P.R.O.M.E.S.A.: ANOTHER CONSEQUENCE OF THE CONSTITUTIONALLY INFIRM INTERPRETATION OF THE TERRITORIAL CLAUSE

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"And relief was something which the Congress made Puerto Rico beg for, hard, and in the most revolting ways, as a beggar does on a church step, filthy hat in hand, exhibiting sores, calling and grimacing in exaggerated humility. And this last was the real crime of America in the Caribbean, making of Puerto Ricans something less than the men they were born to be".[1]

Abstract

After more than a century of territorial and colonial domination, Puerto Rico was dragged, once again, in the same pattern: submission to the *absolute and undisputed* power of Congress who, recently, *legislated directly on the local government*. This time, Congress *imposed* P.R.O.M.E.S.A. to Puerto Rico, which is a federal law that exercises financial oversight over the fiscal affairs of the island by a non-elected Oversight Board. How did it happen? This will be explained in three steps: (1) the colonial impulse manifested in P.R.O.M.E.S.A. and endorsed by the constitutionally infirm interpretation of the Territorial Clause; (2) the unreasonableness of the determination that invalidated the *only* nonfederal existing legal option available that Puerto Rico had to restructure its debts and; (3) the clear path to *legislate directly for the local government* under the *absolute and undisputed* power of Congress combining the pre- and post- Spanish American war cases and its consequences.

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Resumen

Pasado más de un siglo de dominación territorial y colonial, Puerto Rico fue arrastrado, una vez más, en el mismo patrón: sumisión al poder *absoluto e indiscutible* del Congreso quien, recientemente, *legisló directamente para el gobierno local* de la isla. El Congreso *impuso* P.R.O.M.E.S.A. directamente a Puerto Rico, la cual es una ley federal que ejerce la supervisión financiera sobre los asuntos fiscales mediante una Junta de Supervisión Fiscal no electa, y cuyos nombramientos de sus miembros han sido impugnados constitucionalmente. ¿Cómo pasó esto? Lo explicaremos en tres pasos: (1) analizaremos el colonialismo mandatorio manifestado en P.R.O.M.E.S.A. como consecuencia de la interpretación errónea que por siglos se le ha dado a la Cláusula Territorial; (2) la irrazonabilidad de la determinación que invalidó la *única* opción legal disponible que tenía Puerto Rico para reestructurar su deuda; (3) el camino despejado para *legislar directamente para el gobierno local* de la isla bajo el poder *absoluto e indiscutible* del Congreso que revive y combina la noción de la jurisprudencia en los casos pre- y post- Guerra Hispanoamericana y sus consecuencias.

I. Introduction

Here are some pages about another event in the history of the *oldest colony in the world*: Puerto Rico.[2] The island is begging for fiscal, political and humanitarian stability. Puerto Rico and its instrumentalities are in the midst of a fiscal crisis.[3] Puerto Rico responded to the fiscal crisis by enacting the *Puerto Rico Corporation Debt Enforcement and Recovery Act* (hereinafter, *Recovery Act*) in 2014.[4] Shortly after, investors, who collectively hold nearly two billion dollars of bonds issued by one of the distressed public utilities, brought a suit, in Summer 2014, to challenge the Recovery Act's validity and enjoin its implementation.[5] The United States District Court for Puerto Rico held that Section 903(1) of the Bankruptcy Code preempted Puerto Rico's Recovery Act. Accordingly, in appellate stages, the First Circuit Court and the Supreme Court of the United States affirmed the District Court's decision, as we will fully discuss below. Such a decision served as the perfect platform to reveal the underlying reality behind the most widely used legal euphemism of the last century: *democracy*. Specifically, it must be emphasized that a nonfederal bankruptcy solution, like the Recovery Act, was not *another* option for Puerto Rico, it was the *only* existing legal option available to restructure its debts.[6]

Interestingly, shortly after the abovementioned decisions, on June 30, 2016, the *Puerto Rico Oversight, Management, and Economic Stability Act*, (hereinafter, *P.R.O.M.E.S.A.*)[7] was enacted into law, as Public Law 114-187.[8] Congress enacted P.R.O.M.E.S.A. pursuant to Article IV, Section 3 of the United States Constitution, which provides Congress the power to dispose of and make all needful rules and regulations for U.S. territories.[9] Accordingly, P.R.O.M.E.S.A. created a structure for exercising federal oversight over the fiscal affairs of Puerto Rico.[10] Specifi-

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1 Rexford Guy Tugwell, The Stricken Land: The Story of Puerto Rico 33 (Doubleday & Company, Inc., Garden City, New York 1947).

2 Opening sentence inspired by the book, Puerto Rico: The Trials of the Oldest Colony in the World by José Trías Monge.

3 Puerto Rico v. Franklin California Tax-Free Trust, 136 S.Ct. 1938, 1942 (2016).

4 Puerto Rico Public Corporation Debt Enforcement and Recovery act, Law No. 71 of June 28, 2014, 2014 P.R. Laws.

5 *See* Franklin California Tax-Free Trust v. Puerto Rico, 85 F.Supp.3d 577 (2015). *See* Franklin California Tax-Free Trust v. Puerto Rico, 805 F.3d 322, 324 (2015).

6 136 S.Ct. 1938, 1954 (2016) (J. Sotomayor, Dissent).

7 The word "*promesa*" means promise in Spanish.

8 Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2102-2241 (2016).

9 48 U.S.C. § 2121(b)(2).

10 PROMESA Overview, Promesa Codex, http://www.promesacodex.com/overview.html (last visited December 17, 2019).

cally, P.R.O.M.E.S.A. established the Financial Oversight and Management Board (hereinafter, *Oversight Board*) to oversee the development of budgets and fiscal plans for Puerto Rico's instrumentalities and government.[11] The Oversight Board was not elected by the people of Puerto Rico.[12]

Moreover, in early versions of the bill that ultimately became P.R.O.M.E.S.A., it would have applied to all U.S. territories.[13] However, territories, other than Puerto Rico, would have had a say in the law's application to them, because the law would have been extended only upon request by the territorial governor.[14] Puerto Rico, in particular, was not given such a choice. As enacted, P.R.O.M.E.S.A. was *only* imposed on Puerto Rico.[15] Therefore, after more than a century of territorial and colonial domination, Puerto Rico was dragged, once again, into the same pattern: "to wait for possible congressional action in order to attend a looming [economic and] humanitarian crisis."[16] The threshold question is: Where in the Constitution is it allowed to uphold such mandatory colonialism regime?

In an attempt to explain how Puerto Rico was dragged here, and to analyze P.R.O.M.E.S.A. under the scope of what it seems to be constitutionally mandated colonialism, this article will be divided into four parts. Part II will explain Puerto Rico's treatment under the Territorial Clause, as well as its historical and constitutional interpretation. Part III will analyze the history and purpose of Section 903 of the Bankruptcy Code. Part IV will discuss the consequences of interfering with Puerto Rico's exercise of its territorial police powers in enacting the Recovery Act. Part V will synthesize the legal contribution of this article and share some final thoughts.

II. Territorial Clause: History and Interpretation for Puerto Rico

The Supreme Court of the United States (hereinafter, *SCOTUS*) has decided that Congress, acting under its plenary power over the territories pursuant to the Constitution's Territorial Clause, "may treat Puerto Rico differently from states so

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[11] *Id.*

[12] *See* Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, et al., 590 U.S. ____ (2020). Aurelius Investment, LLC v. Puerto Rico, 915 F.3d. 838 (1st Cir. 2019), *cert. granted*, 139 S.Ct. 2736 (No. 18-1475). *See* Oral Argument, Financial Oversight and Management Bd. for Puerto Rico v. Aurelius Investment, LLC, 139 S.Ct. 2736 (No. 18-334), *available at* https://www.supremecourt.gov/oral_arguments/audio/2019/18-1334 (last visited May 18, 2020). The First Circuit Court decided that the Oversight Board was unconstitutionally appointed.

