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## CHAPTER ONE

### TERRITORIAL FEDERALISM

The notion of a “territorial federalism”<sup>1</sup> operating within the U.S. constitutional ecosystem may at first glance appear misguided. After all, conventional accounts of federalism as a structure of government connote distinct and sovereign political entities jointly exercising governmental power over a given geographic region, with each entity acting as a check on the others’ actions and ambitions.<sup>2</sup> Given federalism’s commitments, its viability as an effective structural arrangement would seem to require entity independence in the *sovereign* sense: where the very existence of one political entity is premised on the permission of a second, any notion of an effective check on the second appears more illusory than actual. Yet under long-established principles of U.S. constitutional law, America’s territories lack even a modicum of sovereign independence from the federal government;<sup>3</sup> rather, “territorial governments are entirely . . . creation[s] of Congress,” which “retains plenary power over [them]” so long as their territorial status persists.<sup>4</sup> Within such a legal environment, the story goes, notions of federalism have scant application to the federal-territory relationship.

This Chapter seeks to turn the conventional story on its head. Adopting as a paradigm the structural relationship between Congress and the Commonwealth of Puerto Rico<sup>5</sup> as it has developed since 1898, section A will illustrate how the federal-territory relationship has more or less gradually progressed toward functionally mimicking the federal-state structural relationship.<sup>6</sup> Territorial federalism as a matter

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<sup>1</sup> While this Chapter is not the first piece to use the phrase “territorial federalism,” *see, e.g.*, Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT’L L. & POL. 941 (2008) (using “territorial federalism” to refer to a “multiculturalist legal system[]” premised on geography, *id.* at 944), this essay is the first to use the phrase to describe the federal government’s relationship with the U.S. territories.

<sup>2</sup> *See infra* notes 125–26 and accompanying text.

<sup>3</sup> *See, e.g.*, *United States v. Lebrón-Caceres*, 157 F. Supp. 3d 80, 96–97 (D.P.R. 2016).

<sup>4</sup> *Id.* at 97. In short, any self-rule that the territories exercise is simply a product of “congressional grace.” *The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 307, 347 (2016).

<sup>5</sup> This Chapter focuses on the insular territories, using Puerto Rico as a case study. It does not discuss Washington, D.C., which — although not classified as a U.S. territory — is in many respects the functional equivalent of one, arguably resulting in a distinction without a difference. *But cf.* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 831 n.163 (2005). However, unlike the insular territories, Washington, D.C., has a voice in the Electoral College. *See* U.S. CONST. amend. XXIII.

<sup>6</sup> This Chapter is not the first work to consider how principles of federalism can elucidate the relationship that has developed between the Puerto Rican and federal governments. *See* David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, in *APPLICABILITY OF THE UNITED STATES CONSTITUTION*

of *structure* has become an on-the-ground reality — and has provided an avenue by which the territories and their residents have reaped federalism’s benefits despite the formal contours of the federal-territory relationship as reflected in contemporary constitutional doctrine.

At least that was the case before June 2016, when “an unholy trinity” of developments in the law descended upon Puerto Rico’s shores.<sup>7</sup> Two of these developments emerged from the U.S. Supreme Court.<sup>8</sup> However, as section A will explain, it is the development that emerged from Congress — the Puerto Rico Oversight, Management, and Economic Stability Act<sup>9</sup> (PROMESA) — that most directly challenged the structural arrangement that this Chapter labels territorial federalism. With its creation of a federal oversight board possessing substantial authority over Puerto Rico’s finances, PROMESA represents Congress’s most significant incursion into Puerto Rican self-rule since the Commonwealth’s formation in 1952 — signaling a retrenchment from the functional mimicry of the federal-state relationship that had come to define the relationship between Washington and San Juan.

However, the retrenchment evinced by PROMESA does not mark the end of this Chapter; section B turns toward scrutinizing congressional intervention in territorial self-governance, illustrating that the movements toward a functionally federal relationship between the federal and territorial governments that defined the pre-PROMESA era are worthy of judicial recognition and protection as a matter of *doctrine*.<sup>10</sup> In other words, a robust doctrine of territorial federalism is theoretically sound, normatively desirable, and warranted as a tool to reconcile the U.S. territories’ legal status with America’s foundational commitments to democracy, republicanism, and popular sovereignty. Section C offers a brief conclusion.

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AND FEDERAL LAWS TO THE COMMONWEALTH OF PUERTO RICO (FIRST CIRCUIT JUDICIAL CONFERENCE PROCEEDINGS), 110 F.R.D. 449, 453, 468–73 (1986). Moreover, Professor Stanley Laughlin, Jr., previously contemplated the project pursued in this Chapter but did not himself pursue it. See STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 20–23 (1995).

<sup>7</sup> *The Supreme Court, 2015 Term — Leading Cases*, *supra* note 4, at 356.

<sup>8</sup> *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016) (holding that the federal Bankruptcy Code excludes Puerto Rico from its debt restructuring provisions while also preempting Puerto Rico’s own bankruptcy law); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876–77 (2016) (concluding that Puerto Rico is not a sovereign for double jeopardy purposes).

<sup>9</sup> Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified in scattered sections of 15, 29, and 48 U.S.C.).

<sup>10</sup> This Chapter limits its scope to already-existing federalism-mimicking relationships between a given territory and the federal government. It reserves the question whether the federal government should be understood to possess a constitutional obligation to establish such relationships with territories in the first instance.

### A. Territorial Federalism on the Ground

1. *Territorial Federalism: Mimicking the Federal-State Relationship.* — While formally reaching only the relationship between the federal government and the states, the influence of American-style federalism runs much deeper — and thousands of nautical miles farther. For decades, a largely overlooked form of federalism has had a significant influence on the political lives of millions of U.S. citizens and nationals as the federal government — with Congress at the helm — and the U.S. territories have moved toward mimicking the federal-state relationship to varying degrees and in varying ways. Such mimicry, a product of the devolution of power from D.C. to the territorial capitals,<sup>11</sup> has created a form of functional territorial federalism that has flourished outside the traditional mold’s formal legal limits.

In this regard, the pre-PROMESA relationship between Puerto Rico and Congress offers a paradigmatic example.<sup>12</sup> Puerto Rico’s colonial status dates to 1493.<sup>13</sup> After nearly four-hundred years as a Spanish possession, the island fell under U.S. dominion with the conclusion of the Spanish-American War in 1898.<sup>14</sup> Over the next half century, authority to choose the island’s political leadership progressively devolved from D.C. to San Juan, albeit in “fits and starts.”<sup>15</sup>

After these five decades — during which Puerto Ricans gained U.S. citizenship<sup>16</sup> — Congress went one step further: it authorized the Puerto Rican people to “embark on the project of constitutional self-governance,”<sup>17</sup> the islanders’ “most significant assertion of sovereignty

<sup>11</sup> Although the U.S. territories are not states and do not possess the sovereign independence of states, their internal governing institutions and structural arrangements have progressively moved toward becoming functionally equivalent to those operating in states, with the requisite level of autonomy from federal authority to boot — at least pre-PROMESA.

<sup>12</sup> At least one scholar has previously expressed the view that the logic of American federalism “applies partially” to the federal–Puerto Rico relationship: “no, with respect to national political rights relating to representation in Congress and the Presidential vote; yes, with respect to most other components of the federal system.” Helfeld, *supra* note 6, at 468.

<sup>13</sup> Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 12 (2000).

<sup>14</sup> See Treaty of Paris, Spain-U.S., art. II, Dec. 10, 1898, 30 Stat. 1754. In addition to ceding Puerto Rico, the Treaty of Paris explicitly deferred the question of Puerto Ricans’ “civil rights and political status,” leaving the delineation of their contours to Congress. *Id.* art. IX.

<sup>15</sup> *The Supreme Court, 2015 Term — Leading Cases*, *supra* note 4, at 347. Beginning in 1900, Congress allowed Puerto Ricans to elect the lower house of their legislature. See Organic Act of 1900 (Foraker Act), ch. 191, §§ 27, 29, 31 Stat. 77, 82–83 (codified in scattered sections of 48 U.S.C.). Then, in 1917 Congress opened the legislature’s upper house to popular election. See Organic Act of 1917 (Jones Act), ch. 145, § 26, 39 Stat. 951, 958–59. Finally, in 1947 Congress expanded the franchise to include selection of the island’s governor. See Act of Aug. 5, 1947 (Elective Governor Act), Pub. L. No. 80-362, 61 Stat. 770.

<sup>16</sup> See Nationality Act of 1940, Pub. L. No. 76-853, § 202, 54 Stat. 1137, 1139; Jones Act § 5.

