed] to an argument advanced by neither party[.]” and that his ruling was “rather flagrantly contrary to the clear meaning of the Constitution.”).

52. *356 Bales of Cotton*, 26 U.S. (1 Pet.) at 546.

53. *Id.*

54. *Id.*

55. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 162–66 (1878) (stating that the First Amendment prohibits Congress from forbidding the free exercise of religion in the territories, but upholding a federal anti-bigamy statute as constitutional because Congress can regulate religious conduct such as religiously-mandated polygamy, not beliefs). *See also* EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES’ NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* 40–45 (2006) (arguing three cases in the 1850s, *Cross v. Harrison*, *Fleming v. Page*, and the infamous *Dred Scott v. Sandford* opinion, are sufficient evidence the Supreme Court determined the Constitution applied automatically and fully to the territories); *see also* Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the United States-Puerto Rico Relationship*, 100 MINN. L. REV. HEADNOTES 79, 84–85 (2016) (asserting that, as a result of the “racially charged imperialistic mania” of the late 19th and early 20th centuries, the Supreme Court ignored *Dred Scott*’s clear limitation of the Territory Clause to “lands held at the time of the treaty with Great Britain in 1783 . . .”).

56. *See, e.g., United States v. Gratiot*, 39 U.S. 526, 537 (1840) (“[The] power [of the Territory Clause] is vested in Congress without limitation . . .”); *see also Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850) (stating territorial courts were under the “supervision and control” of Congress and “no[t] subject to [the Constitution’s] complex distribution of the powers of government . . .”).

57. 101 U.S. 129, 133–34 (1879).

58. *Id.* at 133; *see also Snow v. United States*, 85 U.S. (18 Wall.) 317, 320 (1873) (“The extent of the power thus granted [to a territorial legislature] . . . is at all times subject to such alterations as Congress may see fit to adopt.”).

regulation of the Territories, Congress did not have powers “expressly or by implication reserved in the prohibition of the Constitution.”⁵⁹

The dicta of *County of Yankton* became the law in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*.⁶⁰ In 1890, the Mormon Church sued the United States after Congress, under the Morrill Anti-Bigamy Act of 1862, invalidated the charter of incorporation that the then-territory of Utah had given to the Mormon Church.⁶¹ The Supreme Court found for the United States because it was “too plain for argument” that Congress could repeal the charter whenever it saw fit to do so.⁶² Nonetheless, the majority mused, “Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments”⁶³ Even so, the majority stated that such limitations existed “by inference and the general spirit of the Constitution”⁶⁴

2. *Post-Spanish-American War Jurisprudence*

a. *The Impact of the Insular Cases: The Constitution Does Not Always Follow the Flag*

The aftermath of the Spanish-American War brought up the question Justice Story had evaded decades prior: Did the Constitution automatically extend to the Territories upon annexation, or did Congress have to expressly extend the Constitution to the Territories?⁶⁵

In the Treaty of Paris of 1898, Spain ceded Cuba, Puerto Rico, the Philippines, and Guam to the United States.⁶⁶ The Treaty left the “civil rights and political status of the native inhabitants of the [T]erritories . . .” for Congress to determine.⁶⁷ Scholars assumed Congress would eventually admit the Territories as states with all the rights the Constitution guaranteed them.⁶⁸ However, the

59. *Cty. of Yankton*, 101 U.S. at 133.

60. 136 U.S. 1, 42–45 (1890) [hereinafter *Mormon Church*].

61. *Id.* at 5–6.

62. *Id.* at 45. Such a ruling was unsurprising given that, roughly a month before, the Supreme Court defined territories as organized entities whose powers “are conferred upon them by act of Congress, and [whose] legislative acts are subject to the disapproval of the Congress of the United States.” *In re Lane*, 135 U.S. 443, 447 (1890).

63. *Mormon Church*, 136 U.S. at 44.

64. *Id.*

65. See STORY I, *supra* note 37, at 227–28.

66. BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 4 (Peter Charles Hoffer & N. E. H. Hull eds., 2006).

67. Treaty of Peace Between the United States of America and the Kingdom of Spain, art. IX, ¶ 2, Dec. 10, 1898, 30 Stat. 1754.

68. SPARROW, *supra* note 66, at 4–6; see *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955) (“Territorial government in the continental United States was customarily viewed as a transition step to statehood”). *But see* Abbott Lawrence Lowell, *The Status of Our New*

Insular Cases raised the possibility that Congress could keep the Territories as possessions indefinitely with no guarantee that the Constitution's protections would apply to them.⁶⁹

The *Insular Cases* were a series of early 20th century cases that set the course for modern Territory Clause jurisprudence.⁷⁰ A major impetus for these cases was the annexation of Puerto Rico.⁷¹ In 1900, Congress passed the Foraker Act to replace the military occupation of Puerto Rico with a new "civil government."⁷² The Act gave Puerto Ricans an elected legislature whose laws Congress could freely invalidate and provided Puerto Rican citizenship.⁷³ Whether the Constitution extended to Puerto Rico was a question in the first two *Insular Cases*.

These cases, *De Lima v. Bidwell* and *Downes v. Bidwell*, occurred in 1901.⁷⁴ Both involved companies suing the collector of the port of New York over a tariff on Puerto Rican goods.⁷⁵ In *De Lima*, the company argued payment of the tariff imposed by the 1897 Dingley Act was improper because Puerto Rico was not a foreign country for tariff purposes.⁷⁶ The Supreme Court agreed, considering Puerto Rico and the other overseas Territories "domestic" Territories for tariff purposes but excluding them from the United States.⁷⁷ Though strange, the situation was not out of the ordinary, given the long

Possessions—A Third View, 13 HARV. L. REV. 155, 174–76 (1899) (arguing the United States could hold territories as possessions unincorporated into United States and to which the Constitution would not apply).

69. SPARROW, *supra* note 66, at 6. See 2 SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 341 (1950) ("The petty islands and guano rocks that had already been annexed had never raised, as Puerto Rico and the Philippines did, the embarrassing question of . . . the nature and extent of Congressional control.").

70. SPARROW, *supra* note 66, at 4–5. Scholars disagree about the number of cases to include in the *Insular Cases*, with the cases being as few as five or as many as thirty-five. Compare *id.* at 257 (identifying thirty-five such cases) with David M. Helfield et al., *Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, 110 F.R.D. 449, 454 (1985) (identifying five cases). Though not claiming to have a definitive number, this Note disagrees with several of Professor Sparrow's choices because they are duplicative. See, e.g., *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (consisting only of a citation to *Dooley v. United States*, 182 U.S. 222 (1901), another of the *Insular Cases*).

71. *Downes v. Bidwell*, 182 U.S. 244, 247 (1901); *De Lima v. Bidwell*, 182 U.S. 1, 1 (1901).