[13] *See* H.R. 4900, 114th Cong. (2016).

[14] *Id.*

[15] 48 U.S.C. § 2121 (b)(1).

[16] *Id.*

long as there is a rational basis for its actions."[17] Article IV, Section 3 of the United States Constitution (hereinafter, *Territorial Clause*) provides that "[t]he Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States…."[18] As noted, the territories are grouped with, and treated exactly like, *other property*. In consequence, Congress has treated Puerto Rico, as a territory, in a way that it seems that the island is an uninhabited piece of land or, again, *other property*.[19] The picture, in sum, appears to be one of constitutionally obligatory colonialism.[20] Some scholars note that one of the options is to embrace colonialism with at least equanimity.[21] They argue that the Territorial Clause appears "structured to facilitate the[] treatment [of territories] as colonies because it lumps the territories in with other U.S. property."[22] A letter written in 1803 by Gouverneur Morris, the drafter of the Territorial Clause, in which he explained his efforts to write colonialism into the Constitution, leads to that conclusion. The letter, in part, states as follows:

> I always thought that when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that had it been more pointedly expressed, a strong opposition would have been made.[23]

Hence, the Territorial Clause is structured to facilitate the territories' treatment as colonies and place territorial self-governance at the mercy of Congress.[24] Before the Spanish American War, since 1810, in *Sere v. Pitot*, the SCOTUS has stated that the Territorial Clause gave Congress the "absolute and undisputed power of

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[17] Harris v. Rosario, 446 U.S. 651, 651-52 (1980). *See* Califano v. Torres, 435 U.S. 1, 5 (1978)("So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket").

[18] U.S. CONST. art. IV, §3, cl. 2.

[19] Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 908 (1990).

[20] *Id.*

[21] *Id.*

[22] Dean Delasalas, *La promesa cumplida [the promise fulfilled]: How the U.S. Constitución has enabled colonialism*, 67 CATH. U. L. REV. 761, 765 (2018) (*citing* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853 (1990)).

[23] *Lawson*, at page 908 (*citing* letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *quoted in* De Lima v. Bidwell, 182 U.S. 1, 63 (1901)).

[24] *Delasalas*, *supra* note 22, at 765 (*citing* Professor Lawson in *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853 (1990) to explain his conclusions).

governing and legislating…" for the territories.[25] In the same direction, in 1879, in *National Bank v. County of Yankton*, the SCOTUS stated that

> Congress may not only abrogate laws of the territorial legislatures, but it may itself *legislate directly for the local government.* It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."[26]

In consequence, the SCOTUS added that "[s]uch power is an incident of sovereignty and continues until granted away."[27]

Up to that point in history, the power of Congress over territories was interpreted as *absolute* and *undisputed*. However, neither the SCOTUS nor any other branch of government, *had even intimated that a distinction between territories existed; that some territories are incorporated while others are not*. [28] Decades later, in the Treaty of Paris of 1898, Spain ceded Cuba, Puerto Rico, the Philippines, and Guam to the United States.[29] However, the Treaty of Paris and, later, the Foraker Act conclusively demonstrated that those territories had not been acquired to become states eventually, but rather to be colonies of the United States, indefinitely.[30] Therefore, after the Spanish American War, many questions arose: What would be the international condition of these colonies? What would be their treatment under the constitutional law of the United States? What powers would Congress have over them? What constitutional rights would their inhabitants have?[31]

In the discussions in Congress, "the constitutional thesis of the imperialists triumphed: Congress could, free of constitutional restrictions, acquire territories and govern them indefinitely without integrating them into the nation or channeling towards statehood."[32] However, shortly after, a 20th century set of cases, known as the *Insular Cases,* started to differentiate between *incorporated* and *unincorpo-*

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[25] Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336-37 (1810).

[26] National Bank v. County of Yankton, 101 U.S. 129, 133-34 (1879) (emphasis added).

[27] *Id.*

[28] SUPREME COURT OF THE UNITED STATES BLOG, *Brief for Amici Curiae Scholars of Constitutional Law and Legal History Supporting the First Circuit's Ruling on the Appointment Clause Issue* 10, https://www.scotusblog.com/case-files/cases/aurelius-investment-llc-v-puerto-rico/ (Last visited January 22, 2020).

[29] BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGE OF AMERICAN EMPIRE 4 (Peter Charles Hoffer & N.E.H. Hull eds., 2006).

[30] I RAUL SERRANO GEYLS, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO 449 (1997).

[31] *Id.* at 450. (our translation). *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 227 (3d. ed. 1858).

[32] *Id*. (our translation).

rated territories. This set of cases gave constitutional validity to an unequal treatment: "the United States had the power to acquire new territories, Congress had the power to rule them under the Territorial Clause, and the Constitution did not necessarily follow the flag."[33] Therefore, "[a] newly acquired territory would not be part of the United States unless Congress so determined, and only fundamental constitutional provisions would apply in those unincorporated territories."[34] Consequently, the constitutional framework of Puerto Rico's current relationship with the United States is molded by the territorial incorporation doctrine.

Though it was not the first case concerning the newly acquired territories, *Downs v. Bidwell* stood out with the creation of the territorial incorporation doctrine.[35] Its purpose was to justify keeping the then-newly acquired territories, without the intent of incorporating them into the Union as states.[36] Interestingly, in *Downes,* a fragmented Court produced a majority only for the judgment, and not exactly for the opinion supporting it. In *Downes*, the validity of the Foraker Act was challenged as violating the Uniformity Clause. The SCOTUS was confronted with a case that required determining whether the Constitution applied to Puerto Rico, which, at the same time, required an answer as to the status and rules governing the newly acquired territories. Justice White offered a view of incorporation and emphasized on the following inquiry: "Had [Puerto Rico] … been incorporated into and become an integral part of the United States?"[37] The SCOTUS struggled to reconcile the possible constitutional limitations on the Territorial Clause with cases like *356 Bales of Cotton*, which held that Congress had *complete and supreme* power over the Territories.[38]

In his concurrence, Justice White focused on Congress's discretion under both the Territorial Clause and its role in ratifying treaties. Justice White articulated that

> [i]t is … indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution … that the treaty-making power cannot incorporate territory into the

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[33] Carlos I. Gorrín Peralta, *Puerto Rico and the United States at the Crossroads*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 187 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

[34] *Id.*

[35] Christina Duffy, Burnett, *Puerto Rico: The Trials of the Oldest Colony in the World. By José Trías Monge*, 23 YALE J. INT'L L. 561, 561-62 (1998).

[36] *Id.* at n.1.

[37] Downes v. Bidwell, 182 U.S. 244, 299 (1901).

[38] American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 533-35 (1828). *See Id.* at 263-64.

> United States without express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation…. It must follow, therefore, that where a treaty contains no conditions favorable to incorporation, and, above all, where it not only has no such conditions but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.[39]

Therefore, Justice White concluded that Puerto Rico could not be incorporated into the United States, under the treaty-making power, by a mere cession without the express or implied approval of Congress.[40] In consequence, the Court held that Puerto Rico is an unincorporated territory, and the *United States could hold Puerto Rico as a possession.* Justice White emphasized that

> [t]he result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense because the island had not been incorporated in to the United States, but was merely appurtenant thereto as a possession.[41]

Justice White decided to create a puzzling and cryptic conclusion about Puerto Rico's territorial status, by offering the distinction between incorporated and unincorporated territories.[42] *Such a distinction between incorporated or unincorporated territories does not appear anywhere in the United States Constitution*. That conclusion leads to a contradictory and malleable concept of a territory that is both foreign and domestic at once.[43] Also, it created a contradiction with *De Lima v. Bidwell*, decided the same day, which held that Puerto Rico was a domestic territory and within the U.S. tariff barrier.[44] *Downes*, left this conflict unexplained. Unfortunately for the inhabitants of the territories, as Justice Juan R. Torruella observed:

> [T]he holding in *Downes* laid the grounds for recognition of omnipotent plenary powers in Congress –derived from a treaty rather than [a]

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39 *Id.* at 339.