<sup>17</sup> *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016).

in centuries.”<sup>18</sup> On July 3, 1950, Congress — “fully recognizing the principle of government by consent” — enacted Public Law 600<sup>19</sup> “so that the people of Puerto Rico [might] organize a government pursuant to a constitution of their own adoption.”<sup>20</sup> Styled “in the nature of a compact,”<sup>21</sup> Public Law 600 submitted itself to the Puerto Rican electorate “for acceptance or rejection through an island-wide referendum,” approval of which by a majority of participating voters would authorize Puerto Rico’s legislature to convene a constitutional convention to draft a constitution for the island.<sup>22</sup> Puerto Rico’s voters overwhelmingly accepted Public Law 600,<sup>23</sup> and within two years, the Constitutional Convention of Puerto Rico produced — and Puerto Rico’s voters sanctioned via a second referendum<sup>24</sup> — a draft constitution for a new polity: the Commonwealth of Puerto Rico.<sup>25</sup>

Congress subsequently “took its turn on the document,”<sup>26</sup> both adding and subtracting language.<sup>27</sup> The Constitutional Convention promptly approved Congress’s revisions,<sup>28</sup> and with the Puerto Rico Governor’s proclamation, the Constitution of the Commonwealth of Puerto Rico was “endowed with the force and effect of law”<sup>29</sup> — thereby constituting a new Commonwealth of, by, and for the people of Puerto Rico.

Since its genesis, the Commonwealth has held the status of a “self-governing” polity,<sup>30</sup> one possessing and exercising “wide-ranging self-rule”<sup>31</sup> that has “brought mutual benefit to the Puerto Rican people

<sup>18</sup> *The Supreme Court, 2015 Term — Leading Cases*, *supra* note 4, at 348.

<sup>19</sup> Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319.

<sup>20</sup> *Id.* § 1.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 2. Public Law 600 required the eventual constitution to “provide a republican form of government and . . . include a bill of rights.” *Id.*

<sup>23</sup> See Act of July 3, 1952 (Public Law 447), Pub. L. No. 82-447, 66 Stat. 327; *see also* Malavet, *supra* note 13, at 33 n.138 (citation omitted).

<sup>24</sup> See Public Law 447.

<sup>25</sup> See Resolution 23: Final Declarations of the Constitutional Convention of Puerto Rico (Feb. 4, 1952), *reprinted in* OFFICE OF THE COMMONWEALTH OF P.R., DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 166 (2d ed. 1964) [hereinafter DOCUMENTS].

<sup>26</sup> *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1869 (2016); *see also* Public Law 600 § 3 (providing that a constitution would become effective only “[u]pon approval by the Congress”).

<sup>27</sup> *Sanchez Valle*, 136 S. Ct. at 1869 (citing Public Law 447).

<sup>28</sup> See Resolution 34: To Accept, in Behalf of the People of Puerto Rico, the Conditions of Approval of the Constitution of the Commonwealth of Puerto Rico Proposed by the Eighty-Second Congress of the United States Through Public Law 447 Approved July 3, 1952 (July 10, 1952), *reprinted in* DOCUMENTS, *supra* note 25, at 196.

<sup>29</sup> *The Supreme Court, 2015 Term — Leading Cases*, *supra* note 4, at 348; *see also* Public Law 447; Proclamation by the Governor of Puerto Rico, Establishment of the Commonwealth of Puerto Rico (July 25, 1952), *reprinted in* DOCUMENTS, *supra* note 25, at 198.

<sup>30</sup> *Sanchez Valle*, 136 S. Ct. at 1874.

<sup>31</sup> *Id.* at 1876.

and the entire United States.”<sup>32</sup> As the Supreme Court recently observed, “Puerto Rico became a new kind of political entity” in 1952, an entity “governed in accordance with, and exercising self-rule through, a popularly ratified constitution”<sup>33</sup> — much like a state. In fact, the Court has explicitly recognized that Congress’s purpose in Public Law 600 and the 1952 revisions of the draft constitution was “to accord to Puerto Rico the degree of autonomy and independence *normally associated with States of the Union*.”<sup>34</sup> Accordingly, the Court has repeatedly noted since 1952 that “Congress relinquished its control over [Puerto Rico’s] local affairs . . . and granted Puerto Rico a measure of autonomy comparable to that possessed by the States.”<sup>35</sup>

This autonomy has manifested itself both on the ground in Puerto Rico<sup>36</sup> and in the island’s treatment by the federal government. While differentiating between Puerto Rico and the states for some purposes — for example, in the allocation of federal funding, as Puerto Rican residents do not pay federal income tax<sup>37</sup> — Congress has by and large, at least up to the passage of PROMESA, treated Puerto Rico as but another state of the Union.<sup>38</sup> Likewise, the executive branch has long recognized Puerto Rico’s state-like quality, with President George H.W. Bush directing “all Federal departments, agencies, and officials” to treat Puerto Rico, with few exceptions, “as if it were a State.”<sup>39</sup> The federal judiciary has even extended Eleventh Amendment sovereign immunity to the Commonwealth.<sup>40</sup> In short, although “not explicitly grounded” in the Constitution or any other law, certain “developments and tendencies” in the exercise of federal power over Puerto Rico came to “form part of an understanding which

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<sup>32</sup> *Id.* at 1874.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (emphasis added) (quoting *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976)).

<sup>35</sup> *Examining Bd.*, 426 U.S. at 597; see also *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (“Puerto Rico, like a state, is an autonomous political entity, ‘sovereign over matters not ruled by the [U.S.] Constitution.’” (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974))).

<sup>36</sup> For instance, Puerto Rico has exercised its local autonomy to ban the death penalty in its constitution, P.R. CONST. art. II, § 7; to designate both English and Spanish as official languages, P.R. LAWS ANN. tit. 1, § 59 (2008); and to make Election Day a holiday, P.R. LAWS ANN. tit. 16, § 4143 (2013).

<sup>37</sup> See, e.g., *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam) (holding that Congress may provide less federal financial assistance to Puerto Rico under the Aid to Families with Dependent Children program); *Califano v. Torres*, 435 U.S. 1, 5 & n.7 (1978) (per curiam) (same under the Supplemental Security Income program).

<sup>38</sup> See, e.g., 48 U.S.C. § 734 (2012) (providing that federal laws “not locally inapplicable, except as [explicitly] provided, shall have the same force and effect in Puerto Rico as in the United States”).

<sup>39</sup> Memorandum on the Commonwealth of Puerto Rico 2, PUB. PAPERS 2171 (Nov. 30, 1992).

<sup>40</sup> See *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981).

has been transformed into the equivalent of a constitutional tradition whose effectuation and continued strengthening [became] highly predictable.”<sup>41</sup>

Yet what was once “highly predictable” is no longer so. With the enactment of PROMESA, Congress has undermined territorial federalism as a structural arrangement with any viable force and effect, and with it, subverted a constitutional tradition empowering millions of U.S. citizens with the dignity of self-governance.

<sup>41</sup> Helfeld, *supra* note 6, at 470. While the federal–Puerto Rico relationship offers a paradigm case of territorial federalism that is in some respects sui generis, the Commonwealth’s four sister territories with permanent populations of their own — the Commonwealth of the Northern Mariana Islands (CNMI), the U.S. Virgin Islands, Guam, and American Samoa — each possess a distinct relationship with the federal government that is, to greater and lesser degrees, federal-like.

Consider the CNMI, the U.S. territory with a relationship to the federal government arguably closest to the Puerto Rico paradigm. The CNMI’s federalism-mimicking relationship comes not from a congressional grant but rather from a voluntary covenant. On February 15, 1975, the United States and the Northern Mariana Islands — previously a United Nations trust territory, *see* LAUGHLIN, JR., *supra* note 6, at 428–30 — entered a covenant to establish the CNMI under U.S. sovereignty, for which the population of the Northern Mariana Islands overwhelmingly voted in favor. *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, N. Mar. I.-U.S., Feb. 15, 1975, 90 Stat. 263 [hereinafter Covenant]; LAUGHLIN, JR., *supra* note 6, at 430. Importantly, the Covenant guarantees the CNMI’s “right of local self-government” and autonomy over internal affairs, Covenant § 103, as well as purports to limit the federal government’s authority over it, *see* Covenant § 105. The Covenant also authorized the CNMI to adopt a constitution in a fashion — and with restrictions — similar to Congress’s authorization for Puerto Rico to do the same in Public Law 600. *See* Covenant art. II. The Constitution of the CNMI took effect on January 9, 1978. Proclamation No. 4534, 42 Fed. Reg. 56,593, 56,594 (Oct. 24, 1977).

The remaining trifecta of territories move more sharply away from the Puerto Rico paradigm. Consider American Samoa, “the only unorganized territory with a substantial permanent population.” LAUGHLIN, JR., *supra* note 6, at 84. An unorganized territory lacks an organic act, which is an act of Congress establishing the territory’s government structure. *Id.* As a result, unorganized territories are under the direct control of the executive branch. *Id.* at 87. In the case of American Samoa, however, the executive branch transferred administrative responsibility in anticipation of the enactment of a constitution. *See* Exec. Order No. 10,264, 3 C.F.R. 447 (Supp. 1951). The subsequently enacted Constitution of American Samoa provides for a popularly elected legislature and a governor. AM. SAMOA CONST. art. II (legislature); *id.* art. IV, § 2 (governor). Congress has since passed a law providing that this constitution cannot be amended without its consent, effectively transforming the constitution into an organic act. Act of Dec. 8, 1983, Pub. L. No. 98-213, § 12, 97 Stat. 1459, 1462; LAUGHLIN, JR., *supra* note 6, at 87–88.