72. Foraker Act, Pub. L. No. 56-191, 31 Stat. 77, 77–78 (1900).

73. *Id.* §§ 7, 31–32. Puerto Rico also had a governor appointed by the President and confirmed by the Senate. *Id.* § 17. The Act's namesake Senator Joseph Foraker wanted to give Puerto Ricans the opportunity to obtain U.S. citizenship, establish an elected legislature, and extend the Constitution to Puerto Rico. SPARROW, *supra* note 66, at 34–35. However, Foraker's fellow senators disagreed because they considered the Puerto Ricans "'illiterate, and unacquainted with [American] institutions, and incapable of exercising the rights and privileges guaranteed by the Constitution to the States of the Union.'" *Id.*

74. *Downes*, 182 U.S. at 244; *De Lima*, 182 U.S. at 1.

75. *Downes*, 182 U.S. at 247; *De Lima*, 182 U.S. at 1.

76. *De Lima*, 182 U.S. at 180.

77. *Id.* at 199–200, 217.

stretches of time between the acquisition of Territories and their admission into the Union.⁷⁸ However, *Downes* destroyed the underlying assumption of eventual statehood.

In a 5-4 decision, the Supreme Court used *Downes* to clarify the legal precedents regarding the nature of Territories.⁷⁹ To do so, the Supreme Court had to determine the meaning of “United States.”⁸⁰ The Supreme Court struggled to reconcile the possible constitutional limitations on the Territory Clause with cases like *356 Bales of Cotton*, which held that Congress had “complete and supreme” power over the Territories.⁸¹ Interestingly, the Supreme Court discussed Chief Justice Roger Taney’s analysis of the Territory Clause in the *Dred Scott* decision in which he concluded the Territory Clause did not permit Congress to establish territorial governments.⁸² However, the Supreme Court found *Dred Scott* distinguishable from *Downes* because *Dred Scott* involved the removal of slaves—“property”—from U.S. citizens settling in a territory.⁸³ Ultimately, the Supreme Court determined the Constitution applied only to “the States whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them.”⁸⁴

Consequently, the Supreme Court articulated the extension doctrine.⁸⁵ Under this doctrine, “the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct.”⁸⁶ The Supreme Court first examined instances in which either Congress or treaty terms expressly conferred rights to the Territories.⁸⁷ Then, interpreting the Thirteenth Amendment, the Supreme Court distinguished the states of the Union from “any place subject to their jurisdiction . . .” (i.e. Territories).⁸⁸ Finally, looking at the various treaties, the Supreme Court posited there was a period of time between annexation and “the proper time [for admission] . . . to the enjoyment of all

78. See SPARROW, *supra* note 66, at 3 (noting considerable variations in “the length of time between when an area came under U.S. sovereignty and when Congress admitted it as a state . . .” with Oklahoma taking 104 years to be admitted).

79. See *Downes*, 182 U.S. at 258 (acknowledging its decisions regarding this issue “ha[d] not been altogether harmonious”).

80. See *id.* at 249.

81. See *id.* at 258, 263–67.

82. *Id.* at 250.

83. *Id.* at 274–75.

84. *Id.* at 277.

85. STANLEY K. LAUGHLIN, *THE LAW OF THE UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 116 (1995).

86. *Downes*, 182 U.S. at 279 (emphasis added).

87. See, e.g., *id.* at 254 (reasoning the citizens of the Louisiana Territory were granted “liberty, property, and religion,” not by the Constitution, but rather by the Louisiana Purchase’s terms). See also *id.* at 269 (agreeing with an earlier decision nullifying the prohibition for jury trials in restitution cases in the then-territory of Iowa because Congress, “by express provision and by reference, extended the laws of the United States . . .” to Iowa.).

88. *Id.* at 277.

rights of citizens of the United States”⁸⁹ The Supreme Court asserted that, during that period, public opinion, the moral character of Congress, and the “principles of natural justice inherent in the Anglo-Saxon character” would safeguard the Territories.⁹⁰ It thus regarded disagreement with Congress’s decision regarding the acquisition and regulation of a territory as “solely a political question.”⁹¹

In his concurrence, Justice White articulated the incorporation doctrine.⁹² Under this doctrine, Congress could regulate a territory without making it part of the United States.⁹³ Determining the Constitution’s allocation of powers to Congress would properly limit Congress’s power under the Territory Clause,⁹⁴ Justice White focused on Congress’s discretion under both the Territory Clause and its role in ratifying treaties.⁹⁵ He believed immediately incorporating the Territories into United States upon annexation would deprive the American people, through Congress, of their right to determine who should be part of the United States.⁹⁶ Justice White concluded the United States could hold Puerto Rico, and by extension the other Territories, as “possession[s]” to which the Constitution would not apply.⁹⁷

With the Constitution not automatically applicable to the Territories, the Supreme Court had to determine what constitutional protections did apply. In 1903, the Supreme Court upheld a Hawaiian man’s manslaughter conviction even though he was not formally indicted by a grand jury or convicted by a unanimous jury because the inclusion of such procedural mechanisms were “not

89. *Id.* at 280 (quoting Treaty of Peace, Friendship, Limits and Settlement Between the United States of America and the Mexican Republic, art. IX, July 8, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo]). Like the other examples the Court cited, the Treaty of Guadalupe Hidalgo expressly protected the liberty, property, and free exercise of religion of the citizens of the ceded territory. Treaty of Guadalupe Hidalgo, art. IX. Chief Justice Fuller had a less rosy picture of this intermediate period, claiming *Downes* permitted Congress to “keep [Puerto Rico] . . . in an intermediate state of ambiguous existence for an indefinite period” *Downes*, 182 U.S. at 372 (Fuller, C.J., dissenting).

90. *Downes*, 182 U.S. at 280–82, 381. The Court believed that the “principles of the Constitution” (but not the Constitution itself) would protect the citizens of the territories. *Id.* at 283 (emphasis added). Justice White had a similarly wishy-washy answer. *Id.* at 291 (White, J., concurring) (“[E]ven in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.”). Justice Gray was blunter. *Id.* at 346 (Gray, J., concurring) (“If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.”).

91. *Id.* at 286.

92. *Id.* at 299 (White, J., concurring).

93. *Id.* (White, J., concurring)

94. *Id.* at 298 (White, J., concurring).

95. *Id.* at 310–15 (White, J., concurring).

96. *Id.* at 315 (White, J., concurring).