40 *See Id.* at 312.

41 *Id*. at 341-42.

42 Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE LAW & POLICY REV. 57, 73 (2013).

43 *Id.*

44 *See* De Lima v. Bidwell, 182 U.S.1 (1901).

> Constitution– that to this day have allowed the United States to rule over [Puerto Rico] without [the people of Puerto Rico's] consent or their democratic participation. In this way, the insular cases effectively turned on its head the clear and unquestionable basis of U.S. law: *legal authority must be derived from the Constitution, and that, when laws or treaties conflict with that supreme document, they cannot stand*.[45]

Setting aside for a moment the discussion on the insular cases, it is timely to understand the grounds of the aforementioned comment of Justice Torruella. First, it is essential to analyze the historical context in which these decisions were made. Part of that historical context was masterfully summarized by Justice Torruella as follows:

> [f]irst on the list is *Manifest Destiny*[46], the mantra of Darwinian imperialist that promoted American territorial expansion under a mixed bag of geopolitical theory, religious righteousness, and economic entrepreneurship.[47] [That mantra, and the notion of territorial expansion was intensely present in the Insular Cases, for example, by constantly referring to the *American empire*].[48] Second, the civil war had just ended, and the nation wanted to focus its attention away from that horrendous fratricidal conflict. Third, *Plessy v. Ferguson*, decided in 1896 by almost the same court as the one that ruled the Insular Cases, provided the immediate back drop and a legal basis for the disparate racial treatment of persons under the jurisdiction of the United States. Fourth, it was argued … that the newly conquered territories were different from those previously acquired in that they were noncontiguous to the mainland United States, separated by large expanses of oceans and home to different races, languages, religions, and cultures than those found in the continental United States.[49]

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[45] Torruella, *Ruling America's Colonies: The Insular Cases, supra* note 42, at 73 (emphasis added).

[46] As historically known, Manifest Destiny is a phrased coined in 1845. Is the idea that the United States is destined to expand its dominion and spread democracy and capitalism across the entire North American continent. The philosophy drove 19th century U.S. territorial expansion and was used to justify the forced removal of Native Americans and other groups from their homes. The rapid expansion of the United States intensified the issue of slavery as new states were added to the Union, leading to the outbreak of the Civil War. HISTORY, https://www.history.com/topics/westward-expansion/manifest-destiny (last visited May 27, 2020).

[47] Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 68 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (emphasis added).

[48] *Id. See* Loughborough v. Blake, 18 U.S. 317, 319 (1820) ("Does this term designate the whole, or any particular portion of the American empire?").

[49] *Id.* (emphasis added).

That summarized historical background set the grounds for the constitutionally infirm interpretation of the Territorial Clause through the Insular Cases decisions. As stated before, in the Treaty of Paris of 1898, Spain ceded Cuba, Puerto Rico, the Philippines, and Guam to the United States. The Treaty of Paris expressly stated that "the *civil rights* and political status of the native inhabitants of the territories hereby ceded to the United States *shall be determined by Congress*."[50] As Justice John Marshall Harlan stated in his dissent in *Downes v. Bidwell:*

> [t]he idea that this country [United States] may *acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies* or provinces –the people inhabiting them to enjoy only such rights as Congress chooses to accord them– *is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution*.[51]

Accordingly, Justice Torruella added to this reasoning the obvious notion that a treaty cannot trump the Constitution.[52] Also, the SCOTUS has asserted that argument when reasoning that "the Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not the power to decide when and where its terms apply*."[53] Second, another aspect that supports the constitutionally infirm interpretation of the treatment given to Puerto Rico as the oldest colony in the world is the fact that *the United States lacks constitutional authority to have colonies or to hold territories as colonies indefinitely*. On this matter, Justice Roger B. Taney stated:

> There is *certainly no power given by the Constitution to the Federal Government to establish or maintain colonies* bordering on the United States or at a distance, to be ruled *and governed at its own pleasure*; nor to enlarge its territorial limits in any way except by the admission of new States … *[N]o power is given to acquire a Territory to be held and governed permanently in that character [colonial character]*.[54]

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[50] Treaty of Peace between the United States of America and the Kingdom of Spain, art. IX, December 10, 1898, 30 Stat. 1754 (emphasis added).

[51] Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting) (emphasis added).

[52] Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, *supra* note 47, at 69.

[53] *Id.* (*citing* Boumediene v. Bush, 553 U.S. 723, 727 (2008)) (emphasis added).

[54] *See Id*. at 70 (*citing* Dred Scott v. Sandford, 60 U.S. 393 (1856)) (emphasis added).

Therefore, not even the racially-charged Court in *Dred Scott v. Sandford*, supported permanent colonialism manifested by a territorial limbo.[55] On this matter, Justice Taney went further and emphasized the obligation that the United States has to decide, or dispose, over an acquired territory's political status: "[a territory] is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority…"[56] Third, the *Dred Scott* Court explained, unequivocally, *the reach of the Territorial Clause* as follows:

> The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States' [the Territorial Clause], but, *in the judgment of the court, that provision … was intended to be confined, to the territory which at the time [of its independence from Great Britain] belonged to, or was claimed by the United States … and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more*.[57]

By the reasoning adopted in *Dread Scott* it could be argued that the Territorial Clause, by its original purpose and terms, does not apply to territories acquired in 1898 and thereafter. Therefore, not applicable to Puerto Rico.

However, another aspect that must be discussed is the relationship between Puerto Rico and the United States. Such a unique relationship have as its source the *consent of the people of Puerto Rico*, and not the Treaty of Paris, nor the Territorial Clause.[58] Therefore, Puerto Rico is not another territory that shares the same characteristics as the territories lumped together with, "other property" in the Territorial Clause, as historically interpreted. The United States Constitution, since Puerto Rico had never been part of the United States in the domestic sense, was applied only in its fundamental provisions and in a manner compatible with the new status [Free Associated State of Puerto Rico, or as translated in a misleading way: the Commonwealth of Puerto Rico].[59] Since the relations between the

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[55] *See* Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 Yale J. Int'l L. 229, 263 (2018).

[56] *Dred Scott v. Sandford*, 60 U.S. 393, 447 (1856).

[57] *See* Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, *supra* note 47, at 70 (*citing* Dred Scott v. Sandford, 60 U.S. 393, 432 (1857)) (emphasis added).

[58] José Trías Monge, *El Estado Libre Asociado Ante los Tribunales 1952-1994*, 54 Rev. Jur. UPR 1, 3 (1995) (our translation).

[59] *Id.* (our translation).

United States and Puerto Rico were based on mutual consent, they were unalterable, except at the will of both parties.

To the application of which provisions the people of Puerto Rico consented? The people of Puerto Rico consented to the exercise by the United States of certain powers and the consequent application of certain clauses of the United States Constitution.[60] But among those clauses it is improper to include the Territorial Clause, insofar as it entails the retention by Congress of plenary powers over Puerto Rico, since it would be denying all meaning of the constitutional change that was being so solemnly attempted.[61] To hold the contrary is, in effect, to confirm that the granting of certain powers of self-government to the people of Puerto Rico was a monumental fraud.[62] Powers that Congress may, within this theory, nullify at will.[63]

Either it is called free association status, or colony by consent, as it has been called, the underlying reality of the status of Puerto Rico is that it plays no role in justifying the erroneous interpretation of the Territorial Clause as applied to Puerto Rico. Some cite *Harris v. Rosario*[64], as irrefutable proof that Puerto Rico is subject to the plenary power of Congress under the Territorial Clause.[65] They are not wrong. The Territorial Clause has been interpreted in two different aspects, and historically, it has been highlighted just one of those aspects. First, as a source of Congress's power to adopt certain measures that affects entities linked in some way to the United States, regardless of the degree of self-government or sovereignty they have achieved.[66] Second –the most generic and frequently used interpretation– an indication of the status of such entities and the power of Congress to legislate for them practically as they wish.[67] That last aspect of interpretation is nourished by the vestiges of constitutionally obligatory colonialism. As we will fully disclosed later on, the people of Puerto Rico have the inalienable right to self-determination in order for the people to unleash at any time from the colony to which it is subjected.