Consider also the U.S. Virgin Islands and Guam. *See* LAUGHLIN, JR., *supra* note 6, at 375–81 (U.S. Virgin Islands); *id.* at 399–404 (Guam). Both territories have Congress’s blessing to enact their own constitutions, *see* Act of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899, and both have taken steps to act on that authority, *see* Dep’t of Justice Views on the Proposed Constitution Drafted by the Fifth Constitutional Convention of the United States Virgin Islands, 34 Op. O.L.C. (Feb. 23, 2010), <https://www.justice.gov/file/18426/download> [<https://perma.cc/UQQ9-HJUT>]; *id.* at 3 (discussing a proposed constitution for Guam). However, neither has done so.

As with Puerto Rico, people born in these territories — apart from American Samoa — have been extended U.S. citizenship by congressional act. *See* 8 U.S.C. § 1406 (U.S. Virgin Islands); *id.* § 1407 (Guam); Covenant § 303 (CNMI). People born in American Samoa are instead U.S. nationals. *See* 8 U.S.C. § 1408; *see also id.* § 1101(a)(29).

2. *PROMESA's Roots: The Puerto Rican Debt Crisis.* — PROMESA's origins lie in the Commonwealth's debt — totaling around \$72 billion — which former Puerto Rico Governor Alejandro García Padilla publicly acknowledged in June 2015 was simply “not payable.”<sup>42</sup>

Puerto Rico's fiscal fiasco has arguably been a century in the making. In 1917, Congress granted Puerto Rico a special federal tax status designed to benefit the island's treasury.<sup>43</sup> Throughout the twentieth century, Congress continued to apply special tax provisions to U.S. territories — including Puerto Rico<sup>44</sup> — as a means of driving their economic development.<sup>45</sup> Among the most consequential of these special provisions was section 936 of the Internal Revenue Code, which provided a tax credit to U.S. corporations equal to the full amount of their U.S. income tax liability on income derived from corporate operations in the U.S. territories.<sup>46</sup> In other words, U.S. companies could operate in the U.S. territories free from federal income taxation.

And U.S. companies did, especially in Puerto Rico,<sup>47</sup> which attracted substantial investment from — and jobs in — “pharmaceutical, textile, and electronics industries.”<sup>48</sup> However, Congress phased out the tax credit between 1996 and 2005, citing worries that it fostered tax evasion.<sup>49</sup> The consequences for the Commonwealth have been dire:

<sup>42</sup> Michael Corkery & Mary Williams Walsh, *Puerto Rico's Governor Says Island's Debts Are "Not Payable,"* N.Y. TIMES: DEALBOOK (June 28, 2015), <http://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html> [https://perma.cc/7WGA-JFKG].

<sup>43</sup> See Organic Act of 1917 (Jones Act), ch. 145, § 9, 39 Stat. 951, 954; Michelle Kaske & Tatiana Darie, *Puerto Rico's Slide*, BLOOMBERG: QUICKTAKE (Dec. 23, 2016, 3:43 PM), <https://www.bloomberg.com/quicktake/puerto-ricos-slide> [https://perma.cc/V9K6-P6TH].

<sup>44</sup> Puerto Rico's status as a U.S. territory has in fact provided “many of the advantages of being a state and few of the downsides.” Mary Williams Walsh & Liz Moyer, *How Puerto Rico Debt Is Grappling with a Debt Crisis*, N.Y. TIMES: DEALBOOK (July 1, 2016), <http://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html> [https://perma.cc/NR7R-VKF8]. Perhaps most significantly, although most of its residents pay no federal income tax, Puerto Rico receives federal financial assistance. *Id.* However, its status is in many respects a double-edged sword. For example, with regards to Medicare and Medicaid, the federal government reimburses Puerto Rico's doctors and hospitals at lower rates than it reimburses the states, incentivizing doctors to move off the island. *See id.*

<sup>45</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-93-109, TAX POLICY: PUERTO RICO AND THE SECTION 936 TAX CREDIT 2 (1993).

<sup>46</sup> See I.R.C. § 936 (1976); U.S. GEN. ACCOUNTING OFFICE, *supra* note 45, at 4; Larry Rohter, *Puerto Rico Fighting to Keep Its Tax Breaks for Businesses*, N.Y. TIMES (May 10, 1993), <http://www.nytimes.com/1993/05/10/business/puerto-rico-fighting-to-keep-its-tax-breaks-for-businesses.html> [https://perma.cc/HB92-MXPF]. Section 936 was created by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520 (codified in scattered titles of the U.S. Code).

<sup>47</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 45, at 2 (noting that over ninety-nine percent of section 936 benefits from 1983 to 1993 went “to companies operating in Puerto Rico”).

<sup>48</sup> Kaske & Darie, *supra* note 43.

<sup>49</sup> Rashid Marcano-Rivera, *Puerto Rico Can't Pay Its Debt, and the United States Is Partly to Blame*, WASH. POST: MONKEY CAGE (July 15, 2015), <https://www.washingtonpost.com>

tens of thousands of jobs lost, exacerbated by the Great Recession; ongoing economic contraction; a dramatically high poverty rate; and a shrinking population.<sup>50</sup> As a result of these events, by the second decade of the century Puerto Rico found itself “in the midst of a fiscal crisis” of staggering proportion,<sup>51</sup> imperiling the island’s essential public services along with investors’ returns.<sup>52</sup>

The Commonwealth’s elected branches responded to the island’s escalating financial crisis in June 2014, swiftly enacting the Puerto Rico Public Corporation Debt Enforcement and Recovery Act<sup>53</sup> (Recovery Act) as a means to enable its public utilities to restructure their debts.<sup>54</sup> Ultimately, however, the Recovery Act proved more a symbolic action than sound law: in June 2016, the U.S. Supreme Court held in *Puerto Rico v. Franklin California Tax-Free Trust*<sup>55</sup> that the federal Bankruptcy Code not only bars Puerto Rico from enacting the Recovery Act, but also precludes it from availing itself of federal debt-restructuring provisions.<sup>56</sup>

3. *PROMESA and Its Implications for Territorial Federalism.* — Foreclosed from access to federal bankruptcy protections, yet unable to take its own steps toward reconciling its increasingly precarious financial position, Puerto Rico was left by *Franklin California* at the mercy of Congress and the White House to resolve its debt crisis. Their solution was PROMESA, which became law on June 30, 2016 — one year and two days after Puerto Rico’s governor had pronounced the island’s debts “not payable,” and just one day before \$1.9 billion of Puerto Rico’s debt payments became due.<sup>57</sup>

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/news/monkey-cage/wp/2015/07/15/puerto-rico-cant-pay-its-debt-and-the-united-states-is-partly-to-blame [https://perma.cc/49EG-JFJL].

<sup>50</sup> See Kaske & Darie, *supra* note 43; Marcano-Rivera, *supra* note 49.

<sup>51</sup> See *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016).

<sup>52</sup> For years, Puerto Rico issued municipal bonds — or “munis” — to raise funds to offset declining government revenue. Puerto Rico “easily found investors,” as its bonds were tax exempt for U.S. investors and thus “paid higher yields than other munis.” Walsh & Moyer, *supra* note 44. With the expiration of the section 936 tax credit in 2006 and resulting economic malaise, however, Puerto Rico’s tax revenue plummeted. *Id.* Puerto Rico increased its borrowing to fill the gaps — a course that proved to be a band-aid on a bullet hole. *See id.*

<sup>53</sup> 2014 P.R. Laws Act No. 71. For descriptive analyses of the Recovery Act, see Recent Legislation, *Puerto Rico Public Corporation Debt Enforcement and Recovery Act*, 2014 P.R. Laws Act No. 71, 128 HARV. L. REV. 1320, 1322–23 (2015); and Stephen J. Lubben, *Puerto Rico and the Bankruptcy Clause*, 88 AM. BANKR. L.J. 553, 558–62 (2014).

<sup>54</sup> Recent Legislation, *supra* note 53, at 1320–21.

<sup>55</sup> 136 S. Ct. 1938.

<sup>56</sup> *Id.* at 1942. Justice Sotomayor disputed reading the Bankruptcy Code to preempt Puerto Rico’s ability to enact the Recovery Act, arguing that “[s]tatutes should not easily be read as removing the power of a government to protect its citizens.” *Id.* at 1954 (Sotomayor, J., dissenting).

<sup>57</sup> Nick Brown, *Puerto Rico Authorizes Debt Payment Suspension; Obama Signs Rescue Bill*, REUTERS (June 30, 2016, 7:16 PM), <http://www.reuters.com/article/us-puertorico-debt-idUSKCN0ZG09Y> [https://perma.cc/S8S6-UQDS].