97. *Id.* at 342 (White, J., concurring).

fundamental” and their exclusion was “suited to the conditions of the islands, and well calculated to conserve the rights of [those Territories’] citizens”⁹⁸ A year later, in *Binns v. United States*, the Supreme Court upheld a licensing fee Congress directly imposed on Alaska in a case that only arose because Congress did not give Alaska its own legislature.⁹⁹ The Supreme Court concluded Congress did not have to establish a legislature for Alaska because Congress was not “limited” to following the Constitution’s model of government when establishing territorial governments.¹⁰⁰

By 1922, with *Balzac v. Porto Rico*, the incorporation doctrine became “the settled law of the court.”¹⁰¹ Thus, to determine whether a Puerto Rican man accused of libel was entitled to a jury trial under the Sixth Amendment, the Supreme Court looked into whether Congress had incorporated Puerto Rico into the Union and thereby extended the Constitution to Puerto Rico.¹⁰² The Supreme Court concluded Congress did not intend to incorporate Puerto Rico when it passed the Jones Act in 1917 because it had granted Puerto Rico a separate Bill of Rights.¹⁰³ Therefore, the Supreme Court held the man was not entitled to a jury trial.¹⁰⁴

b. After the Insular Cases: Colonial Calculus in the Granting of Constitutional Rights to the Territories

Since 1922, the Supreme Court has operated on the premise of *Balzac*: that, while regulating the Territories, Congress can grant or withhold rights normally guaranteed by the Constitution.¹⁰⁵ Consequently, for the Territories, the determination of rights has turned into divinations into congressional intent and constitutional hairsplitting.

98. *Hawaii v. Mankichi*, 190 U.S. 197, 208, 217–18 (1903). *See also* *Dorr v. United States*, 195 U.S. 138, 148–49 (1904) (holding a man convicted of libel in the Philippines was not entitled to a trial by jury because Congress did not expressly extend that right to the Filipino legal system). *But see* *Thompson v. Utah*, 170 U.S. 343, 350–51 (1898) (holding Utah should have given a jury trial to a man tried for stealing a calf right before Utah’s admission into the Union and later retried after Utah’s admission into the Union because he was constitutionally entitled to one after Utah became a state).

99. 194 U.S. 486, 492–93, 496 (1904).

100. *Id.* at 491–92. *Cf.* *Mullaney v. Anderson*, 342 U.S. 415, 419–20 (1952) (holding the then-territory of Alaska could not impose a licensing fee that discriminated against non-residents because Congress could choose and did choose to make Alaska subject to the Privileges and Immunities Clause of the Constitution).

101. 258 U.S. 298, 305 (1922).

102. *Id.* at 304–06.

103. *Id.* at 306–07.

104. *Id.* at 313–314. Though the Supreme Court acknowledged that jury trials enabled the citizenry to “prevent [the] arbitrary use or abuse” of the justice system, the Supreme Court considered it improper to impose such a system upon people who were “not brought up in a fundamentally popular government . . . living in compact and ancient communities, with definitely formed customs and political conceptions. . . .” *Id.* at 310.

105. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974).

In 1974, the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.* determined the Constitution's formulation of due process applied to Puerto Rico because Congress's joint resolution approving Puerto Rico's constitution included due process among the provisions of the Constitution applied to Puerto Rico.¹⁰⁶ Five years later, in *Torres v. Puerto Rico*, the Supreme Court concluded the Fourth Amendment applied to Puerto Rico because Puerto Rico's constitution included a provision using the language of the Fourth Amendment.¹⁰⁷ Nonetheless, the Supreme Court stated Congress could overrule applications of the Constitution that interfered with Congress's ability to regulate the Territories.¹⁰⁸

With *Harris v. Rosario* in 1980, the Supreme Court placed only the flimsiest restraints on Congress's regulatory power over the Territories.¹⁰⁹ Accounting for the Territory Clause, the Supreme Court applied rational basis scrutiny to Congress's decision to give less financial assistance to parents in Puerto Rico than to parents in the States and upheld that decision.¹¹⁰

Expanding on *Harris*, courts have found Congress only needs a rational basis for treating Territories differently from the States. In 1987, the D.C. Circuit in *Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel* held Congress only needs a rational basis for having the Secretary of the Interior control and supervise American Samoa's courts.¹¹¹ Two years later, in *Virgin Islands v. Dowling*, the Third Circuit stated Congress would only need a rational basis for permitting the U.S. Virgin Islands to give "substantially more severe" sentences for grand larceny than is recommended by federal guidelines.¹¹²

In Territories, Congress did not incorporate rights such as citizenship that the people in the States take for granted and must be bestowed by Congress or risk exclusion.¹¹³ In 2013, in *Tuaua v. United States*, the District Court for the District of Columbia dismissed the case of five American Samoans who argued Congress's decision to deny American Samoans U.S. citizenship violated the Citizenship Clause of the Fourteenth Amendment.¹¹⁴ The court found the Citizenship Clause did not apply to Territories and that citizenship was not a fundamental right that could be extended to unincorporated Territories such as American Samoa absent congressional action.¹¹⁵

106. *Id.*

107. 442 U.S. 465, 470–71 (1979).

108. *Id.* at 470.

109. 446 U.S. 651, 651 (1980).

110. *Id.* at 651–52.

111. 830 F.2d 374, 385 (D.C. Cir. 1987).

112. 866 F.2d 610, 615 (3d Cir. 1989).

113. *See, e.g.*, *Tuaua v. United States*, 951 F. Supp. 2d 88, 95 (D.D.C. 2013).

114. *Id.* at 94.

115. *Id.* at 94–98; *see also* *Entines v. United States*, 160 F. Supp. 3d 208, 213 (D.D.C. 2016) (holding a Filipino man born when the Philippines was still a U.S. territory did not have birthright

Affirming the D.C. District Court's verdict, the D.C. Circuit tied the applicability of constitutional rights to the Territories to the practical concerns that arise while regulating them.¹¹⁶ The D.C. Circuit differentiated "fundamental" and "non-fundamental" constitutional rights, with the latter involving rights "idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence."¹¹⁷ In respect to "non-fundamental" constitutional rights, the D.C. Circuit stated that "[t]he means by which free and fair societies may elect to ascribe the classification of citizen must accommodate variation where consistent with respect for other, inherent and inalienable, rights of persons."¹¹⁸

C. Current Congressional Micromanagement in Territorial Affairs as Seen in the Territories' Governing Documents

Unlike the States, U.S. Territories have organic acts instead of actual constitutions.¹¹⁹ Organic acts are statutes that "establish[] an administrative agency or local government."¹²⁰ Because organic acts are federal statutes, the federal government can easily change the territorial governments' very structure by amending the organic acts.¹²¹ This fact applies even to Guam's "Bill of Rights,"¹²² which roughly approximates the Bill of Rights of the U.S. Constitution.¹²³

Congress has designated Guam and the U.S. Virgin Islands as "unincorporated territor[ies] of the United States" and placed them under the

U.S. citizenship because such citizenship is not a right "integral to free and fair society" when other democratic nations base a person's citizenship on his/her parent's nationality (quoting *Tuaua*, 788 F.3d at 308)).