In sum, the interpretation of the Territorial Clause application to Puerto Rico and the Insular Cases reasoning has developed on shaky and questionable constitutional grounds. First, "[t]he notion that some territories are *incorporated* while

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60 *Id.* at 47. (our translation).

61 *Id.* (our translation).

62 *Id.* (our translation).

63 *Id.* (our translation).

64 446 U.S. 651 (1980).

65 Trías Monge, *El Estado Libre Asociado Ante los Tribunales 1952-1994, supra* note 58, at 26. (our translation).

66 *Id.* (our translation).

67 *Id.* (our translation).

others are not is constitutionally infirm."[68] The Territorial Clause's single reference to "territor[ies]," does not differentiate between *incorporated,* and *unincorporated*. Second, the text of the Treaty of Paris cannot trump the Constitution and Congress does not have the power to decide when and where its terms apply. Third, Congress, fueled by their inertia, has no power to acquire a territory to subject it to a territorial limbo permanently, or, to an indefinite constitutionally mandatory colonialism. Fourth, as the *Dred Scott* Court reasoned, it could be argued that the Territorial Clause, by its original purpose and terms, does not apply to territories acquired in 1898 and thereafter. Fifth, the history regarding the political status of Puerto Rico, and the unique characteristics of the relationship of Puerto Rico and the United States, makes improper to sustain the Territorial Clause can be applied to Puerto Rico as an acknowledgement of the power of Congress to legislate for Puerto Rico, practically as they wish.

From the Insular Cases, the incorporation doctrine and the infirm interpretation of the Territorial Clause emerge many other constitutional and political conflicts. For example, the incorporation doctrine "defers to Congress and the president the governance of the territory, compromising the basic tenets of democracy, liberty, and self-determination of the people [of Puerto Rico]."[69] Accordingly, law school academics such as professor Carlos I. Gorrín Peralta explained that

> [t]he federal government is not a government of the people of Puerto Rico, nor is it validated by the people, nor does it rule for the people of Puerto Rico. Puerto Rico is subjected to the application of federal laws without the real participation of its people in the Congress that enacts these laws. The federal executive administers such laws in Puerto Rico, despite the fact that Puerto Ricans do not participate in its election. The federal judiciary interprets and applies the laws in Puerto Rico, despite the fact that the judges are designated by a president it does not elect and are confirmed by a senate in which Puerto Rico does not even have nominal participation.[70]

Given the multiple consequences of the Insular Cases and its reasoning endorsed by the Territorial Clause, the SCOTUS decided in *Reid v. Covert* the following: "it is our judgement that *neither the cases nor their reasoning should be given any further expansion*."[71] Interestingly, the SCOTUS in *Boumedine v. Bush*

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[68] Torruella, *Ruling America's Colonies: The Insular Cases, supra* note 42, at 73.

[69] Gorrín, *supra* note 33, at 188.

[70] *Id.*

[71] Reid v. Covert, 354 U.S. 1, 14 (1957) (emphasis added).

held that the incorporation doctrine's paramount constitutional vice is that it lends itself to misconstruction as a broad and generic license for the political branches "to switch the Constitution on or off at will,"[72] by affording them the discretion to decide whether or not to incorporate a territory, an outcome that the Court has rejected.[73] Accordingly, the SCOTUS explained in *Boumediene* that

> [t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers *are not absolute and unlimited*.… To hold that political branches have the power to switch the Constitution on or off at will is quite another.[74]

However, in a twist diametrically opposite to what was reasoned in *Reid,* and despite the precited reasoning of the Court, the SCOTUS in *Boumediene* decided to extend the reasoning of the insular cases, contrary to what it had said in *Reid.*

At this point in history, the constitutionally obligatory colonialism to which Puerto Rico is subjected, is not only a political and constitutional issue: just as slavery, colonialism is a lucrative business. This time, Congress *legislated, again, directly for the local government* by enacting and imposing P.R.O.M.E.S.A. on Puerto Rico under their *absolute and undisputed power*. With the interpretative endorsement of the SCOTUS, Congress deprived Puerto Rico of the *only* nonfederal bankruptcy solution available to restructure its debts. At what cost? Let us see another consequence of the constitutionally infirm interpretation of the Territorial Clause: the emergence of P.R.O.M.E.S.A. and its imposition to Puerto Rico.

III. Depriving Puerto Rico of its *Only* Nonfederal Legal Option to Restructure its Debts

Puerto Rico responded to the fiscal crisis by enacting the Recovery Act in 2014.[75] The Recovery Act would have enabled Puerto Rico's public utilities to implement a recovery or restructuring plan for their debt.[76] However, it must be emphasized that a nonfederal bankruptcy solution, like the Recovery Act, was the *only* existing legal option available for Puerto Rico to restructure its debts.[77]

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[72] Boumediene v. Bush, 553 U.S. 723, 765 (2008).

[73] *Id.* at 757-58.

[74] *Id.* at 765.

[75] Puerto Rico v. Franklin California Tax-Free Trust, 136 S.Ct. 1938, 1943 (2016).

[76] *Id.*

[77] 136 S.Ct. 1938, 1954 (2016) (J. Sotomayor, Dissent).

Why should this premise be emphasized? This part outlines the sequent of events that were behind Puerto Rico's deprivation of its *only* nonfederal legal option to restructure its debt. Even though a federal bankruptcy law already exists, as we will fully explain below, Chapter 9 of the Bankruptcy Code, in particular, is inapplicable to Puerto Rico for the restructuring of its debt since 1984.

A. Creating Opportunity to Legislate Directly for the Local Government of the Colony: *Puerto Rico v. Franklin California Tax-Free Trust*

Interestingly, just days before the enactment of P.R.O.M.E.S.A., the SCOTUS decided *Puerto Rico v. Franklin California Tax-Free Trust*.[78] A group of investment funds, including the Franklin California Tax-Free Trust, brought a suit against Puerto Rico and various government officials, to enjoin the enforcement of the Recovery Act.[79] The plaintiffs alleged that the Federal Bankruptcy Code prohibited Puerto Rico from implementing its own municipal bankruptcy scheme.[80] The District Court of the United States for Puerto Rico concluded that the preemption provision in Chapter 9 of the Federal Bankruptcy Code precluded Puerto Rico from implementing the Recovery Act and enjoined its enforcement.[81] On appeal, the United States Court of Appeals for the First Circuit affirmed.[82] Specifically, the First Circuit concluded that the Bankruptcy Code's definition of *state*, which included Puerto Rico, *except* for the purpose of defining who may be a debtor under Chapter 9, did not remove Puerto Rico from the scope of the preemption provision.[83] The First Circuit reasoned that it was up to Congress, not Puerto Rico, to decide when the government-owned companies could seek bankruptcy relief.[84] Puerto Rico, in *certiorari*, asked the SCOTUS for review of the First Circuit decision.

The SCOTUS began outlining the legal framework by stating that "[t]he Constitution empowers Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States.'"[85] After establishing the source of Congress's power, the SCOTUS started to analyze the history of the bankruptcy acts and part of the legislative history. The matter at issue was if Puerto Rico was no

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78 P.R.O.M.E.S.A. took effect on June 30, 2016 and *Puerto Rico v. Franklin California Tax-Free Trust* was decided on June 13, 2016.

79 *Franklin California*, 136 S.Ct. at 1943.