Chief among its provisions, PROMESA establishes a federal Financial Oversight and Management Board (Oversight Board), whose stated purpose is “to provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets.”<sup>58</sup> Consisting of seven presidentially appointed members,<sup>59</sup> the Oversight Board is designed to function as the island’s “finance czar,” endowed with the power and responsibility to oversee the development and approval of (1) territory and instrumentality budgets<sup>60</sup> by Puerto Rico’s elected branches of government,<sup>61</sup> and (2) territory and instrumentality fiscal plans — pre-budget proposals “to achieve fiscal responsibility and access to the capital markets”<sup>62</sup> — by Puerto Rico’s elected Governor.<sup>63</sup>

The Oversight Board’s power runs broad.<sup>64</sup> Where “the Governor fails to submit . . . a Fiscal Plan that the Oversight Board determines *in its sole discretion* satisfies [PROMESA’s] requirements” by a specified deadline, then “the Oversight Board shall develop and submit to the Governor and the Legislature a Fiscal Plan.”<sup>65</sup> Such an Oversight Board–developed fiscal plan “*shall be deemed approved* by the Governor.”<sup>66</sup> Moreover, the Governor may not submit a proposed budget to the legislature for a given fiscal year before the Oversight Board certifies the territory fiscal plan for that fiscal year.<sup>67</sup> In regards to budgets, where Puerto Rico’s legislature and Governor “fail to develop and approve” a “compliant budget”<sup>68</sup> for the island on schedule, then “the Oversight Board shall submit a Budget to the Governor and the Legis-

<sup>58</sup> Pub. L. No. 114-187, § 101(a), 130 Stat. 549, 553 (2016); *id.* § 101(b)(1), 130 Stat. at 553.

<sup>59</sup> *Id.* § 101(e)(1)(A), 130 Stat. at 554. In addition to the presidential appointees, Puerto Rico’s Governor, or his designee, sits on the Oversight Board as a nonvoting ex officio member. *Id.* § 101(e)(3), 130 Stat. at 555.

<sup>60</sup> PROMESA defines “Territory Budget” as a “budget for a territorial government,” *id.* § 5(21), 130 Stat. at 552 which is “the government of a covered territory, including all covered territorial instrumentalities,” *id.* § 5(18), 130 Stat. at 552. While PROMESA defines “territory” to include not only Puerto Rico, but also four additional U.S. territories, *id.* § 5(20), 130 Stat. at 552, the Oversight Board established by PROMESA covers Puerto Rico alone, *see id.* § 101(b)(1), 130 Stat. at 553.

PROMESA defines “Instrumentality Budget” as a “budget for a covered territorial instrumentality, designated by the Oversight Board.” *Id.* § 5(13), 130 Stat. at 552. A “territorial instrumentality” can include “any political subdivision, public agency, instrumentality — including any instrumentality that is also a bank — or public corporation of a territory.” *Id.* § 5(19)(A), 130 Stat. at 552.

<sup>61</sup> *See id.* § 202, 130 Stat. at 566–68.

<sup>62</sup> *Id.* § 201(b)(1), 130 Stat. at 564.

<sup>63</sup> *See id.* § 201, 130 Stat. at 563–65.

<sup>64</sup> Congress’s stated constitutional basis for its establishment of the Oversight Board is the Territory Clause. *Id.* § 101(b)(2), 130 Stat. at 553 (citing U.S. CONST. art. IV, § 3).

<sup>65</sup> *Id.* § 201(d)(2), 130 Stat. at 565 (emphasis added).

<sup>66</sup> *Id.* § 201(e)(2), 130 Stat. at 566 (emphasis added).

<sup>67</sup> *Id.* § 201(c)(1), 130 Stat. at 564–65.

<sup>68</sup> Under PROMESA, a “compliant budget” is “a budget that is prepared in accordance with agreed accounting standards; and the applicable Fiscal Plan.” *Id.* § 5(6), 130 Stat. at 551.

lature . . . and such Budget *shall be . . . deemed to be approved* by the Governor and the Legislature; . . . [and] in full force and effect beginning on the first day of the applicable fiscal year.”<sup>69</sup> The Oversight Board exercises identical power where Puerto Rico’s Governor does not develop a “compliant budget” for an instrumentality on schedule.<sup>70</sup>

The Oversight Board’s congressional mandate to assume control over Puerto Rico’s finances in lieu of the Commonwealth’s elected government poses a direct challenge to the vitality of territorial federalism — a functional relationship that courts should recognize, one stemming from mimicry of traditional federalism’s shared power structure between national and subnational governments. With the imposition of the Oversight Board into the heart of the Commonwealth’s role as a government, that functional mimicry quickly begins to dissipate. PROMESA is much closer to legislation envisioned within a colonial relationship than a federal one; the Puerto Rican people certainly seem to see it as such.<sup>71</sup> What Congress has done to Puerto Rico with PROMESA — and may do to other U.S. territories in the future<sup>72</sup> — courts undoubtedly would not sanction if done to a sovereign state.<sup>73</sup> But Puerto Rico is a territory, not a state, and different rules apply.

But it need not be that way. To the contrary, an alternative approach to congressional authority over territorial self-governance — one in which the judiciary explicitly recognizes and safeguards territorial federalism as a matter of doctrine — is both necessary and appropriate. Now is the time to articulate such an approach and to give it force.

### B. Territorial Federalism in the Courts

1. *The Constitution and the Territories.* — Before turning to the theoretical and normative motivations that would undergird a judicial

<sup>69</sup> *Id.* § 202(e)(3), 130 Stat. at 567–68 (emphasis added).

<sup>70</sup> *Id.* § 202(e)(4), 130 Stat. at 568.

<sup>71</sup> See, e.g., David Dayen, *Protests Greet Puerto Rico Control Board*, AM. PROSPECT (Oct. 4, 2016), <http://prospect.org/article/protests-greet-puerto-rico-control-board> [https://perma.cc/62TT-F2EP]; Rafael Matos, Opinion, *Puerto Rico’s Rude Awakening*, N.Y. TIMES (July 14, 2016), <http://www.nytimes.com/2016/07/14/opinion/puerto-ricos-rude-awakening.html> [https://perma.cc/JH8A-FQLH]; Mary Williams Walsh, *Puerto Rico Debt Relief Law Stirs Colonial Resentment*, N.Y. TIMES: DEALBOOK (June 30, 2016), <http://www.nytimes.com/2016/07/01/business/dealbook/puerto-rico-debt-relief-law-stirs-colonial-resentment.html> [https://perma.cc/SBP7-RQV8].

<sup>72</sup> See Pub. L. No. 114-187, § 5(20), 130 Stat. at 552 (defining “territory” to include Puerto Rico, Guam, American Samoa, the CNMI, and the U.S. Virgin Islands).

<sup>73</sup> See *New York v. United States*, 505 U.S. 144, 162 (1992). While the Supreme Court has used the concept of sovereignty as a means to unpack the contours of federalism, see, e.g., *Alden v. Maine*, 527 U.S. 706, 713–15 (1999), it is worth noting that neither the term “sovereignty” nor any of its derivatives appear in the U.S. Constitution itself. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) (“To the Constitution of the *United States* the term SOVEREIGN, is totally unknown.”).

doctrine of territorial federalism, it is imperative to ascertain how understandings of the legal relationship between the United States and its territories have evolved over the centuries — and where that relationship, in the law, stands today.

(a) *Nineteenth-Century Foundations.* — Although initially “a more perfect Union”<sup>74</sup> of thirteen sovereign states concentrated along North America’s east coast, state membership in the nation’s political community has grown nearly fourfold in the succeeding centuries, expanding across the continent, and over both land and sea. The nation’s “supreme Law”<sup>75</sup> contemplated just such an expansion, explicitly endowing Congress with the power to admit new states to the Union.<sup>76</sup> These new states would have to come from somewhere.<sup>77</sup> In order to admit new states, then, the Union first required land from which to form them.<sup>78</sup>

Beginning with the Louisiana Purchase in 1803,<sup>79</sup> and as a matter of standard practice throughout the nineteenth century, the federal government enlarged the nation’s boundaries via territorial annexation and acquisition,<sup>80</sup> and then enlarged the nation’s sisterhood of states by developing and admitting new members.<sup>81</sup> In the interim — be-

<sup>74</sup> U.S. CONST. pmbl.

<sup>75</sup> *Id.* art. VI, cl. 2.

<sup>76</sup> *Id.* art. IV, § 3, cl. 1.

<sup>77</sup> Article IV limits the ability of Congress to form new states from existing states, either by carveout or combination. *See id.*

<sup>78</sup> This gradual expansion of the national community was made possible by the federal government’s regular acquisition of territory throughout the nineteenth century. *See infra* notes 79–81 and accompanying text. It is worth noting, however, that the power of the federal government to acquire territory has been a source of contention at various points in the nation’s history, including soon after the Founding. *See* JOSÉ LÓPEZ BARALT, *THE POLICY OF THE UNITED STATES TOWARDS ITS TERRITORIES WITH SPECIAL REFERENCE TO PUERTO RICO* 3–19 (1999). Yet such doubts have never plagued a majority of the Supreme Court, which as early as 1828 had determined — in an opinion authored by Chief Justice John Marshall — that “the government of the Union . . . possesses the power of acquiring territory,” seeming to locate the power as a corollary to the federal government’s powers over “making war” and “making treaties.” *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828).

<sup>79</sup> Treaty Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, 8 Stat. 200.

