

*Puerto Rico Oversight, Management, and Economic Stability Act —
Sovereign Immunity — Eleventh Amendment — U.S. Territories —
Financial Oversight & Management Board for Puerto Rico v.
Centro de Periodismo Investigativo, Inc.*

Puerto Rico is in a state of crisis. The island bears a debt burden of more than seventy-two billion dollars,¹ retains lasting damage from natural disasters whilst being subject to discriminatory restrictions on federal aid,² and is vulnerable to corporate interests and exploitation.³ The resultant austerity measures imposed in response to the debt crisis have raised critical legal and political questions about the appropriate solution to the island's distress, the limited role of Puerto Rican citizens in the recovery process, and the fraught status of Puerto Rico as a territory of the United States.⁴ Last Term, in *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*⁵ (*FOMB*), the Supreme Court held that Congress did not clearly abrogate the sovereign immunity of the Financial Oversight and Management Board created by the Puerto Rico Oversight, Management, and Economic Stability Act⁶ (PROMESA).⁷ But, by declining to decide or even discuss the issue of whether the federally appointed Board could

¹ Lorae Stojanovic & David Wessel, *Puerto Rico's Bankruptcy: Where Do Things Stand Today?*, BROOKINGS (Aug. 17, 2022), <https://www.brookings.edu/blog/up-front/2022/08/17/puerto-ricos-bankruptcy-where-do-things-stand-today> [<https://perma.cc/HBZ3-ZV37>]; see also Natasha Lycia Ora Bannan, *Puerto Rico's Odious Debt: The Economic Crisis of Colonialism*, 19 CUNY L. REV. 287, 287 (2016).

² See Fernando Tormos-Aponte, Mary Angelica Painter & Sameer H. Shah, *Puerto Rico's Electricity Problems Go Beyond Maria and Fiona*, WASH. POST (Sept. 28, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/09/28/puerto-ricos-electricity-problems-go-beyond-maria-fiona> [<https://perma.cc/7LRB-9EYL>]; ED MORALES, FANTASY ISLAND: COLONIALISM, EXPLOITATION, AND THE BETRAYAL OF PUERTO RICO 3 (2019) ("The Trump administration's sluggish and neglectful deployment of FEMA and military assistance . . . laid bare the racist colonialism with which the United States has often administered Puerto Rico . . .").

³ See, e.g., Alexander Gladstone, *McKinsey Clients Won Puerto Rico Contracts as Firm Advised Government*, WALL ST. J. (June 27, 2022, 9:00 AM), <https://www.wsj.com/articles/mckinsey-clients-won-puerto-rico-contracts-as-firm-advised-government-11656334801> [<https://perma.cc/9NDP-K2T7>]; see also Juan R. Torruella, Commentary, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 HARV. L. REV. F. 65, 90–92 (2018) (outlining the "major contributors" to the debt including: "economic fragility" of Puerto Rico "inherited from years of exploitation"; "Congress's actions and inactions," *id.* at 90, which enabled "corporate greed," *id.* at 91; and inequality in federal support as compared to that extended to the states, *id.* at 92).

⁴ See, e.g., Jorge Ruiz, *An Unfulfilled Promise: Colonialism, Austerity, and the Puerto Rican Debt Crisis*, HARV. POL. REV. (June 14, 2022), <https://harvardpolitics.com/unfulfilled-promise-2> [<https://perma.cc/P55R-DETQ>]; MORALES, *supra* note 2, at 2 ("After more than a hundred years since the United States granted Puerto Ricans US citizenship, that identity's value is being questioned and the fantasy of its promise is being exposed."); Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101, 103–04 (2020).

⁵ 143 S. Ct. 1176 (2023).

⁶ 48 U.S.C. §§ 2101–2177, 2191–2241.