80 *Id.*

81 *Id.*

82 *See* Frankilin California Tax-Free Trust v. Puerto Rico, 805 F.3d 322 (2015).

83 *Id. See Franklin California*, 136 S.Ct. at 1940.

84 *Id.* at 345.

85 *Franklin California*, 136 S.Ct. at 1944.

longer a *state* for purposes of the preemption provision. The SCOTUS held that Puerto Rico is still a *state* for purposes of the preemption provision, even though the Bankruptcy Code *expressly* provides that Puerto Rico *is not a state for Chapter 9 purposes*.[86]

However, this conclusion should not be analyzed lightly. A finding that Congress intended for Puerto Rico to have no ability –either from the Bankruptcy Code or from domestic legislation– to adjust municipal debts jeopardizes the delivery of public services, the very function that Puerto Rico municipalities were created to fulfill.[87] Let us not forget that, up to that point in history, P.R.O.M.E.S.A. was not enacted yet. Academics consider that it is implausible that Congress, by denying Puerto Rico's municipalities access to Chapter 9 of the Bankruptcy Code, intended that they have no avenue at all by which to adjust their debts.[88] Given the long-settled rule against preemption of state or territorial legislation, unless preemption is unmistakably clear, and the absence of clear preemption, in this case, the Court should not have invalidated the Recovery Act.[89] Let us analyze first, Congress's intention with Chapter 9 of the Bankruptcy Code and Puerto Rico.

B. Concept and History of Bankruptcy Code Section 903

Article I, Section 8 of the United States Constitution (hereinafter, *Bankruptcy Clause*) provides that Congress shall have power to "establish … uniform Laws on the subject of Bankruptcies throughout the United States."[90] Therefore, the Bankruptcy Code responds to that notion. Specifically, section 903 is the constitutional mooring for Bankruptcy Code Chapter 9, as it embodies a statutory declaration that the enactment of municipal bankruptcy law, pursuant to Article 1, Section 8 of the United States Constitution, does not limit or impair the rights reserved to the States pursuant to the Tenth Amendment.[91] Chapter 9 of the Bankruptcy Code is directed toward a reorganization of a municipality's financial affairs or, as the statutory title states, an "adjustment of its debts."[92] The purpose of Chapter 9 legislation is to permit a financially distressed public entity to seek protection from its creditors while it formulates and negotiates a plan for adjustments of its debts.[93]

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86 *Id.* at 1946.

87 Br. for amici curiae Professors Clayton P. Gillette and David A. Skeel, JR. in support of petitioner at 4, Puerto Rico v. Franklin California Tax-Free Trust, et. al., 136 S.Ct. 1938 (2016) (No. 15-233, 15-255).

88 *Id.*

89 *Id.*

90 U.S. CONST. art. I, §8, cl. 4.

91 6 Collier on Bankruptcy P 903.01 (16th 2019).

92 *Id.* at 900.01 (16th 2019).

93 *Id.*

Section 903 of the Bankruptcy Code provides that

> [t]his chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but
>
> (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition.[94]
>
> (2) …

Professors Clayton P. Gillet and David A. Skeel[95] explained that, "[a]lthough Congress's reasons for excluding Puerto Rico municipalities from Chapter 9 are not clear, there is substantial evidence that Congress did not intend to preempt Puerto Rico's legislation such as the Recovery Act."[96] Also, there is no evidence at all that Congress had the intention to leave Puerto Rico without any restructuring option when it adopted and/or, amended the Bankruptcy Code.[97] Therefore, a structural analysis of the Bankruptcy Code and, specifically, of section 903 is necessary *to understand why the Bankruptcy Code did not preempted Puerto Rico's Recovery Act*.

From the creation of municipal bankruptcy laws until 1984, Puerto Rico municipalities were authorized to file for municipal bankruptcy.[98] The first Municipal Bankruptcy Act was enacted in 1934, in the depths of the Great Depression.[99] Notwithstanding the care with which the legislation was drafted, the SCOTUS held that Bankruptcy Act unconstitutional as an improper interference with the sovereignty of the states.[100] Undaunted by the SCOTUS decision, Congress, in 1937, enacted a revised Municipal Bankruptcy Act as Chapter X of the Bankruptcy Act.[101] The Bankruptcy Act, at that time, defined *state* to include territories such as Puerto Rico.[102] These municipal bankruptcy provisions, which governed until Congress enacted the current Bankruptcy Code, in 1978, clearly covered municipalities in Puerto Rico as well as municipalities in the states.[103]

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94 11 U.S.C.A. § 903(1).

95 Professor David A. Skeel is now member of the Oversight Board.

96 *Id.* at 5.

97 *Id.*

98 *Id.*

99 6 Collier on Bankruptcy P 900.LH (16th 2019).

100 *Id. See* Ashton v. Cameron County Water District, 298 U.S. 513 (1936).

101 *Id.*

102 *Id.*

103 Br. for amici curiae, *supra* note 88, at 6.

In 1942, the SCOTUS, in *Faitoute Iron & Steel Co. v. City of Asbury Park*,[104] upheld a New Jersey state law restructuring framework. The SCOTUS held that the statute did not offend the contract clause prohibition against state impairment of contracts because it improved the likely recovery of the bonds that would be restructured and came in response to a financial emergency.[105] After *Faitoute*, "a state or territory had two different restructuring options for its municipalities: if permitted by the state or territory, a fiscally distressed municipality could file for bankruptcy in Chapter IX, the predecessor to current Chapter 9, or the state or territory could enact its own restructuring statute."[106] Four years later, in 1946, Congress amended the Bankruptcy Act to restrict state laws that facilitate the restructuring of municipal debt.[107] However, "Puerto Rico still had at least one restructuring option –municipal bankruptcy– at all times."[108]

> As originally enacted, the 1978 Bankruptcy Code, which replaced the prior Bankruptcy Act, did not include a definition of *state*. However, in 1984, Congress added a new provision defining *state* as "includ[ing] the District of Columbia and Puerto Rico, *except for purpose of who may be a debtor under chapter 9 of this title*."[109] Therefore, since 1978, the Bankruptcy Code *expressly excluded Puerto Rico from the eligibility of Chapter's 9 provisions*. It is well settled that, by its terms, Section 903 does not apply to Puerto Rico.

C. **Section 903 Does Not Preempt Puerto Rico's Legislation Such as the Recovery Act: Odd Results and Consequences**

The Recovery Act did not fit into the *state law* requirement. An argument to the contrary requires an assumption regarding that the word *state,* in the abovementioned section, includes Puerto Rico. First, there is no doubt that Puerto Rico is not a state. Nevertheless, whether Puerto Rico must be considered a *state* under Section 903 is a matter of statutory interpretation that depends on Congress' intent. Second, Section 903(1) does not define who may be a debtor under Chapter 9. Third, it is nonsensical to interpret the word *state* in Chapter 9 to include Puerto

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104 316 U.S. 502 (1942).

105 *Id.* at 516.

106 Br. for amici curiae, *supra* note 88, at 7.

107 *Id.*

108 *Id.*

109 11 U.S.C. §101(52) (emphasis added).