116. *Tuaua*, 788 F.3d at 307 (citing *Boumediene v. Bush*, 553 U.S. 723, 758 (2008)).

117. *Id.* at 308.

118. *Id.* at 309. Because the elected leaders of American Samoa opposed birthright citizenship, the D.C. Circuit ruled against the plaintiffs. *Id.* at 310.

119. 48 U.S.C. §§ 1421–1428, 1541–1645 (2012) (referring to the organic act governing Guam and to the organic act governing the U.S. Virgin Islands).

120. *Organic Statute*, BLACK'S LAW DICTIONARY (10th ed. 2014) (stating that organic statutes are the same as organic acts).

121. *Ngiraingas v. Sanchez*, 495 U.S. 182, 203–204 (1990) ("By a simple vote of Congress, the Organic Act under which the unincorporated territory exists may be repealed and the limited self government which it enjoys nullified") (quoting Brief for Government of Virgin Islands, *ex rel.* Godfrey R. de Castro, Attorney General of the Virgin Islands as Amicus Curiae in Support of Respondents at 8, *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990) (No. 88-1281)); *see* *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) (citing 48 U.S.C. § 1421a); *see also* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 733 (2016) (citing 48 U.S.C. §§ 1421a–b).

122. Serkin & Tebbe, *supra* note 121, at 733.

123. 48 U.S.C. § 1421b. Guam's Bill of Rights is a mishmash of the U.S. Constitution's Bill of Rights and the limits of Congressional power as stated in Article I, Section 9 of the U.S. Constitution. *See id.*

control of the Secretary of the Interior.¹²⁴ Congress has expressly extended to them, among other things, the first nine amendments of the U.S. Constitution, the Thirteenth Amendment, and the privilege of the writ of habeas corpus.¹²⁵ Notably, Congress has reserved the right to modify or repeal their laws.¹²⁶

Although Puerto Rico and American Samoa have constitutions, there is a distinction without a difference between organic acts and territorial constitutions, as the Eleventh Circuit has noted Congress may “unilaterally repeal the Puerto Rican Constitution . . . and replace [it] with any rules or regulations of [Congress’s] choice.”¹²⁷ The federal government likewise believes Puerto Rico’s unique status as a commonwealth did not remove Puerto Rico from Congress’s regulatory power.¹²⁸ The Supreme Court agreed in *Puerto Rico v. Sanchez Valle*, holding Puerto Rico was not a sovereign entity despite its commonwealth status because its power originated from the federal government, not from the citizens of Puerto Rico.¹²⁹

The Eleventh Circuit dicta at least holds true for American Samoa, because Congress has reserved the right to amend its constitution.¹³⁰ No similar provision exists in Puerto Rico’s constitution.¹³¹ The American Samoan constitution, as approved by Congress, vests all “civil, judicial, and military” authority in the President of the United States until Congress establishes a formal government for American Samoa.¹³² The President in turn has tasked the Secretary of the Interior with the administration of American Samoa.¹³³ Only time will tell if the same holds true for Puerto Rico, but the abovementioned dicta does not predict a favorable outcome.

124. *Id.* §§ 1421a, 1541(a)–(c).

125. *Id.* §§ 1421b(u), 1561.

126. *Id.* §§ 1421c(a), 1574(c).

127. *United States v. Sanchez*, 992 F.2d 1143, 1152–53 (11th Cir. 1993). *But see* *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988) (rejecting the idea that Puerto Rico was not a sovereign entity because it found that the Puerto Rican government’s power emanated from the Puerto Rico Constitution).

128. Brief for the United States as Amicus Curiae Supporting Respondents at 3–4, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016) (No. 15-108).

129. *Sanchez Valle*, 136 S. Ct. at 1876.

130. 48 U.S.C. § 1662a.

131. However, the lack of such a provision likely would not be a hindrance to Congress. *See Nat’l Bank v. Cty. of Yankton*, 101 U.S. 129, 133 (1879) (“In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away.”).

132. *Revised Constitution of American Samoa*, AM. SAM. BAR ASS’N, http://www.asbar.org/index.php?option=com_content&view=article&id=1961&Itemid=177 (last visited Feb. 9, 2018).

133. Exec. Order No. 10264, 16 Fed. Reg. 6417 (June 29, 1951).

D. Recent Challenges to the Territory Clause's Grant of Plenary Power

On August 7, 2017, objecting to a petition the Oversight Board had filed to protect Puerto Rican assets, various creditors challenged the constitutionality of PROMESA by filing suit in the United States District Court for the District of Puerto Rico.¹³⁴ Specifically, the creditors argued that the method used to appoint the Oversight Board's members violated the Appointments Clause of the U.S. Constitution.¹³⁵ The creditors contended that members of the Oversight Board are officers of the United States and therefore their appointment must conform to the procedure set out in the Appointments Clause, the Territory Clause notwithstanding.¹³⁶

The creditors' argument is not unheard of.¹³⁷ Professor Lawson proposed a similar argument in 1990, only to cast doubt on his argument's persuasiveness in light of the Supreme Court's willingness to have constitutional limits yield to Congress's plenary regulatory power over the Territories.¹³⁸

Such doubt was warranted. Ultimately, the Puerto Rico District Court held the Appointments Clause did not place a limit on Congress's powers under the Territory Clause because longstanding jurisprudence has established that Congress can create "governmental institutions for territories that . . . include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States."¹³⁹ Furthermore, the District Court held that, even if the Appointment Clause did place such limits on those powers, the Appointments Clause was inapplicable to the Oversight Board because the members of the Oversight Board were not officers of the United States.¹⁴⁰

II. SIGNIFICANCE OF PROMESA

PROMESA combines the worst of pre- and post-Spanish-American War jurisprudence on the Territory Clause. PROMESA permits the pre-Spanish-American War excesses Congress indulged in with the United States' earlier Territories, while maintaining the post-Spanish-American war position that permits Congress to experiment with the constitutional rights and protections of the Territories to ensure the effective administration thereof.

134. Objection and Motion of Aurelius to Dismiss Title III Petition, *In re* Financial Oversight and Management Board for Puerto Rico, 301 F. Supp. 3d 288 (D.P.R. 2017) (No. 17 BK 3283-LTS).

135. *Id.* at 1–5.

136. *Id.* at 11–17.

137. See, e.g., Lawson, *supra* note 33, at 865.

138. *Id.* at 867–870, 874–77.

139. *In re* Fin. Oversight and Mgmt. Bd. for P.R., No. 17 BK 3283-LTS, 2018 U.S. Dist. LEXIS 117348, at *12–13, 24 (D.P.R. July 13, 2018).

140. *Id.* at *26.