⁷ *FOMB*, 143 S. Ct. at 1186.

avail itself of sovereign immunity as an extension of Puerto Rico’s immunity,⁸ the Court implicitly conflated Puerto Rican self-governance with the exercise of territorial governance by the United States. This decision further obscures distinctions between the uniquely subordinate status of Puerto Rico and other like territories vis-à-vis the constitutionally empowered and politically enfranchised states. The narrow question addressed in *FOMB* illustrates the Court’s ongoing unwillingness to confront the present-day colonial relationship between the United States and Puerto Rico, perpetuated further by PROMESA and the Board’s very existence.⁹

In 2016, Congress passed PROMESA in response to Puerto Rico’s crushing public debt and the lack of alternate avenues for Puerto Rico to service or restructure that debt.¹⁰ The stated goal of PROMESA was to help Puerto Rico “achieve fiscal responsibility and access to the capital markets” through a financial oversight system that provided protections against bankruptcy.¹¹ To accomplish this, the Act created a seven-member oversight board, an “entity within the territorial government” of Puerto Rico, whose structure, obligations, and authority to approve and enforce the island’s fiscal policies fell within the ambit of local governance.¹² PROMESA also empowered the Board to represent Puerto Rico in Title III cases for restructuring debt.¹³ Further, in a “Jurisdiction” provision, PROMESA delineated that “any action against the Oversight Board, and any action otherwise arising out of PROMESA, ‘shall be brought’” in the U.S. District Court for the District of Puerto Rico and that such actions could lead to “declaratory or injunctive relief against the Oversight Board.”¹⁴ However, other PROMESA provisions also stipulated that the Board could not be held monetarily liable for “actions taken to carry out” PROMESA, nor could cases challenging the Board’s “certification determinations” be heard.¹⁵ The same year Congress created the Board, the Centro de Periodismo Investigativo (CPI), a Puerto Rican organization of journalists covering the fiscal emergency and debt restructuring, requested that the Board release various documents regarding the financial state of the island, the

⁸ *Id.* at 1183.

⁹ See James T. Campbell, *Aurelius’s Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and “The Law of the Territories,”* 131 YALE L.J. 2542, 2546 (2022) (describing the Board as “a novel, quasi-governmental entity chartered to wrest control over Puerto Rico’s financial affairs from the island’s elected government”).

¹⁰ See *FOMB*, 143 S. Ct. at 1181.

¹¹ *Id.* (quoting 48 U.S.C. § 2121(a)).

¹² *Id.* (quoting 48 U.S.C. § 2121(c)(1)). Notably, this law was enacted after Puerto Rico’s own solution to the debt crisis was invalidated by the Court in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016).

¹³ *FOMB*, 143 S. Ct. at 1181.

¹⁴ *Id.* (citing 48 U.S.C. § 2126(a), (c)).

¹⁵ *Id.* (citing 48 U.S.C. §§ 2125, 2126(e)).

Board's work, and the members' own finances.¹⁶ The request went unanswered.¹⁷

When CPI sued the Board in federal court to compel release of the documents,¹⁸ the Board moved to dismiss the suit, arguing that it enjoyed sovereign immunity because it was an entity within the Puerto Rican government.¹⁹ The district court denied the Board's motion, reasoning that if the Board enjoyed general sovereign immunity, Congress, through PROMESA's jurisdictional provisions, acted as the ostensible legislature of Puerto Rico and exercised a self-waiver of Board immunity.²⁰ The court also entertained the possibility that Congress's Territorial Clause power constitutionally abrogated the Board's immunity.²¹ Still, continuing conflict between the Board and CPI over privileged content led CPI to bring a second suit in 2019 to compel the release of additional documents regarding the Board's communications with Puerto Rican and U.S. officials.²² The Board filed another motion to dismiss and asserted a new sovereign immunity defense, which the district court once again denied, rejecting the argument that PROMESA's liability exemptions granted the Board immunity in this case.²³ The two orders were consolidated for appeal.²⁴

The First Circuit affirmed the denial of immunity.²⁵ Citing circuit precedent and noting the district court's assumption that the Board shared Puerto Rico's immunity,²⁶ the court held that PROMESA abrogated that immunity through "unmistakably clear" and unequivocal language in the Act's "grant of jurisdiction" to federal district courts.²⁷ Further, the court found that two other PROMESA provisions on litigation supported this conclusion.²⁸ PROMESA's provision of "declaratory and injunctive relief" for claims against the Board, as well as explicit limitations on judicial review of the Board's financial certifications,

¹⁶ *Id.* at 1182; *see* *Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 35 F.4th 1, 6 n.3 (1st Cir. 2022).