Rico where *Congress expressly excluded* Puerto Rico from the definition of *state* for the purpose of defining who may be a debtor under Chapter 9.[110]

The First Circuit and the SCOTUS interpreted section 903 as precluding Puerto Rico from using its police power to enact a restructuring law such as the Recovery Act.[111] Accordingly, they stated that section 903 is a blanket prohibition invalidating every state municipal restructuring law.[112] Since Puerto Rico is defined as state for every other purpose in the Bankruptcy Code, *except* for determining which municipalities can file for Chapter 9, the Court extended the blanket prohibition to Puerto Rico.[113] However, the First Circuit, and the SCOTUS ignored the implications of such a conclusion, because it cannot be reconciled with either the literal language nor a more holistic interpretation, of section 903 as it extends section 903 to a context for which it was never intended.[114]

Gillette and Skeel explained the implications of the abovementioned courts' decisions even through a technical analysis of the language and context of section 903 as follows:

> Under section 903 (1), a composition law "may not bind any creditor that does not consent," and section 903 (2) says that "a judgment entered under such a law may not bind a creditor that does not consent to such composition." The key term here is "creditor," which is carefully defined by the Bankruptcy Code. A "creditor" is "an entity that has a claim against the debtor that arose at the time of, or before, the order for relief concerning the debtor,"[115] or an entity that has a claim under a handful of other sections of the Bankruptcy Code not relevant here. As this definition makes quite clear, "creditors" do not exist until a debtor has actually filed a bankruptcy case. The term "debtor" is defined quite similarly. Under the Bankruptcy Code "[t]he term debtor means person or municipality concerning which a case under this title has been commenced." By its literal terms, section 903 therefore does not apply unless a Chapter 9 case has actually been filed.[116]

Ignoring and evading the literal and unequivocal language of the legal framework, the First Circuit, and the SCOTUS concluded that section 903 was intended

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110 *See Id.*

111 Br. for amici curiae, *supra* note 88, at 9.

112 *Id.*

113 *Id.*

114 *Id.* at 10.

115 11 U.S.C. §101(10)(A).

116 Br. for amici curiae, *supra* note 88, at 10-11.

to ban all nonfederal municipal restructuring laws, even in the absence of pending Chapter 9 proceedings.[117] The courts ignored the technical definitions of *creditor* and *debtor* in the Bankruptcy Code and used another meaning of creditor to achieve what the courts mistakenly believed to be the express purpose of section 903.[118]

However, there is another serious question: whether a blanket ban would constitute an unconstitutional interference with states' and territories' police powers. A leading bankruptcy treatise states that "[i]f a state composition procedure does not run afoul of the contract's clause, then municipal financial arrangement under a state procedure should be a permissible exercise of state power, and a congressional enactment prohibiting that exercise would be a congressional overreaching."[119] The flaws in the First Circuit and SCOTUS' opinions are even more apparent when one considers the objectives that Congress had in mind when it enacted section 903. Specifically, when Congress enacted the predecessor of section 903 in 1946, lawmakers were concerned to promote uniform municipal bankruptcy *among the States*.[120] There is no evidence that lawmakers were thinking about Puerto Rico or other territories at all.[121] In fact, in the House Report, for instance, lawmakers stated that "a bankruptcy law under which the bondholders of a municipality are required to surrender or cancel their obligations should be *uniform throughout the 48 states*."[122] However, the literal and express meaning of section 903 is that it applies to the states, and it has no application to Puerto Rico.[123]

More importantly, "the premise of section 903 is a shield for state autonomy, free from congressional intrusion. Section 903 does not apply to Puerto Rico, for the simple reason that Puerto Rico does not enjoy the same Tenth Amendment autonomy from congressional intervention as the states."[124] As a constitutional matter, allowed by the constitutionally infirm interpretation granted to the Territorial Clause, Congress has exercised authority over a territory that it cannot exercise over the states.[125] Therefore, Section 903's objective of averting any claim of unconstitutional federal intrusion into powers reserved to the states, plays no role in the relationship between Congress and Puerto Rico, which has no Tenth Amendment immunity.[126]

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117 *Id. See* Franklin California Tax-Free Trust, 805 F.3d at 355.

118 *See* Franklin California Tax-Free Trust, 805 F.3d at 340 (To justify its disregard of the definitions, the First Circuit strained to find examples of provisions that use the term creditor more broadly that the literal definition).

119 6 Collier on Bankruptcy P 903.03 (16th 2019).

120 Brief for Amici Curiae, *supra* note 88, at 15.

121 *Id.* at 16.

122 *Id. See* H.R. Rep. No. 2246, 79th Cong., 2d Sess. 4 (1946) (emphasis added).

123 *Id.*

124 *Id.* at 19.

125 *Id.*

126 *Id.*

Regarding the argument for the need of uniformity, the courts agreed that Chapter 9 does not apply to Puerto Rico at all.[127] Puerto Rico is treated differently from the states with respect to debt adjustment.[128] Hence, there is no uniformity between the states and Puerto Rico regarding debt adjustment.[129] Thus, the uniformity rationale for section 903, which makes sense when Chapter 9 is available, has no application to Puerto Rico's debt adjustment.[130] Similarly, the First Circuit and the SCOTUS concluded that the need for uniformity suggests that there is a conflict as to preemption: "all of the relevant authority shows that Congress quite plainly wanted a single federal law to be the sole source of authority if municipal bondholders were to have their rights altered without their consent."[131] However, scholars like Gillet and Skeel emphasized that the failure to include Puerto Rico municipalities within Chapter 9 weakens the First Circuit and the SCOTUS' argument about the uniform treatment, "since holders of Puerto Rico municipal bonds are, by hypothesis, treated in a nonuniform manner relative to holders of municipal bonds issued by municipalities of states that have access to Chapter 9."[132]

Congress "may treat Puerto Rico differently from states so long as there is a rational basis for its actions."[133] If Congress can treat, and has treated, Puerto Rico less favorably than it treats the states, there is no reason to believe, and there is no evidence, that they wanted to treat Puerto Rico more favorably by allowing it greater flexibility than the states enjoy with respect to resolving municipal distress. Therefore, the judicial interpretation, in this case, replaced Congress's real intention with Chapter 9 and the unequivocal language of the Bankruptcy Code. Why?

IV. P.R.O.M.E.S.A.: Constitutionally Mandatory Colonialism?

"*The equation is simple. The colonizer makes the colonized pay the colony he imposes on him.*"[134]

P.R.O.M.E.S.A. combines the worst consequences of pre- and post-Spanish American War cases on the Territorial Clause. As enacted, and imposed upon

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[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id. See* Franklin California Tax-Free Trust, 805 F.3d at 343.

[132] *Id.*

[133] Harris v. Rosario, 446 U.S. 651 (1980).

[134] ROLANDO EMMANUELLI JIMÉNEZ & YASMÍN COLÓN COLÓN, "PROMESA" vii (Situm 2017)(our translation).

Puerto Rico, P.R.O.M.E.S.A. treats the island as an uninhabited piece of land because of the broad and malleable interpretation of the Territorial Clause. Specifically, P.R.O.M.E.S.A. revives the notion of absolute congressional micromanagement over the territories as possessions of the United States. Therefore, P.R.O.M.E.S.A. allows the pre-Spanish American war absolutism of Congress, through its absolute and undisputed power, even to legislate directly for the local government of territories. All this, while maintaining the post-Spanish American war position that permits Congress to experiment with the constitutional rights and protections of territories. First, let us discuss the sense of Congress and some provisions of Title I and II of P.R.O.M.E.S.A., both of which concern the Oversight Board.

P.R.O.M.E.S.A.'s section 701 expresses the sense of Congress that "any durable solution for Puerto Rico's fiscal and economic crisis should include permanent, pro-growth fiscal reforms that feature, among other elements, a free flow of capital between possessions of the United States and the rest of the United States."[135] Congress found it necessary to address an imminent fiscal emergency.[136] Congress justified its action of *legislating directly for the local government and imposing P.R.O.M.E.S.A. to Puerto Rico* with the Territorial Clause. Section 101 of P.R.O.M.E.S.A., specifically, states that "Congress enacts [P.R.O.M.E.S.A.] pursuant to Article IV, Section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories."[137]

Accordingly, to implement P.R.O.M.E.S.A., Congress created the Oversight Board to oversee the development of budgets and fiscal plans for Puerto Rico's instrumentalities and government.[138] The Oversight Board consists of seven members appointed by the President of the United States and one ex-officio member designated by the Governor of Puerto Rico.[139] *In fact, the Governor of Puerto Rico is an ex-officio member with no voting rights*. According to P.R.O.M.E.S.A., the purpose of the Oversight Board is "to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets."[140] For example, the Oversight Board may issue subpoenas, certify voluntary agreements between creditors and debtor, seek judicial enforcement of *its authority*, and impose

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[135] 48 U.S.C. §2241.