<sup>80</sup> *See, e.g.*, Joint Resolution for Annexing Texas to the United States, 5 Stat. 797 (1845) (annexation); Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of all the Russias to the United States of America, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539 (acquisition).

<sup>81</sup> *See* An Act to Provide for the Government of the Territory North-West of the River Ohio, 1 Stat. 50, 51 n.a (1789). The Northwest Ordinance of 1787 — which established the pattern of territorial development followed as a matter of course during the nineteenth century — “envisioned three stages in a territory’s evolution: (1) total governmental authority in an appointed Governor; (2) continuance of an appointed Governor but with an elected legislature and local courts; and (3) Statehood.” ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 6 (1989).

tween a territory's<sup>82</sup> initial formation as a political entity and its admission as a sovereign state on “equal footing” with its sisters<sup>83</sup> — the responsibility to govern the territory fell to Congress, in the exercise of its power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>84</sup> The Court has long given a generous reading to this grant of authority over territorial “Rules and Regulations,” noting as far back as 1828 that “[i]n legislating for [the territories], Congress exercises the combined powers of the general, and of a state government.”<sup>85</sup> A unanimous Court reiterated this stance in 1879, stating in no uncertain terms that “Congress is supreme [over the territories], and for the purposes of this department of its governmental authority has all the powers of the people of the United States.”<sup>86</sup>

The Court's articulation of the scope of federal power over territorial governance may seem a jurisprudential oddity when one considers what distinguishes territories, as a constitutional class, from states: absence of direct representation in the federal government. Since the

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<sup>82</sup> Here, “territory” refers to the *political entities* admitted as states to the Union, not the *land* that came into the possession of the United States, much of the latter being carved up into the former. For example, fifteen states include land acquired in the Louisiana Purchase. Joseph Harris, *How the Louisiana Purchase Changed the World*, SMITHSONIAN MAG. (Apr. 2003), <http://www.smithsonianmag.com/history/how-the-louisiana-purchase-changed-the-world-79715124/> [https://perma.cc/5K44-AT26].

<sup>83</sup> See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 35 (1831) (Baldwin, J., concurring); see also *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 n.4 (2016) (explaining the “equal footing” doctrine).

<sup>84</sup> U.S. CONST. art. IV, § 3, cl. 2. While several high-profile nineteenth-century commentators disputed the interpretation of the Constitution's Territory Clause that brought within its purview territories acquired or annexed after the Founding, most early members of Congress read the clause to empower Congress to govern all U.S. territories, regardless of when they came under U.S. control. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 172–73 (2002); see also *id.* at 172 n.1179 (quoting 13 ANNALS OF CONG. 474 (1803) (statement of Rep. Caesar A. Rodney)).

The Supreme Court endorsed this reading of the Territory Clause within the nation's first few decades. See *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828). At that time, the Court considered the implications of the minority reading, noting that “the power of governing a territory . . . , which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States.” *Id.* at 542–43. The Court also considered whether “[t]he right to govern, may be the inevitable consequence of the right to acquire territory.” *Id.* at 543. The Court concluded that “[w]hichever may be the source, whence the power is derived, the possession of it is unquestioned.” *Id.*

<sup>85</sup> *Am. Ins. Co.*, 26 U.S. (1 Pet.) at 546.

<sup>86</sup> *Nat'l Bank v. Cty. of Yankton*, 101 U.S. 129, 133 (1879); see also *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840) (“Congress has the same power over [U.S. territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest.”); Burnett, *supra* note 5, at 816–17 (reviewing this history).

Founding, U.S. territories — unlike the states they were theoretically destined to become — have been constitutionally ineligible for voting representation in Congress<sup>87</sup> or the Electoral College.<sup>88</sup> Instead, any representation that the territories and their inhabitants receive is purely “virtual” in nature.<sup>89</sup> For a nation established on the ideals of democratic self-rule, representative government, and popular sovereignty, such a state of affairs — broad national power with no direct voice in the same — may appear inconsistent with these ideals, if not outright hypocritical.<sup>90</sup>

Yet hypocritical the Territory Clause was not intended to be. Rather, the extent of Congress’s power over territorial “Rules and Regulations” mirrored Congress’s responsibility in that power’s exercise: to develop new states for entry into the Union.<sup>91</sup> Affirming the duty of the United States with regard to “the unappropriated lands that may be ceded or relinquished” to it by the several states, the Continental

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<sup>87</sup> See U.S. CONST. art. I, § 2, cl. 1 (House of Representatives); *id.* art. I, § 3, cl. 1 (Senate). However, Congress has authorized the territories to elect nonvoting delegates to the House of Representatives. See 2 U.S.C. § 25a (2012) (Washington, D.C.); 48 U.S.C. § 891 (2012) (Puerto Rico); § 1711 (Guam and the U.S. Virgin Islands); § 1731 (American Samoa); § 1751 (CNMI).

<sup>88</sup> See U.S. CONST. art. II, § 1, cl. 1–2. Washington, D.C., is an exception to this general rule. See *id.* amend. XXIII.

<sup>89</sup> The theory of virtual representation posits that “elected actors represent . . . individuals that can vote as well as those that cannot, because the interests of both parties are assumed to be very nearly related, and most inseparably connected.” Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 *FORDHAM L. REV.* 175, 233 (2012). However, as will be discussed *infra* p. 1653, virtual representation may not be able to adequately protect minority interests.

<sup>90</sup> It is useful at this juncture to consider the territories in relation to two other categories of political entities that exist outside the federal-state archetype: municipalities and Indian tribes. At first glance, the relationships between municipalities and their state governments may appear substantially analogous to those between territories and the federal government. Under longstanding law, municipalities are mere subdivisions, or agencies, of the state with no autonomy outside the four corners of home-rule arrangements that themselves exist essentially at the mercy of the state. See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907); *City of New York v. State*, 65 N.E.2d 649, 651 (N.Y. 1995). Unlike U.S. territories, however, municipalities possess protections of structure and process within their respective states, with city residents possessing voting representation in their state legislatures and the right to vote for state governors. Cf. *supra* notes 87–88 and accompanying text. Thus, despite superficial similarities to territories, municipalities in fact receive protections parallel to those of the states via the political process — protections unavailable to the territories. Likewise, the Indian tribes — whose powers of local self-government “Congress has plenary authority to limit, modify or eliminate,” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) — are directly represented in both state and federal governmental institutions through the votes of their citizens, see Office of Tribal Justice, *About Native Americans*, U.S. DEP’T OF JUSTICE (June 17, 2014), <https://www.justice.gov/otj/about-native-americans> [https://perma.cc/6GJF-KK7Z]. Territories are therefore uniquely excluded from the halls of federal power, with no direct representation to their names. While such representation would not guarantee desirable substantive outcomes in all circumstances, the inability to access the procedural safeguards of the political process can make achieving such outcomes considerably more difficult.

<sup>91</sup> See LEIBOWITZ, *supra* note 81, at 8 (arguing the same).

Congress in 1780 resolved that these territorial possessions “shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states.”<sup>92</sup> Despite the revolution against the Articles of Confederation embodied by the 1787 Constitution and the “more perfect Union” that it heralded, the nation’s first century bore witness to the continued vitality of this territory-to-statehood trajectory: America’s nineteenth-century territories — all of them — eventually assumed the status of statehood.<sup>93</sup>

Logically, then, Congress’s responsibilities in exercising its power over the territories would seem to limit the substance of the “Rules and Regulations” that it could lawfully impose. Under this view, this broad constitutional language does not necessarily grant Congress a free hand to do with America’s territories as it deems fit; on the contrary, Congress’s hands seem tied to a large extent by the obligation to prepare territories for entry into the sisterhood of states — an obligation incompatible with territories held as such in perpetuity, akin to colonial possessions<sup>94</sup> rather than proto-states.<sup>95</sup>

If indeed a given territory’s admission to the Union as a state is for all intents and purposes preordained, then the problematic anti-democratic nature of territorial status in the U.S. constitutional system becomes slightly less problematic. Within this framework, territorial status is simply a temporary condition, one that gives Congress the necessary degree of authority to adequately prepare the territory to assume the obligations of statehood. Conceptually, a territory is not a colony of the United States; it is a state-in-waiting.<sup>96</sup>

<sup>92</sup> 18 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 915 (Gaillard Hunt ed., 1910).

<sup>93</sup> See Brief for Amici Curiae Professors Christina Duffy Ponsa and Sam Erman in Support of Respondents at 6, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016) (No. 15-108), 2015 WL 9459831, at \*6 (observing that “every territory annexed prior to 1898 eventually gained admission into statehood and concomitant separate sovereignty [from the federal government] after adopting a constitution that would become the state constitution”).

<sup>94</sup> As the terms are used in this Chapter, “colonial possessions” or “colonies” refer to lands — and the people who inhabit them — subjected, for an indefinite period of time, to “alien subjugation, domination and exploitation,” G.A. Res. 1514 (XV), ¶ 1, Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

<sup>95</sup> Chief Justice Taney, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) — a case long discredited for its rejection of the citizenship and personhood of slaves — articulated this understanding of the status of territories, as well as Congress’s relationship to them and end goal for them. See *id.* at 447 (noting that territory “is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority”).