¹⁷ *FOMB*, 143 S. Ct. at 1182.

¹⁸ The suit arose from "a provision of the Puerto Rican Constitution interpreted to guarantee a right of access to public records." *Id.*

¹⁹ *Centro de Periodismo Investigativo v. Fin. Oversight & Mgmt. Bd. for P.R.*, Civil No. 17-1743, 2018 WL 2094375, at *4 (D.P.R. May 4, 2018). The Board also argued that PROMESA preempted Puerto Rico's constitutional obligations to provide public access to information. *Id.* at *1.

²⁰ *Id.* at *5.

²¹ *Id.* at *7.

²² *Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 35 F.4th 1, 8 (1st Cir. 2022).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 5. Judge Thomspon was joined by Judge Kayatta. Judge Lynch dissented.

²⁶ Although CPI argued that Puerto Rico does not enjoy Eleventh Amendment sovereign immunity, they did not dispute the argument that the Board is an arm of Puerto Rico. *See id.* at 15.

²⁷ *Id.* at 17. The circuit court found the waiver argument the weaker of the two and thus focused on abrogation. *See id.* at 16.

²⁸ *Id.* at 17.

illustrated Congress’s intent to abrogate the Board’s immunity against certain claims.²⁹ In dissent, Judge Lynch instead concluded that the PROMESA provisions did not adequately convey congressional “intent to abrogate” the Board’s immunity under a clear and unequivocal standard, and that several PROMESA provisions actually supported the conclusion that Congress chose not to include language abrogating immunity.³⁰ Further, Judge Lynch reasoned that the majority’s conclusions burdened the Board with heavy discovery production requests and frustrated its congressional mandate.³¹

The Supreme Court reversed.³² Writing for the Court,³³ Justice Kagan framed the legal issue as one of statutory interpretation: whether PROMESA, and specifically its jurisdictional provision, abrogated the Board’s immunity.³⁴ Assuming, in line with the lower courts’ reasoning and circuit precedent, that Puerto Rico has sovereign immunity, Justice Kagan then assumed that immunity extended to the Board.³⁵ Justice Kagan observed that the Court consistently required an “unequivocal declaration” from Congress that it intended to abrogate sovereign immunity, citing cases involving both states and Native tribes in analogous positions to the territory of Puerto Rico.³⁶ This clear statement rule has only been met in two situations: when the statute “says in so many words” that it is abrogating immunity, and when the statute “creates a cause of action and authorizes suit against a government on that claim.”³⁷

In searching for indicia of abrogation, Justice Kagan concluded that PROMESA neither expressly declared that the Board or Puerto Rico was subject to suit nor created a cause of action or approved of a claim against the Board.³⁸ Justice Kagan highlighted PROMESA’s Title III debt restructuring exception — where the Board represents Puerto Rico in specific bankruptcy proceedings — as evidence of Congress’s choice to refrain from adopting “similar language to govern other kinds of litigation involving the Board.”³⁹ Further, in response to the argument that several PROMESA provisions would be rendered superfluous without

²⁹ *Id.* (citing 48 U.S.C. § 2126(c), (e)). The majority and the dissent both noted the second step of the abrogation test to be an inquiry into the validity of the exercise of Congress’s abrogation of immunity, with the majority briefly finding it “an exercise of power that neither party has questioned here and that the Board has not challenged in other litigation.” *Id.* at 19; *see also id.* at 21 (Lynch, J., dissenting).

³⁰ *Id.* at 21 (Lynch, J., dissenting).

³¹ *Id.* at 25–26.

³² *FOMB*, 143 S. Ct. at 1182.