[136] 48 U.S.C. §2194.

[137] 48 U.S.C. §2121(b)(2).

[138] *Overview*, PROMESA CODEX, http://www.promesacodex.com/overview.html (last visit May 12, 2020).

[139] *Oversight Board,* PROMESA CODEX, http://www.promesacodex.com/oversight-board.html (last visit May 12, 2020).

[140] 48 U.S.C. §2121(a).

penalties.[141] Among the Oversight Board's broad powers are: (1) approving the governor's fiscal plan; (2) approving annual budgets; (3) enforcing budgets and ordering any necessary spending reductions; (4) *reviewing laws, contracts, rules, regulations, or executive orders for compliance with the fiscal plan*.[142]

In addition to the broad powers that the Oversight Board has, and the actions it is authorized to execute *at their sole discretion*, Congress expressly stated that the Oversight Board is "an entity [created] within the territorial government" of Puerto Rico.[143] Similarly, even though P.R.O.M.E.SA. and the Oversight Board is a creature of Congress, P.R.O.M.E.S.A. states that the Oversight Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government."[144] Furthermore, Congress made sure that they do not compromise their Treasury by stating that the Oversight Board has to be funded entirely from [Puerto Rico's] resources.[145] Paradoxically, even though it was Congress's intention to make the Oversight Board an entity created within the territorial government, Section 108 of P.R.O.M.E.S.A., precludes Puerto Rico's Governor and Legislature from exercising any power or authority over the Oversight Board.[146] In consequence, Puerto Rico's territorial government is subordinated to the non-elected Oversight Board. Specifically, Section 108 of P.R.O.M.E.S.A. states that "*[n]either the Governor nor the Legislature* may exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or [e]nact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes … determined by the Oversight Board."[147]

P.R.O.M.E.S.A. includes other subordination provisions. For example, Section 101 provides that the Oversight Board, "*in its sole discretion*, and at such time as the Oversight Board determines to be appropriate, may designate the territorial instrumentality as a covered territorial instrumentality …."[148] Also, regarding budgets and reports, Section 101 provides that "[t]he Oversight Board may require, *in its sole discretion*, the Governor to submit to the Oversight Board such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the Oversight Board determines to be necessary …."[149] Furthermore, pursuant

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[141] *Overview*, PROMESA CODEX, http://www.promesacodex.com/overview.html (last visit May 12, 2020 (emphasis added).

[142] *Id.* (emphasis added).

[143] 48 U.S.C. §2121 (c)(1).

[144] 48 U.S.C. §2121 (c)(2).

[145] 48 U.S.C. §2127.

[146] 48 U.S.C. §2128.

[147] 48 U.S.C. §2128 (1)(2) (emphasis added).

[148] 48 U.S.C. §2121 (d)(1)(A) (emphasis added).

[149] 48 U.S.C. §2121 (d)(1)(B) (emphasis added).

Section 101, the Oversight Board, "*in its sole discretion*, shall designate and may require … separate instrumentality budget for covered territorial instrumentalities, and require that the Governor develop such instrumentality budget."[150]

Another important aspect of the subordination of Puerto Rico's local government to P.R.O.M.E.S.A. is that it has a supremacy clause which states that *"[t]he provisions of this chapter shall prevail over any general or specific provision of territory law, state law, or regulation that is inconsistent [with P.R.O.M.E.S.A.]*."[151]

Accordingly, Section 204 provides that

> [e]xcept to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after [the Legislature] enacts any law during any fiscal year in which the Oversight Board is in operation, *the Governor shall submit the law to the Oversight Board*.[152]

If the Oversight Board finds that the law is significantly inconsistent with the Fiscal Plan for the fiscal year, *it shall issue* a certification of such finding together with the reasons behind it.[153] According to P.R.O.M.E.S.A., the Oversight Board *shall direct the territorial government* to "(1) correct the law to eliminate inconsistency; or (2) provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate."[154] If the government of Puerto Rico *fails to comply with a direction given by the Oversight Board respect to a law*, "the Oversight Board may take such actions as it considers necessary, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, *including preventing the enforcement or application of the law*."[155]

As noted, P.R.O.M.E.S.A. affects all areas of Puerto Rico's legal framework, and also its economic and social system.[156] Furthermore, it impairs Puerto Rico's Constitution and laws. Specifically, P.R.O.M.E.S.A. confers legislating power, and leaves the limited democratic sphere of Puerto Ricans in the hands of seven unelected people. However, there are some other implications in the combination of the worst consequences of pre- and post-Spanish American war cases.

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150 48 U.S.C. §2121 (d)(1)(C) (emphasis added).

151 48 U.S.C. §2103 (emphasis added).

152 48 U.S.C §2144 (a)(1) (emphasis added).

153 48 U.S.C §2144 (a)(2)(C) (emphasis added).

154 48 U.S.C §2144 (a)(4)(B) (i-ii) (emphasis added).

155 48 U.S.C §2144 (a)(5) (emphasis added).

156 EMMANUELLI, *supra* note 135, at X.

As the SCOTUS stated, more than a century ago, in *Binns v. United States*, the Territorial Clause grants Congress great flexibility to structure territorial governments.[157] Therefore, "by creating the Oversight Board, a virtual fourth branch of government in Puerto Rico, Congress is utilizing that flexibility as proclaimed in P.R.O.M.E.S.A.'s stated constitutional basis."[158] "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."[159] For instance, through the Oversight Board, Congress may nullify laws as they did in pre-Spanish American war cases, and under the same reasoning, like *Nat'l Bank v. City of Yankton*, in 1879, where the SCOTUS held that

> [a]ll territory within the jurisdiction of the United States not included in any state must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organization. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purpose of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.
>
> 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 way. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of Territories and all the departments of territorial government.[160]

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[157] Binns v. U.S., 194 U.S. 486, 491-92 (1904).

[158] Delasalas, *supra* note 22, at 779.

[159] *Id.*

[160] Nat'l Bank v. City of Yankton, 101 U.S. 129, 133-34 (1879).

In addition to outright nullifying laws, the Oversight Board governs Puerto Rico because, if the Puerto Rican government fails to ensure compliance, "[P.R.O.M.E.S.A.] unceremoniously cuts out the territorial government and enables the Oversight Board to create a compliant budget."[161] One last consequence that must be mentioned is that, in the next elections, Puerto Ricans will be effectively deprived of their right to vote. They will be making a symbolic vote for candidates, such as their governor, that are subordinated to the *absolute and undisputed* power of Congress, executed by the Oversight Board.