<sup>96</sup> This conceptual difference has been crucial to America’s “civic imagination.” Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 267 (2015) (observing that America’s “civic imagination” views “the country from its birth [as having] been anti-imperial, conceived as an assault on an entire ‘system of social hierarchy’”).

(b) *Twentieth-Century Innovations*. — However, such a conception of U.S. territorial possessions did not withstand shifting U.S. political ambitions at the turn of the twentieth century. With the conclusion of the Spanish-American War in 1898, the United States acquired sovereignty over three Spanish colonial possessions: Puerto Rico, Guam, and the Philippines.<sup>97</sup> By so doing, President William McKinley and his administration “embarked on an altogether different project” from their nineteenth-century brethren: “the acquisition of colonies, not as a means toward the end of making new states, but as an end in itself.”<sup>98</sup>

In a series of decisions collectively known today as the *Insular Cases*,<sup>99</sup> the Supreme Court endorsed the McKinley Administration’s approach, articulating a new doctrine of “territorial incorporation” in the process.<sup>100</sup> Of the *Insular Cases*, *Downes v. Bidwell*<sup>101</sup> — and particularly Justice Edward Douglass White’s now-signature concurrence<sup>102</sup> — has come to be considered the most consequential for defining the unique constitutional status of U.S. territories acquired as a result of and since the Spanish-American War.<sup>103</sup> *Downes* posed the question whether the newly acquired territory of Puerto Rico was part of the “United States” for purposes of the Constitution’s Uniformity Clause,<sup>104</sup> which requires that “all Duties, Imposts, and Excises shall be uniform throughout the United States.”<sup>105</sup>

The *Downes* Court held that it was not, with a plurality of the Court concluding that Puerto Rico “is a territory appurtenant and belonging to the United States, but not a part of the United States,” at least for purposes of the Uniformity Clause.<sup>106</sup> Writing a concurrence whose reasoning was adopted by a majority of the Court within three years,<sup>107</sup> and by a unanimous court in 1922<sup>108</sup> — Justice White reached the plurality’s judgment, but reached the judgment via an al-

<sup>97</sup> See Treaty of Paris, *supra* note 14, arts. II, III.

<sup>98</sup> Burnett, *supra* note 5, at 799; see also *id.* at 805–06 (explaining that the United States gave in to “the temptations of possession,” *id.* at 806).

<sup>99</sup> The particular makeup of the set of cases comprising the *Insular Cases* is a matter of some dispute. See, e.g., *id.* at 798 n.2, 809 & nn.45–47.

<sup>100</sup> See *id.* at 806–10.

<sup>101</sup> 182 U.S. 244 (1901).

<sup>102</sup> *Id.* at 287 (White, J., concurring); see also *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (“[T]he opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.”); Burnett, *supra* note 5, at 806–07.

<sup>103</sup> See, e.g., LAUGHLIN, JR., *supra* note 6, at 115; Burnett, *supra* note 5, at 806.

<sup>104</sup> See *Downes*, 182 U.S. at 249 (plurality opinion).

<sup>105</sup> U.S. CONST. art. I, § 8.

<sup>106</sup> *Downes*, 182 U.S. at 287 (plurality opinion).

<sup>107</sup> See *Dorr v. United States*, 195 U.S. 138, 140 (1904).

<sup>108</sup> See *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

ternative line of reasoning.<sup>109</sup> To Justice White, while Puerto Rico was not a foreign country in an “international sense,” as “it was subject to the sovereignty of and was owned by the United States,”<sup>110</sup> Puerto Rico was nevertheless “foreign to the United States in a domestic sense, because the island had not been *incorporated* into the United States, but was merely appurtenant thereto as a possession.”<sup>111</sup> In Justice White’s view, *incorporated* territories form an integral part of the United States and are on the path to statehood;<sup>112</sup> *unincorporated* territories such as Puerto Rico do not and are not.<sup>113</sup>

Yet Justice White did not end his analysis by drawing a distinction between those territories that are incorporated and those that are not. Expanding on the constitutional consequences of the distinction, he explained that while “it is lawful for the United States to take possession of and hold . . . a particular territory, without incorporating it into the United States,” the authority to do so includes “obligations of honor and good faith which . . . sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so.”<sup>114</sup> Moreover, Justice White suggested that “for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated” could conceivably amount to a “violation of duty under the Constitution.”<sup>115</sup>

Beneath the surface of his reasoning, Justice White seemed aware that the prospect of the United States as a colonial empire raised a quandary of potentially constitutional — not simply political or moral — magnitude. At least as a matter of “honor and good faith,” but possibly as a constitutional matter as well,<sup>116</sup> any unincorporated territory must one day become incorporated and be put on a path to statehood, or must be released from U.S. sovereignty to forge a path of its own.<sup>117</sup>

(c) *Contemporary Implications.* — Now subject to U.S. sovereignty for well over a century, and despite its high degree of state-like self-

<sup>109</sup> *Downes*, 182 U.S. at 287 (White, J., concurring). An argument that prefigured Justice White’s had been offered in these very pages two years earlier. See Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155, 176 (1899).

<sup>110</sup> *Downes*, 182 U.S. at 341 (White, J., concurring).

<sup>111</sup> *Id.* at 341–42 (emphasis added).

<sup>112</sup> Washington, D.C., is an exception to this rule.

<sup>113</sup> Burnett, *supra* note 5, at 799–800. Congress, in the exercise of its power under the Territory Clause, may determine whether a given territory will be incorporated into the United States. See *Balzac*, 258 U.S. at 305 (quoting *Dorr v. United States*, 195 U.S. 138, 149 (1904)). Moreover, Congress may “incorporate” an unincorporated territory through appropriate legislation. See *id.*

<sup>114</sup> *Downes*, 182 U.S. at 343 (White, J., concurring).

<sup>115</sup> *Id.* at 343–44.

<sup>116</sup> *Id.*

<sup>117</sup> See Burnett, *supra* note 5, at 799 (arguing that the *Insular Cases* articulate a doctrine of “territorial deannexation”).

rule, Puerto Rico remains classified for constitutional purposes as an unincorporated territory.<sup>118</sup> As such, the island and its millions of U.S. citizens remain subject to Congress's power to legislate over them "without limitation" and without end, at least according to conventional accounts of congressional power over territorial governance.<sup>119</sup>

The situation in which Puerto Rico finds itself today illustrates well the considerable disconnect between the nineteenth- and twentieth-century political and legal thought vis-à-vis U.S. territories' status in the American constitutional system. In the nineteenth century, congressional exertion of wide-ranging authority over territorial governance — an authority repeatedly affirmed throughout the century by the nation's highest court — operated as a provisional necessity. Congress exercised such power to prepare territories for the role of statehood and then allowed them to assume that role — a process repeated dozens of times in America's first century.<sup>120</sup>

Then, however, the Supreme Court in the *Insular Cases* inaugurated a novel and enduring constitutional line in its territorial jurisprudence, articulating for the first time a distinction between territories that are "incorporated" and those that are not. As a constitutionally unincorporated territory, Puerto Rico is not on a path to statehood, but neither is it necessarily on a path to independence. Rather, it remains stuck in a constitutional limbo — a limbo of the Supreme Court's creation. While Justice White at least implicitly acknowledged the ends to which his reasoning could lead — to territories perpetually classified as constitutionally unincorporated, and for whom sovereign recognition, whether via statehood or independence, would likewise remain unachieved — he assumed America's national leaders would act in good faith to avoid such a state of affairs.<sup>121</sup> Nearly 120 years since Puerto Rico became a U.S. territory, this assumption seems ripe for reconsideration.

Perhaps most problematically for Puerto Rico, when the Court in the *Insular Cases* reimagined the constitutional status of U.S. territories, it did not simultaneously reimagine Congress's power over them. Instead, Congress's power over *all* territories — a power rooted in the body's perceived duty to prepare a territory for statehood — remained

<sup>118</sup> See *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 160 n.21 (1st Cir. 2005).

<sup>119</sup> *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). *But see* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 447 (1857); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 401 (1899) ("A power to rule [the territories] without restriction, as a colony or dependent province, would be inconsistent with the nature of our government.").

<sup>120</sup> See *supra* note 93 and accompanying text; see also Burnett, *supra* note 5, at 825–26, 825 n.127 (listing nineteenth-century congressional acts establishing governments in the then-U.S. territories).

<sup>121</sup> See *Downes*, 182 U.S. at 343–44 (White, J., concurring).

unchanged in scope and substance, despite the new category of the unincorporated territory for which statehood was far from inevitable. Moreover, while the Court articulated independence as another potential end for which Congress could prepare these territories, and at least one unincorporated territory has in fact embarked on such a path,<sup>122</sup> perhaps the option of two potential ends rather than a single definitive one has exacerbated rather than curtailed the limbo, creating an uncertainty that Congress can exploit to avoid resolution.