A. Provisions of PROMESA

PROMESA is divided into seven titles.¹⁴¹ This Note is primarily concerned with Titles I and II, both of which concern the Oversight Board.¹⁴² Titles III and VI govern the remedies Puerto Rico can seek while creditors file claims against it.¹⁴³

Title I establishes a seven-person Oversight Board appointed by the President of the United States.¹⁴⁴ The Oversight Board “provide[s] a method for a covered territory to achieve fiscal responsibility and access to the capital markets.”¹⁴⁵ Interestingly, despite backlash regarding language in a previous draft that included the other U.S. Territories in PROMESA,¹⁴⁶ PROMESA’s definition of “territory” includes not only Puerto Rico, but also Guam, the American Samoa, the Mariana Islands, and the U.S. Virgin Islands.¹⁴⁷

Several times in Title I the Oversight Board is permitted to make decisions based on the Oversight Board’s “sole discretion.”¹⁴⁸ These decisions range from determining which public entities are within the Oversight Board’s purview to demanding the territory’s governor develop a separate budget for certain public entities.¹⁴⁹ In any case, PROMESA expressly prohibits territorial governments from “exercis[ing] any control, supervision, oversight, or review over the Oversight Board or its activities”¹⁵⁰

Title II concerns the Oversight Board’s role in the development and implementation of fiscal plans and budgets.¹⁵¹ The Oversight Board serves as a gatekeeper through the certification process.¹⁵² Before the governor submits fiscal plans and budgets to the legislature, the Oversight Board must certify

141. See generally Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101–2241 (2016).

142. *Id.*

143. *Id.*

144. 48 U.S.C. § 2121(b)(1), (e).

145. *Id.* § 2121(a) (emphasis added).

146. PROMESA H.R. 5278, 114th Cong. § 5(20) (2016); Stacey Plaskett, *Promesa Bill Passes with Revisions in Significant Victory for the U.S. Virgin Islands*, Press Release (June 10, 2016), <https://plaskett.house.gov/media-center/press-releases/promesa-bill-passes-revisions-significant-victory-us-virgin-islands> (criticizing PROMESA for imposing “Orwellian oversight boards” and failing to provide Puerto Rico and the other territories with the means to “grow their own economies”).

147. 48 U.S.C. § 2104(20)(A)–(E).

148. See, e.g., *id.* § 2121(d)(1)(A)–(E).

149. See, e.g., *id.*

150. *Id.* § 2128(a)(1).

151. See generally *id.* §§ 2141–2152.

152. This remains true even in the alternative budget certification process, PROMESA provides: The Oversight Board works with the governor and the legislature to jointly develop a compliant budget and all parties involved “certify that such budget reflects a consensus among them.” 48 U.S.C. § 2142(f).

whether those fiscal plans and budgets are compliant.¹⁵³ If those fiscal plans or budgets are not compliant, the Oversight Board sets a deadline by which the governor must make the necessary revisions.¹⁵⁴ If the governor fails to provide the Oversight Board with a compliant fiscal plan or budget, the Oversight Board can devise a compliant fiscal plan or budget itself.¹⁵⁵

Once the fiscal plan is established, Title II also requires the governor to submit all newly enacted laws to the Oversight Board to ensure the laws are not “significantly inconsistent” with the fiscal plan.¹⁵⁶ If the Oversight Board determines otherwise, the territorial government must revise the law to eliminate the inconsistency or give an explanation for the inconsistency the Oversight Board finds “reasonable and appropriate.”¹⁵⁷ If the territorial government fails to do either, Oversight Board can “take such action as it considers necessary . . . to ensure that the enactment or enforcement of the law will not adversely affect the [territory’s] compliance with the Fiscal Plan, including *preventing the enforcement or application of the law.*”¹⁵⁸

B. Revival of Congressional Micromanagement of the Territories

As the Supreme Court stated in *Binns v. United States*, the Territory Clause grants Congress great flexibility to structure territorial governments however it finds most convenient.¹⁵⁹ By creating the Oversight Board, a virtual fourth branch of government in Puerto Rico, Congress is utilizing that flexibility as proclaimed in PROMESA’s stated constitutional basis.¹⁶⁰ Through the Oversight Board, Congress can expressly exercise the rights it would reserve for itself in an organic act instead of reserving that right by implication.¹⁶¹

With the procedure for submitting legislative acts to the Oversight Board, Congress can exercise its age-old right to nullify territorial legislation, as it could do under the Northwest Ordinance of 1787 and had done in *County of*

153. *Id.* §§ 2141(c)(3), 2142(c). Fiscal plans are compliant when they, among other things, “ensure the funding of essential public services,” “provide adequate funding for public pension systems,” “improve fiscal governance, accountability, and internal controls,” and “include a debt sustainability analysis.” *Id.* § 2141(b)(1)(A)–(N). Budgets are compliant when they comply with the fiscal plan the Oversight Board approved. *Id.* § 2142(c).

154. *Id.* §§ 2141(a), 2142(a).

155. *Id.* §§ 2141(d)(2), 2142(c)(2). For example, regarding the budgets for public entities, the Oversight Board can reduce “nondebt expenditures[,]” institute automatic hiring freezes, and prohibit those entities from entering any contracts and “entering into . . . any financial or other transactions.” *Id.* § 2143(d)(2). Nonetheless, the Oversight Board must cancel those measures if it determines that the public entities have initiated measures to make themselves compliant with the budget. *Id.* § 2143(d)(1), (e).

156. *Id.* § 2144(a)(1)–(2).

157. *Id.* § 2144(a)(4)(B).

158. *Id.* § 2144(a)(5) (emphasis added).

159. 194 U.S. 486, 491–92 (1904).

160. 48 U.S.C. § 2121(b)(2).

161. *See id.* § 2144(b)(5).

Yankton.¹⁶² Under the Foraker Act, Puerto Rico had to submit to Congress all laws enacted by the Puerto Rican legislature, with Congress reserving the right to nullify those laws “if deemed advisable.”¹⁶³ Under Puerto Rico’s constitution, a bill becomes law after receiving majority approval from the legislature and the governor’s signature.¹⁶⁴ However, PROMESA brings back the last step of the process in the Foraker Act with the Oversight Board acting in Congress’s stead.