P.R.O.M.E.S.A., therefore, is the symptom of the underlying problem that is the Territorial Clause's text and interpretation as applicable to Puerto Rico.[162] The colonial impulse has revealed itself in the Oversight Board's interaction with the Puerto Rican government.[163]

V. Final Thoughts

As noted, the threshold problem is the constitutionally mandated colonialism endorsed by the constitutionally infirm interpretation of the Territorial Clause. Such conclusion was noted and identified even by several countries in the first General Assembly of the United Nations in 1946. For instance, "Mexico expressed that the central problem of Puerto Rico was of an economic nature as the people of Puerto Rico had been forced to renounce part of their individuality to ensure their economic salvation."[164] Mexico trusted that the case of Puerto Rico demonstrated the need not to allow any people in the world to be forced to sacrifice their dignity in order to live.[165]

Russia observed that the desperate economic situation of Puerto Rico was a direct result of the American colonial policy imposed on Puerto Rico.[166] Ukraine held that "the Constitution of Puerto Rico constituted a political farce to disguise the fact that Puerto Rico was, and continued to be, a colony whose economy was at the mercy of the monopolies of … the United States."[167] India argued that the *free association [or in spanish, Estado Libre Asociado] did not represent the achievement of self-government or self-determination; on the contrary, what Puerto Rico was facing was the creation of a new form of colonialism*.[168] India clarified that,

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[161] Delasalas, *supra* note 22, at 779. *See* 48 U.S.C. §2142 (d)(2) (emphasis added).
[162] *Id.* at 780.
[163] *Id.* at 781.
[164] IV JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 40 (1983) (our translation).
[165] *Id*. at 40-41 (our translation).
[166] *Id.* at 41 (our translation).
[167] *Id.* at 42 (our translation).
[168] *Id.* (our translation) (emphasis added).

what the United Nations wanted was not the perpetuation of colonialism, but its total elimination.[169]

This article has analyzed the consequences of the constitutionally infirm mandatory colonialism. The enactment and imposition of P.R.O.M.E.S.A. to Puerto Rico demonstrated that it is subject to the mercy and benevolence of Congress, just as a slave was at the mercy of its owner.[170]

As the oldest colony in the world, it is time for the United States to dispose of the territory and commit to decolonization. What are the options? First, as to a constitutional claim –not an easy task, but one that is up to the SCOTUS to decide in which extent– overruling the of the Insular Cases is indispensable to solve the colonial problem. Specifically, to abolish the distinction between incorporated and unincorporated territory. More importantly, to decide that the Territorial Clause should not apply at all to Puerto Rico, or to the territories acquired in 1898 and thereafter.[171] Second, as to a political claim –that is up to Congress to decide– Congress *should and must dispose of the territory declaring their commitment to decolonization and taking the necessary affirmative actions.* For instance, as former Chief Justice Trías Monge suggested:

> the more drastic alternative is that Congress establish, in a joint resolution, that all sovereign powers over Puerto Rico are vested in its people. The sovereignty that is required to negotiate an agreement of independence, or admission to statehood, or free association, would be immediately vested in the Puerto Rican people.[172]

Obviously, this requires much further analysis, however, the possibilities to start the decolonization process are just as many.

As academics have concluded, the territorial limbo is an untenable position for a bankrupt colony as Puerto Rico.[173] In this regard, according to professor Gorrín:

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[169] *Id.* at 43 (our translation).

[170] *See* Gorrín, *supra* note 33, at 195-205. For a comprehensive analysis of Congress' legal, moral and political obligations regarding the exercise of self-determination by the people of Puerto Rico. Also, *see* Sara Robles, *Time For The United States To Start Complying With Human Rights Treaties: On The Self-Executing Treaty Doctrine As To Human Rights Violations*, 54 Rev. Jur. UIPR ____ (2020).

[171] *See* Efrén Rivera Ramos, *The Insular Cases: What is There to Reconsider? in* Reconsidering the Insular Cases: The Past and Future of the American Empire 33-34 (2015).

[172] José Trías Monge, Las Penas de la Colonia Más Antigua del Mundo 230 (1999) (our translation).

[173] *See* Gorrín, *supra* note 33, at 207.

> After [more than 100 years] under the plenary power of Congress colonialism has failed. The territory is broke …. The government of Puerto Rico has been forced to adopt severe measures that have affected public employees, reduced government services, increased taxes, and made it possible for public corporations to default on their obligations. The present depression of the colonial economy taints the prestige of the United States and looms over the Treasury, as some talk of federal bailout to save the day.[174]

Furthermore, the enactment of P.R.O.M.E.S.A. has revealed something that for more than a century remained in the darkness: the *people of Puerto Rico have to pay* for the legally invalid colonial regime shielded behind the Territorial Clause. Therefore, as Puerto Rico has had to endure more than 100 years of territorial domination, it is time for the Congress of the United States to fulfill its legal, moral, and political obligations.

What are the political options to solve the consequences of this cryptic relation between Puerto Rico and the United States? The political options, historically proposed by political leaders in Puerto Rico, are the free association, statehood, and independence. Each of the options urges a multifactorial analysis, and each of them face some great challenges.

First, there is the free association option "as a transitional status toward independence."[175] From this option could arise many questions. What will be the new proposed agreements given the reality that Puerto Rico is a bankrupt colony? What different results could be reached under this option if the Territorial Clause remains applicable to Puerto Rico as historically interpreted? Decolonization under this option must at least express, specifically, that the new agreement cannot be amended except by mutual consent and that the laws of the United States would only apply to Puerto Rico, as long as Puerto Rico approve them. Again, all this is nothing more than a political ideal if Puerto Rico is not expressly excluded from the application of the Territorial Clause.

Second, there is the statehood option. This option is irrevocable.[176] Nevertheless, under this option, Congress has the last word on whether or not to admit a new state that will be subject to federal limitations. This alternative, does not address an essential aspect: *eradicating colonialism it is not just a matter of equality, it is a matter of the right of the people of Puerto Rico to self-determination as an inalienable human right that cannot be renounced*.[177] However, the decision of

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[174] *Id.*

[175] *Id.* at 208.

[176] Gorrín, *supra* note 33, at 208.

[177] *Id.*

Congress whether to admit or not, a state should contain an analysis of the established criteria that have been used when admitting new states:

> (1) That *the inhabitants* of the proposed new states are imbued with and *are sympathetic toward the principles of democracy as exemplified in the American form of government*.
> (2) That a majority of *the electorate wish statehood*.
> (3) That the proposed new State has sufficient population and resources to support State government and at the same time carry its share of the cost of the Federal government.[178]

Third, there is the option of independence. This option "would require a careful but very viable economic transition, such as that already negotiated by the Puerto Rican Independence Party with congressional leaders in 1989-1991."[179] As noted by professor Gorrín: "An independent Puerto Rico would be free to pursue its economic development unhindered by federal limitations. It would be free to establish productive relations with other nations, including the United States, which would benefit much more from a free Puerto Rico than from a bankrupt colony."[180] However, this option faces a great challenge. In the words of the former Chief Justice of the Supreme Court of Puerto Rico José Trías Monge:

> A special circumstance has contributed to [the] conviction that salvation comes from outside: the addiction to the situated…
> Recently, the Puerto Rican tends to seek salvation outside of himself. We have a long training in trying to locate the possible saving agent out of our reach.
> …
> However, the Puerto Rican identity has been robust enough to survive … centuries of colonialism.[181]

All those options have been proposed. Could there be any other? Maybe. However, as a threshold matter, the constitutional claim must be addressed first. Many questions will arise, many actions will have to be taken, economic transitions must take place, procedurals and substantive proposals will have to be considered, but decisions have to be made. Colonialism must be eradicated: the Territorial Clause

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[178] *Id.* (*citing* H.R. Rep. No. 85-624(1957), *reprinted in* 1958 U.S.C.C.A.N. 2933).

[179] *Id.* at 210. (*citing* Rubén Berríos Martínez, Puerto Rico's Decolonization 100-114 (1997)).

[180] *Id.*

[181] V José Trías Monge, Historia Constitucional de Puerto Rico 459-60 (1994) (our translation).

constitutionally infirm interpretation, and the germ of the insular cases must be exterminated. The decision aligned with human dignity, equality, and self-determination, as inalienable rights, correspond to the United States and the SCOTUS. After all, *equal justice under law* must mean something.

The discussion of this article merits leaving the following debate open. It is true that slavery cannot exist without law any more than property in lands and goods can exist without law.[182] However, individual slavery, as historically known, *has an implied reflective character also, establishing and decreeing universal civil and political freedom.* If the United States does not act to liberate the oldest colony in the world, could Puerto Rico be an example of a modern version of the historical institution of slavery: territorial slavery? After more than 100 years of colonial domination, could P.R.O.M.E.S.A. become another incident and badge of slavery?

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[182] Civil Right Cases, 109 U.S. 3, 20 (1883).