Yet judicial recognition and protection of territorial federalism would be a meaningful step toward ameliorating this constitutional conundrum,<sup>123</sup> offering both (1) a robust restriction on Congress's ability to interfere with local democratic institutions and decisionmaking in the territories, and (2) a means to move territories toward a sovereign future, be it statehood or independence. After all, a jurisprudence built around maintaining a viable territorial federalism can provide a means by which Puerto Rico and its sister territories — all unincorporated under current law — can functionally mimic the states' relationship to the federal government, in the process obtaining the relationship's benefits for the territories, their citizens, and the federal government alike.

And those benefits are many. Accordingly, courts have long concerned themselves with maintaining this American invention<sup>124</sup> — a mission that should likewise apply to the federal-territory relationship.

2. *Federalism and the Courts.* — As traditionally understood, federalism has involved the constitutional division of governmental authority between independent sovereign entities, federal and state, with its ultimate goal being to protect individual liberty from the arbitrary exercise of public power.<sup>125</sup> This focus on liberty is key to understand-

<sup>122</sup> See Philippine Independence Act (Tydings-McDuffie Act), Pub. L. No. 73-127, 48 Stat. 456 (1934); Proclamation No. 2695, 11 Fed. Reg. 7517 (July 8, 1946).

<sup>123</sup> One may argue that such a resolution to the "conundrum" simply palliates it by avoiding a confrontation with the conundrum's legal, political, and moral foundations and premises, and by consigning territories to perpetual step-siblinghood. For its part, this Chapter limits itself to the current framework of incorporated-unincorporated territories, assuming its continued force and choosing to work within it to explore how territories' rights to self-governance can most effectively be protected. Numerous scholars have taken an alternate tack, criticizing the framework itself and working toward its delegitimization. See, e.g., JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

<sup>124</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery."); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1448-51 (1987) (discussing the development of American-style federalism).

<sup>125</sup> In other words, "federalism enabled the American People to conquer government power by dividing" national and regional loci of authority. Amar, *supra* note 124, at 1450. Moreover, federalism was designed to work in tandem with the separation of powers within each sovereign, ensuring that "different governments will control each other, at the same time that each will be controlled by itself." *THE FEDERALIST NO. 51*, at 320 (James Madison) (Clinton Rossiter ed., 2003).

ing federalism's historical appeal. As the Supreme Court has come to understand the concept, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from [the] arbitrary [exercise of governmental] power."<sup>126</sup> No sovereign entity possesses all of the power of government, but only some of it. Federalism therefore functions as a "safeguard against tyranny by preventing concentration of governmental power and providing countervailing centers of power."<sup>127</sup>

The Court polices federalism's boundaries — and in the process safeguards its virtues — via myriad lines of jurisprudence,<sup>128</sup> including through its exposition of the Bill of Rights' concluding provision: the Tenth Amendment.<sup>129</sup> Arguably the U.S. Constitution's most explicit contemplation of a doctrine of federalism, the Tenth Amendment's significance as a judiciable reservoir of states' rights has been anything but constant since its adoption. During a sixty-year period in the twentieth century alone, the Court went from characterizing the Amendment as reserving areas of state power free from federal incursion,<sup>130</sup> to "stat[ing] but a truism,"<sup>131</sup> to protecting "States' freedom to structure integral operations in areas of traditional governmental functions"<sup>132</sup> — oscillating between hands-on and hands-off approaches to judicial regulation of federalism.

The Court's move in the late 1970s toward acting as the umpire in federal-state power disputes — and putting judicial teeth in the Tenth Amendment — arose in *National League of Cities v. Usery*.<sup>133</sup> From

<sup>126</sup> *Bond v. United States*, 564 U.S. 211, 222 (2011).

<sup>127</sup> Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 7 (1994). In addition to its liberty-promoting function, federalism is also understood to promote policy competition and experimentation among states, offer choices to citizens as to the policies under which they would prefer to live, and encourage citizen participation in government. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1891 (2014). It has also been endorsed as a militaristically valuable defensive organization, as a tool of cultural and economic integration and development, and as a means to achieve and implement efficient solutions to local and national problems. Rosenn, *supra*, at 6–7.

<sup>128</sup> See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (Commerce and Spending Clauses); *Wyeth v. Levine*, 555 U.S. 555 (2009) (preemption); *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008) (dormant commerce clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Fourteenth Amendment).

<sup>129</sup> U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>130</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 273–76 (1918) (holding that the Tenth Amendment reserves the regulation of "purely local matter[s]," *id.* at 276, to the states), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

<sup>131</sup> *Darby*, 312 U.S. at 124.

<sup>132</sup> *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>133</sup> 426 U.S. 833. In *National League of Cities*, the Court concluded that Congress's regulation of the minimum wages and maximum working hours of the employees of the states and their subdivisions violated the Tenth Amendment. See *id.* at 852.

the proposition that “there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers,”<sup>134</sup> the Court fashioned a doctrine to protect certain “attributes of sovereignty attaching to every state government” from interference by Congress, *not* because Congress lacks the constitutional authority, “but because the Constitution prohibits [Congress] from exercising the authority in *that* manner.”<sup>135</sup> Under this view, the Tenth Amendment shielded areas of “traditional [state] governmental functions” — like state employees’ wages — from federal displacement.<sup>136</sup>

Despite signaling a reinvigoration of the judicial refereeing of federalism, however, *National League of Cities* proved short-lived. In 1985, the Supreme Court returned to the federalism dispute in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>137</sup> To the *Garcia* Court, the “traditional governmental functions” test introduced in *National League of Cities* proved “not only unworkable [as a doctrinal approach] but . . . also inconsistent with established principles of federalism.”<sup>138</sup> Importantly, to support its latter contention, the *Garcia* Court relied on structure and process to justify the judiciary’s relegation to the background in quarrels over the metes and bounds of federalism. In the Court’s view, “the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress”<sup>139</sup> — from the states’ control over congressional electoral qualifications<sup>140</sup> to their role in presidential elections<sup>141</sup> to their guarantee of equal representation in the Senate.<sup>142</sup> Against this structural background and the political process that it scaffolds — and even considering any changes in post-Founding federal structure that may alter state influence in the federal government<sup>143</sup> — the *Garcia* Court determined that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>144</sup> In short, politics — the product of structure and process — can be counted on to effectively regulate traditional federalism; law is inefficient in comparison.

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<sup>134</sup> *Id.* at 842.

<sup>135</sup> *Id.* at 845 (emphasis added).

<sup>136</sup> *Id.* at 852.

<sup>137</sup> 469 U.S. 528.

<sup>138</sup> *Id.* at 531.

<sup>139</sup> *Id.* at 550–51.

<sup>140</sup> See U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII.

<sup>141</sup> See *id.* art. II, § 1, cl. 1–2.

<sup>142</sup> *Id.* art. I, § 3, cl. 1; see also *id.* art. V (protecting states’ equal representation in the Senate).

<sup>143</sup> Compare *id.* art. I, § 3, cl. 1 (providing that state legislatures will select the states’ Senators), with *id.* amend. XVII (providing for the popular election of Senators).

<sup>144</sup> *Garcia*, 469 U.S. at 552.

Although invoking the Tenth Amendment in a line of cases involving the federal “commandeering” of state government for federal policy ends,<sup>145</sup> the Court post-*Garcia* has refrained from applying a *National League of Cities*-style Tenth Amendment jurisprudence to regulate federalism.<sup>146</sup> However, where territorial federalism is in play, the *Garcia* Court’s observations regarding relationship management by means of structure and process have no purchase. The Constitution draws a bright line between states and other types of political entities, with the latter group being constitutionally excluded from the structure- and process-based protections identified by the *Garcia* Court to justify a soft judicial hand in federal-state disputes. As explained in section A, the territories are not eligible to receive direct voting representation in the federal government.<sup>147</sup> Although PROMESA represents a profound assertion of federal authority that goes to the heart of Puerto Rican self-governance — a clear shift away from local autonomy and toward a centralized congressional control more akin to classic colonialism — the Puerto Rican people have no say in the law where it counts the most: at the ballot box. Moreover, as residents of an unincorporated territory, the Puerto Rican people are understood to lack any guarantee that they will receive such a say in the future.

With *Garcia* as a point of comparison, then, the potential role of the judiciary vis-à-vis territorial federalism comes into sharper relief.

3. *Toward a Doctrine of Territorial Federalism.* — How should courts think about territorial federalism, at least once such relationships have been functionally ordained and established between Congress and a given territory?<sup>148</sup>

As explained above, *Garcia*’s political process-oriented approach will not do. Furthermore, the traditional interpretation of the scope and substance of Congress’s powers under the Territory Clause — developed long before *Downes*<sup>149</sup> — simply may not be defensible in the age of seemingly permanently unincorporated territories, a constitu-

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<sup>145</sup> See *New York v. United States*, 505 U.S. 144, 149, 174–76 (1992) (involving the federal commandeering of state legislative functions); *Printz v. United States*, 521 U.S. 898, 925–33 (1997) (involving the federal commandeering of state executive functions).