In addition to outright nullifying laws, the Oversight Board can play the role of the territorial legislature as Congress did for Alaska in *Binns*.¹⁶⁵ The only difference is the Oversight Board can delegate to the territorial government the grunt work of devising the fiscal plans, budgets, and laws.¹⁶⁶ The Oversight Board is still in control because it not only assesses those items for compliance with PROMESA, but also because it can force the Puerto Rican government to revise those items to ensure compliance.¹⁶⁷ If the territorial government fails to ensure compliance, PROMESA unceremoniously cuts out the territorial government and enables the Oversight Board to create a compliant budget.¹⁶⁸

C. *Excessive Deference to Administrative Concerns that Promote a Lack of Accountability and Redress*

In several provisions of PROMESA, Congress effectively codifies the congressional capriciousness defended in *Mormon Church* and lack of redress announced in *Downes*.¹⁶⁹

Similar to how the Supreme Court in *Downes* made the acquisition of territory a political question, Congress expressly prohibits the Puerto Rican government from “exercis[ing] any control, supervision, oversight, or review over the Oversight Board or its activities”¹⁷⁰ Congress also enables the Oversight Board to determine if the Puerto Rican government would be “enact[ing], implement[ing], or enforce[ing] any statute, resolution, policy or rule that would impair or defeat” PROMESA.¹⁷¹ Finally, Congress frees the Oversight

162. See *id.* § 2144(a)(1); *Nat’l Bank v. Cty. of Yankton*, 101 U.S. 129, 133-34 (1879); see generally *Northwest Ordinance; July 13, 1787*, http://avalon.law.yale.edu/18th_century/nw_order.asp (last visited Aug. 13, 2018).

163. Foraker Act, Pub. L. No. 56-191, 31 Stat. 77, § 31 (1900).

164. P.R. Const. art. III, §§ 17, 19.

165. See *supra* notes 100–101 and accompanying text.

166. See generally 48 U.S.C. § 2144.

167. See *id.* §§ 2142(d)(2), 2144(a)(4)–(5).

168. *Id.* § 2142(d)(2).

169. See *supra* notes 62–65, 92 and accompanying text. Nonetheless, creditors have attempted to collaterally attack the Oversight Board’s decision-making powers by questioning the legitimacy of the Oversight Board itself. See *supra* notes 134–135 and accompanying text (arguing that the Oversight Board lacked decision-making authority because its members were appointed in violation of the Appointments Clause of the U.S. Constitution).

170. 48 U.S.C. § 2128(a)(1).

171. *Id.* § 2128(a)(2).

Board and its members of any liability arising from actions taken in accordance with PROMESA's provisions.¹⁷²

Just as Congress in *Mormon Church* was free to revoke a territorial charter of incorporation at any time, so is the Oversight Board often able to act in its "sole discretion."¹⁷³ The Oversight Board can determine which agencies in Puerto Rico need to present a budget to ensure compliance with the fiscal plan and how long the Puerto Rican government has to correct the deficiencies it finds in proposed fiscal plans.¹⁷⁴ The latter is especially significant because if the Oversight Board determines the Puerto Rican government has not made those corrections, the Oversight Board can simply substitute the proposed fiscal plan(s) with a plan it has devised.¹⁷⁵

III. ANALYSIS: PROMESA IS A LOADED WEAPON

PROMESA illustrates the problem of having only "political substitutes for strict self-governance"¹⁷⁶ as the U.S. Territories' safeguards against morally dubious congressional action.¹⁷⁷ The "general spirit of the Constitution"¹⁷⁸ is merely a sentimental ideal when the Constitution's text leaves open the effectively unbridled indulgence of the colonial impulse.

A. *PROMESA is the Symptom of the Underlying Problem that is the Territory Clause's Text*

PROMESA shows how weakly benevolence tempers Congress's prerogative under the Territory Clause. Some requirements of the proposed fiscal plans, such as the adequate funding of pensions and public services, suggest magnanimity from PROMESA's drafters.¹⁷⁹ Nonetheless, the Oversight Board

172. *Id.* § 2125.

173. *See, e.g., id.* § 2121(d)(1)(A)–(D).

174. *Id.* §§ 2121(d)(1)(A)–(D), 2141(a).

175. *Id.* § 2141(d)(2).

176. Lawson, *supra* note 33, at 909. Unfortunately, Professor Lawson subscribes to the same wishy-washiness to which this Note objects. *See id.* (advocating for keeping Congress's broad regulatory power but convincing Congress to achieve "substantive goals" consistent with the Framers' intentions via "free, albeit formalistically nonbinding, election[s]" of territorial governors and "rubber-stamp" the proposals of territorial "legislatures").

177. "Morally dubious congressional action" is a necessarily awkward turn of phrase. "Abuse of congressional authority" flows better off the tongue, but such a phrase would contradict one of this Note's major arguments: Congress has such broad discretion under the Territory Clause that there can be no abuse of that discretion, notwithstanding any limitations implicitly set by the spirit of the Constitution. The only arguments against such broad discretion are those of moral outrage, *see, e.g.,* *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States (Mormon Church)*, 136 U.S. 1, 67–68 (1890) (Fuller, C.J., dissenting), or a challenge to the appointment of the Oversight Board members. Perhaps pragmatism could limit Congress, should the circumstances favor a gentle grip from Congress's iron fist. However, neither moral outrage nor pragmatism are serious legal arguments. In that sense, this Note begrudgingly agrees with Professor Lawson.

178. *Id.* at 44.

179. *See* 48 U.S.C. § 2141(b)(1)(B)–(C).

provisions do not disturb Congress's discretion concerning the regulation of the Territories.¹⁸⁰ Moreover, with the Oversight Board able to interfere with the enforcement of territorial laws and to scrap fiscal plans and budgets it disagrees with, the ugliness of the colonial impulse in the Territory Clause's text remains unconcealed. Those provisions reveal the illusoriness of Puerto Rico's freedom under PROMESA to choose how to address its debt problems, and the futility of appeals to the general spirit of the Constitution to limit the Territory Clause's power grant.

The colonial impulse has revealed itself in the Oversight Board's interactions with the Puerto Rican government.¹⁸¹ On January 18, 2017, following its obligations under PROMESA to consult with the Puerto Rican governor when establishing a schedule for developing a fiscal plan,¹⁸² the Oversight Board sent a letter to Governor Rosselló.¹⁸³ Though the letter stated the Oversight Board was "favorably inclined" to extend the deadline for the submission of the fiscal plan,¹⁸⁴ it reminded Governor Rosselló of its "sole discretion to . . . change the dates of such schedule as it deems appropriate and reasonably feasible."¹⁸⁵ Exercising that discretion, the Oversight Board made the extension contingent on having "*no discussion or consideration* of short-term liquidity loans or near-term financings that could restrict fiscal options."¹⁸⁶

In the same letter, the Oversight Board recommended cutting pensions and higher education and healthcare spending.¹⁸⁷ The letter appears innocuous because of its soft language ("We encourage," "[W]e recommend . . .").¹⁸⁸ However, the veneer of affability begins to peel off when the Oversight Board mentions the fiscal plan must be a "viable fiscal plan that [it] may certify . . ."¹⁸⁹ according to its right under PROMESA.¹⁹⁰

Removing any doubt as to its power, the Oversight Board in February 7, 2017 said it was willing to use PROMESA's enforcement mechanisms to ensure

180. See *supra* notes 161–168 and accompanying text.

181. See Robert Slavin, *Puerto Rico Governor Says No to Board's Austerity Demands*, BOND BUYER (Jan. 23, 2017), <http://www.bondbuyer.com/news/regionalnews/puerto-rico-governor-says-no-to-boards-austerity-demands-1123404-1.html>.

182. 48 U.S.C. § 2141(a).

183. Letter from José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Hon. Ricardo A. Rosselló Nevares, Governor of P.R. 1 (Jan. 18, 2017) (on file with author) [hereinafter Carrión I].

184. *Id.* at 8.

185. 48 U.S.C. § 2141(a).

186. Carrión I, *supra* note 183, at 8 (emphasis added).

187. *Id.* at 5–6. The Oversight Board reiterated this point during a presentation on January 28, 2017 in which the Oversight Board said that it wanted to cut healthcare spending by as much as "28%." *Fiscal Plan Targets Presentation*, FIN. OVERSIGHT & MGMT. BD. FOR P.R. (Jan. 28, 2017), <https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/588cd7c0e0274.pdf>.

188. Carrión I, *supra* note 183, at 7, 9.

189. *Id.* at 1.

190. 48 U.S.C. § 2141(c)(3).

Puerto Rico's compliance with the desired Fiscal Plan.¹⁹¹ The Oversight Board affirmed its willingness to do so in August 30, 2017, when it threatened to stop enforcement of a proposed law empowering the Puerto Rican government to assist citizens whom health insurance companies had denied coverage because the proposed law was significantly inconsistent with the Fiscal Plan approved in March 2017.¹⁹²

In August 2017, the Oversight Board took the logical next step when it sued Governor Rosselló to force compliance with the Fiscal Plan.¹⁹³ In March 2017, the Puerto Rican government had submitted a Fiscal Plan including potential furloughs for government employees and teachers,¹⁹⁴ in addition to reductions in healthcare spending for the 2018 fiscal year by \$100 million, and in higher education spending by \$450 million.¹⁹⁵ Nonetheless, in June 2017, after reviewing the Puerto Rico's proposed budget for compliance with the Fiscal Plan, the Oversight Board demanded an additional spending cut of \$319 million to ensure compliance.¹⁹⁶ In August 2017, the Oversight Board ordered the Puerto Rican government to furlough government employees to save an additional \$218 million.¹⁹⁷ When Governor Rosselló refused, the Oversight Board sued him, only to retract the lawsuit and postpone discussion of furloughs in the wake of Hurricane Maria.¹⁹⁸ Nonetheless, the Oversight Board insisted

191. Letter for José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Elias F. Sánchez, Governor's Representative 1 (Feb. 7, 2017) (on file with author) [hereinafter Carrión II].

192. Letter from José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Hon. Ricardo A. Rosselló Nevares, Governor of P.R., Thomas Rivera Schatz, President of the Senate of P.R., and Carlos J. Méndez Núñez, Speaker of the House of Reps. of P.R. (Aug. 30, 2017) (on file with author) [hereinafter Carrión III].

193. Nick Brown, *Puerto Rico Oversight Board Asks Court to Enforce Furloughs*, REUTERS (Aug. 28, 2017), <https://www.reuters.com/article/us-puertorico-debt-labor/puerto-rico-oversight-board-asks-court-to-enforce-furloughs-idUSKCN1B81WS>.

194. *Board Resolution Adopted on March 13, 2017 (Fiscal Plan Certification)*, FIN. OVERSIGHT AND MGMT. BD. FOR P.R. 2 (Mar. 13, 2017), <https://oversightboard.pr.gov/documents/>.

195. Letter from José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Hon. Ricardo A. Rosselló Nevares, Governor of P.R. 3–4 (Mar. 9, 2017) (on file with author) [hereinafter Carrión IV].

196. Letter from José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Thomas Rivera Schatz, President of the Senate of P.R., and Carlos J. Méndez Núñez, Speaker of the House of Reps. of P.R. 4 (June 27, 2017) (on file with author) [hereinafter Carrión V].

197. Letter from José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Hon. Ricardo A. Rosselló Nevares, Governor of P.R. 3 (Aug. 4, 2017) (on file with author) [hereinafter Carrión VI].

198. Letter from José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Sens. Bob Menendez, Dick Durbin, Cory Booker, Kristen Gillibrand, Bernie Sanders, Chris Murphy, Jeff Merkley, Ed Markey, Kamala Harris, Catherine Cortez Masto, and Tammy Duckworth 1 (Oct. 11, 2017) (on file with author) [hereinafter Carrión VII]; Alex Wolf, *Puerto Rico Board Withdraws Bid to Force Furloughs*, LAW360 (Oct. 4, 2017), <https://www.law360.com/articles/971463/puerto-rico-board-withdraws-bid-to-force-furloughs>.

that the Puerto Rican government not pay Christmas bonuses to government employees.¹⁹⁹

On June 29, 2018, the Oversight Board announced that it would devise and certify its own Fiscal Plan for the Puerto Rican government for 2019 after the Puerto Rican government failed to repeal certain legislation required by the Fiscal Plans that the Oversight Board had previously certified.²⁰⁰ The Oversight Board's Fiscal Plan calls for \$345 million in spending cuts, including the elimination of "the annual \$25 million [University of Puerto Rico] scholarship fund; and the public-sector Christmas bonus across all government employees starting in FY19."²⁰¹ After outlining its own version of the Fiscal Plan, the Oversight Board warned the Puerto Rican government it would certify its own version of the government budget if the Puerto Rican government's proposed budget did not conform with the Fiscal Plan.²⁰²

Tensions escalated when the Puerto Rican government failed to pass a conforming budget and tried to have the Oversight Board certify a non-conforming budget instead.²⁰³ When the Oversight Board instead certified and imposed its own version of the budget, the Legislative Assembly of Puerto Rico sued the Oversight Board.²⁰⁴ The Legislative Assembly challenged the authority of the Oversight Board not only to certify budgets but also to impose budgets and fiscal plans on the Puerto Rican government.²⁰⁵ It alleged that PROMESA limited the Oversight Board to giving "non-binding recommendations" to the Puerto Rican government and thus prevented the Oversight Board from interfering with the Puerto Rican government's budgetary power.²⁰⁶ The

199. Letter from José B. Carrión III, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R., to Hon. Ricardo A. Rosselló Nevares, Governor of P.R. 1 (Nov. 27, 2017) (on file with author) [hereinafter Carrión VIII].