<sup>146</sup> It should be noted that *Garcia*’s status as good law has been questioned based on post-*Garcia* legal developments. See MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 144 (2016). Interestingly, assuming arguendo that the Court has implicitly repudiated *Garcia*’s political process rationale in its post-*Garcia* case law, the case in favor of judicial protection of territorial federalism grows only more compelling; after all, if the Court views structure and process as inadequate safeguards for states, then territories’ complete lack of such safeguards in the first instance would seem deficient indeed.

<sup>147</sup> See *supra* notes 87–88 and accompanying text.

<sup>148</sup> As previously mentioned, this Chapter reserves the question of whether Congress has an *ex ante* constitutional duty to create such relationships. See *supra* note 10.

<sup>149</sup> See *supra* notes 85–86 and accompanying text.

tional category wherein America's foundational ideals of democratic self-rule, representative government, and popular sovereignty may be left subject to congressional grace in perpetuity.

Here, then, an alternative approach begins to take shape, one in which the courts would actively scrutinize congressional intervention in territorial self-governance. Under this approach, the courts — cognizant of the vulnerability of unincorporated territories to politics in which they lack voting representation and to which they may continue to be subject indefinitely — would recognize and protect territorial federalism through the application of a robust form of judicial review.

Exacting judicial review in cases implicating territorial federalism would by no means be a new feature of American jurisprudence; the Court as far back as *McCulloch v. Maryland*<sup>150</sup> has wielded just such a weapon against malfunctions in representative government,<sup>151</sup> and has regularly returned to the subject.<sup>152</sup> More recently, Professor John Hart Ely connected an acknowledgement of, and concern for, failures of representation and participation in the American political process to the Warren Court's constitutional jurisprudence,<sup>153</sup> which Ely convincingly argued was both theoretically sound and normatively desirable.<sup>154</sup>

Accepting the “foundational democratic principles of participation and representation” as the touchstones of judicial review,<sup>155</sup> the case for judicial recognition and affirmative protection of territorial federalism becomes compelling. Unlike a state,<sup>156</sup> which possesses the procedural means to meaningfully advocate on its behalf via the normal po-

<sup>150</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>151</sup> While articulating his “participation-oriented, representation-reinforcing” model of judicial review, Professor John Hart Ely looked to *McCulloch* for its jurisprudential seeds. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980); *see also McCulloch*, 17 U.S. (4 Wheat.) at 428–31 (framing the problem with Maryland's tax on a congressionally chartered national bank as one of representation). In Ely's view, *McCulloch* suggests that “in some situations judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests.” ELY, *supra*, at 86.

<sup>152</sup> *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting situations where restrictions imposed on or failures of the political process may justify “more exacting judicial scrutiny”).

<sup>153</sup> *See ELY, supra* note 151, at 73–75.

<sup>154</sup> To Ely, a “participation-oriented, representation-reinforcing” model of judicial review honors the Constitution's provisions, which protect process — ensuring “procedural fairness in the resolution of individual disputes” and “broad participation in the processes and distributions of government” — while leaving “the selection and accommodation of substantive values . . . almost entirely to the political process,” *id.* at 87; answers the countermajoritarian difficulty; supports the underlying principles of American representative democracy; and “involves tasks that courts . . . can sensibly claim to be better qualified and situated to perform than political officials,” *id.* at 88; *see also id.* at 88–104 (expanding on the justifications for the model).

<sup>155</sup> Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 643 (1991).

<sup>156</sup> The same could be said for a municipality or an Indian tribe. *See supra* note 90.

litical process, a U.S. territory has no such tools; it is devoid of voting representation in the federal legislature and Executive, and dependent instead on “virtual” representation to consider its policy preferences and local interests. However, as PROMESA aptly illustrates, such virtual representation is a poor substitute for actual votes; after all, members of Congress necessarily hail from the states, as have all Presidents.<sup>157</sup> These political decisionmakers “lack the sort of firsthand experience . . . that would enable them to empathize with [the territories’] problems and needs,”<sup>158</sup> especially given the current territories’ geographic characteristics — all are islands far from the continental U.S. — and unique linguistic, social, political, and cultural heritages.

In light of those theoretical foundations, a court’s hypothetical wrestling with PROMESA comes into sharper relief. The federal Oversight Board that PROMESA establishes takes direct aim at the heart of Puerto Rico’s local autonomy: the budgeting of local resources. Enacted by a government in which the island’s people have no direct representation, PROMESA upsets in significant and troubling ways the effective operation of Puerto Rico’s democratically elected government — the government of a polity that has functionally mimicked a state, and that by and large has been afforded the autonomy of a state by all branches of the federal government, for well over half a century.<sup>159</sup> Therefore, should a legal challenge to Congress’s constitutional authority to enact PROMESA be brought, courts should take care to consider its practical effect on Puerto Rican self-rule, Puerto Rico’s historical relationship with the federal government, and Puerto Rico’s legal status and its consequences in the U.S. political process. In short, it should take such a challenge seriously, recognizing territorial federalism and its value, and protecting it accordingly.

### C. Conclusion

During America’s first century, the inevitability of statehood — and with it, formal representation in the federal government — for all U.S.

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<sup>157</sup> The Constitution’s presidential eligibility requirements could be read to permit, say, a Puerto Rican resident to assume the nation’s highest elected office, assuming the phrase “Resident within the United States” is read to include residents of unincorporated territories, which on its face seems contrary to the reasoning underlying the *Insular Cases*. U.S. CONST. art. II, § 1, cl. 5.

<sup>158</sup> Posner, *supra* note 155, at 643. It is useful to compare the political situations of Puerto Rico and its sister U.S. territories to the political situation of noncitizen aliens, who both lack the ability to participate, and lack adequate representation due to the shortcomings of virtual representation in the political process. *Id.* Ely also points to discrimination against aliens as “a relatively easy case” for judicial review under his model. ELY, *supra* note 150, at 161–62.

<sup>159</sup> Even assuming no obligation on Congress to provide Puerto Rico with democratic self-rule or particular powers in the first instance, unilaterally rescinding major delegations on which a population with no direct federal representation has come to rely raises the spectre of unconstitutional coercion, an issue the Court has flagged where representation is not at issue. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2602–03 (2012) (opinion of Roberts, C.J.) (federal-state context).

territories could have been said to alleviate the democratic difficulties inherent in their relationship to Congress. With the turn of the twentieth century, however, statehood became far from inevitable for those U.S. territories deemed “unincorporated,” Puerto Rico among them. This comparably novel category of territories — a category unlikely to be repudiated by the Court in the near future<sup>160</sup> — exists in a constitutional limbo, and while these territories notionally maintain the possibility to one day choose either statehood within the U.S. federal framework or independence from it, such a possibility may be far from likely for most.<sup>161</sup> A new model of judicial review of congressional intervention in territorial self-governance is therefore warranted — one that vindicates the functional federalism that has historically defined the structure of the federal-territory relationship. The theoretical seeds of that model already exist in both the case law and the scholarship. This Chapter seeks to help them grow.

Admittedly, this Chapter’s reach is limited and leaves many questions unanswered. For example, how should a court formulate its doctrinal approach to defending territorial federalism? Should it look to the Court’s past and present caselaw on traditional federalism for guidance — perhaps applying something akin to its broad approach under *National League of Cities*, or something akin to its narrower approach in its contemporary anticommandeering jurisprudence, or something in between? Or should a court simply start anew? More fundamentally, even if courts are theoretically justified in intervening in the federal-territory relationship, should they nonetheless refrain for prudential or other reasons? This Chapter raises these ideas in the hopes that a future piece will pursue them.

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<sup>160</sup> See *Boumediene v. Bush*, 553 U.S. 723, 757–59 (2008).

<sup>161</sup> Of the five permanently populated insular territories, Puerto Rico seems the most likely to eventually achieve either statehood or independence. See LAUGHLIN, JR., *supra* note 6, at 14. In fact, Puerto Rican statehood has been much discussed in the six-plus decades since 1952. See, e.g., Chris Bodenner, *The State of Puerto Rican Statehood*, THE ATLANTIC: NOTES (Mar. 7, 2016, 12:45 PM), <http://www.theatlantic.com/notes/2016/03/the-state-of-puerto-rican-statehood/472599> [https://perma.cc/PAR8-MLCR]. In a nonbinding referendum on the status of Puerto Rico in 2012, sixty-one percent of Puerto Ricans that cast votes on the status question supported statehood. See Mariano Castillo, *Puerto Ricans Favor Statehood for First Time*, CNN (Nov. 8, 2012, 10:32 AM), <http://www.cnn.com/2012/11/07/politics/election-puerto-rico> [https://perma.cc/NPN7-4HYC]. A bill to set forth a process by which to admit Puerto Rico as a state was introduced in the 114th Congress. See H.R. 727, 114th Cong. (2015).

Either statehood or independence seems substantially less likely for the remaining insular territories, due in large part to their population sizes. See LAUGHLIN, JR., *supra* note 6, at 14. Therefore, while the relationship between Puerto Rico and the federal government presents the paradigm for territorial federalism, it may simultaneously present the weakest case for it; after all, the case for recognizing territorial federalism becomes far stronger where a lack of viable alternatives makes territorial status, for all intents and purposes, permanent.