200. Letter from Natalie A. Jaresko, Exec. Dir. of the Fin. Oversight and Mgmt. Bd. for P.R., to Hon. Ricardo A. Rosselló Nevares, Governor of P.R., Thomas Rivera Schatz, President of the Senate of P.R., and Carlos J. Méndez Núñez, Speaker of the House of Reps. of P.R. 1 (June 29, 2018) (on file with author).

201. *Id.* at 2. Though the Oversight Board called for the elimination of the scholarship fund, the Oversight Board intended to replace the fund with an "independently-managed scholarship fund" by using "right-sizing savings achieved from the Legislature, Judiciary, AAFAF, and FOMB." *Id.*

202. *Id.* at 4.

203. *In re* Fin. Oversight & Mgmt. Bd. for P.R., No. 17-3283, 2018 U.S. District LEXIS 134839, at *6-7 (D.P.R. Aug. 7, 2018). The Oversight Board had told the Puerto Rican government that certification of the budget was conditioned on the repeal of a Puerto Rican law known as Law 80. *Id.* at 4-5. When the Puerto Rican government failed to repeal Law 80, the Oversight Board withheld certification of the government's proposed budget and instead certified its own version of the budget. *Id.* at *6-7.

204. *Id.* at *2-3.

205. *Id.* at *7-8. Unlike the Legislative Assembly, Governor Rosselló did not challenge the power PROMESA gave to the Oversight Board despite his disagreements with the Oversight Board. *See, e.g.*, Letter from Ricardo A. Rosselló Nevares, Governor of P.R., to José L. Carrión, Chairman of the Fin. Oversight and Mgmt. Bd. for P.R. (Jan. 20, 2017) (on file with author).

206. *Fin. Oversight & Mgmt. Bd.*, 2018 U.S. District LEXIS 134839, at *7-8.

Legislative Assembly therefore sought: (1) a declaratory judgment stating that the Oversight Board could only provide non-binding recommendations to the Puerto Rican government, and (2) an order nullifying the Oversight Board's budget and compelling the Oversight Board to certify the government's non-conforming budget.²⁰⁷

However, on August 7, 2018, the Puerto Rico District Court ruled in favor of the Oversight Board.²⁰⁸ First, the court denied the Legislative Assembly's request for an order compelling certification of the government's proposed budget because PROMESA precluded judicial review of the Oversight Board's determinations on the compliance of budgets and fiscal plans.²⁰⁹ Second, the court denied the Legislative Assembly's request for a declaratory judgment limiting the Oversight Board's powers to offering non-binding recommendations because PROMESA explicitly pre-empted any territorial laws inconsistent with it and allowed the Oversight Board to "render certified budgets effective by operation of law . . ." despite objections from the Puerto Rican government.²¹⁰

B. The Failure to Resolve the Tension Only Enables More PROMESA-like Laws to be Passed

In light of the precedents regarding the Territory Clause, PROMESA is disconcerting not because Congress passed it, but because Congress can pass similar laws in the future. Congress has not given Puerto Rico or the other Territories an equivalent of the Tenth Amendment to prevent encroachment by the federal government.²¹¹ Because the rights of the Territories are only those Congress has bestowed upon the Territories, the Territories' only safeguards from PROMESA are time and politics, as has been the case since the Northwest Ordinance. Currently, PROMESA's definition of "territory" does not foreclose the ability of Congress to impose Oversight Boards upon the other Territories.²¹²

Keenly aware of this possibility, U.S. Virgin Islands officials in November 2016 had to assure constituents the territory's own debt problems were not severe enough to warrant an Oversight Board after the legislature passed a

207. *Id.*

208. *Id.* at *18.

209. *Id.* at *13–14.

210. *Id.* at *16–18.

211. Such an equivalent would be necessary because in *Franklin California Tax-Free Trust v. Puerto Rico*, the First Circuit held a federal bankruptcy provision could preempt Puerto Rico's Recovery Act because, as a territory, Puerto Rico derives its powers from the federal government and thus "[t]he limits of the Tenth Amendment do not apply to Puerto Rico . . ." 805 F.3d 322, 344 (1st Cir. 2015). Because the Tenth Circuit's decision on this matter hinged on Puerto Rico's status as a territory, arguably it follows the Tenth Amendment does not apply to the other U.S. territories either.

212. *See, e.g.*, 48 U.S.C. § 2162(1)(A) (2012) (defining an entity as "a territory that has requested the establishment of an Oversight Board or has had an Oversight Board established for it by the United States Congress in accordance with section 2121 of this title . . .") (emphasis added).

spending bill that narrowly averted a government shutdown.²¹³ Nonetheless, the possibility of an Oversight Board for the U.S. Virgin Islands has not been ruled out because the U.S. Virgin Islands has more debt-per-capita than Puerto Rico and “rating agencies downgraded its debt to ‘junk’ status in December [2016].”²¹⁴ In fact, a coalition of U.S. Virgin Island business organizations has warned that a “PROMESA event” will occur in the U.S. Virgin Islands if the territory’s economic wellbeing does not improve.²¹⁵ Talk of a “VIOMESA” arose again after Hurricanes Irma and Maria forced the legislature of the U.S. Virgin Islands to contemplate a budget shortfall of over \$200 million even with disaster loans.²¹⁶

IV. CONCLUSION

As the latest manifestation of the colonial impulse enabled by the Territory Clause and the jurisprudence regarding it, PROMESA highlights a part of the Constitution that runs counter to the United States’ democratic values. PROMESA combines the nigh-limitless regulatory power of Congress over the U.S. Territories in the 19th century and earlier 20th century with the modern rationale of flexible governance to strip Puerto Rico of its autonomy. In the process, PROMESA shows the extent of the U.S. Territories’ dependence on the benevolence of Congress for their system of government, their legislation, and even the extension of constitutional protections that the citizens of the States of the Union take for granted. PROMESA is no exceptional horror, and that fact is the true horror behind it.

213. Gilbert, *supra* note 23.

214. *Puerto Rico Debt Law Could Apply to U.S. Virgin Islands*, JUBILEE USA NETWORK (Dec. 30, 2016), <http://www.commondreams.org/newswire/2016/12/30/puerto-rico-debt-law-could-apply-us-virgin-islands>.

215. Ernice Gilbert, *Coalition of Business Organizations Opposes Sin Tax Measure; Unveils Alternative Ideas*, THE V.I. CONSORTIUM (Jan. 28, 2017), <http://viconsortium.com/business/coalition-of-business-organizations-opposes-sin-tax-measure-unveils-alternative-ideas/>.

216. *V.I. Budget Crisis, Part 19: Congress Can Still Do a Lot – But If It Doesn’t, Brace For Impact*, St. Thomas Source (Dec. 31, 2017), <https://stthomassource.com/content/2017/12/31/v-i-budget-crisis-part-19-congress-can-still-do-a-lot-but-if-it-doesnt-brace-for-impact/>.