³³ Justice Kagan was joined by Chief Justice Roberts and Justices Alito, Sotomayor, Gorsuch, Kavanaugh, Barrett, and Jackson. Justice Thomas dissented.

³⁴ *See FOMB*, 143 S. Ct. at 1182.

³⁵ *See id.* at 1183. CPI did not challenge this assumption in their argument. *Id.* at 1182–83.

³⁶ *Id.* at 1183 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989)).

³⁷ *Id.* at 1184.

³⁸ *Id.*

³⁹ *Id.*

an abrogation of immunity, Justice Kagan reasoned that recognizing the Board's immunity under PROMESA was compatible with the absence of an express cause of action.⁴⁰ The immunity would serve to protect the Board from claims that Congress had not authorized under PROMESA.⁴¹ Envisioning a hypothetical Title VII suit brought by a Board employee alleging impermissible termination on racial grounds, Justice Kagan reasoned that Congress drafted litigation provisions in acknowledgment that the Board may face suits authorized by other statutes clearly abrogating its sovereign immunity (such as the Civil Rights Act of 1964).⁴² However, the Court declined to find that PROMESA's establishment of a judicial forum for such claims against the Board met the requisite clear statement standard for categorical abrogation.⁴³

Further, the Court found PROMESA's liability protections against monetary damages in Title III cases compatible with the Board's general sovereign immunity under the statute.⁴⁴ Justice Kagan proposed several instances in which the Board, facing suits under "some other law [that] abrogated or waived the Board's immunity," would be in need of those litigation shields to protect its members from liability for conducting their duties under PROMESA, especially since individual members did not benefit from the Board's sovereign immunity.⁴⁵ For example, *Ex parte Young*⁴⁶ actions, in which individuals would be empowered to bring suit against Board officials for constitutional violations, offered a "limit on the sovereign-immunity principle."⁴⁷ For the Court, this further validated an interpretation of PROMESA's protections as covering the individual gaps in the sovereign immunity framework for the Board as a whole.⁴⁸ In fact, Justice Kagan reasoned, the liability protections were already being applied to PROMESA's express abrogation of Board immunity in Title III cases to limit the kind of relief that could be sought in relation to debt restructuring proceedings.⁴⁹

In dissent, Justice Thomas critiqued a foundational assumption of the majority's decision — that the Board enjoys state sovereign immunity — and, upon deciding that question, concluded that the Board did not possess such immunity because Puerto Rico could not extend an immunity that the territory itself did not possess.⁵⁰ As the Court was not bound by circuit precedent stating that Puerto Rico enjoys state

⁴⁰ *Id.* at 1185.

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1185–86.

⁴⁵ *Id.* at 1185.

⁴⁶ 209 U.S. 123 (1908).

⁴⁷ *FOMB*, 143 S. Ct. at 1186 (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254–55 (2011)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1181, 1185; *see* 48 U.S.C. §§ 2161–2177.

⁵⁰ *FOMB*, 143 S. Ct. at 1186, 1188 (Thomas, J., dissenting).

sovereign immunity, Justice Thomas argued that the immunity question was “logically antecedent” to the abrogation question.⁵¹ Justice Thomas conducted a textualist analysis of the Eleventh Amendment’s immunity provisions to find that it “applies only to lawsuits brought against a State by citizens of another State,” not by citizens of a territory against an entity within their own territorial government.⁵² This distinction was critical, as Justice Thomas found that the concerns of federalism and states’ rights underlying the original drafting of the Eleventh Amendment were not implicated in this suit against the Board.⁵³ Further, Justice Thomas reasoned that the burden of establishing immunity fell on the Board, and its arguments that it shared the same immunity as states failed to meet that burden.⁵⁴

The tension between the majority and dissent, then, rested on the Court’s unwillingness to discuss or decide the issue of the Board’s sovereign immunity, implicitly accepting arguments from the Board that, as an extension of Puerto Rico, it enjoyed state sovereign immunity.⁵⁵ While Justice Thomas based his dissent on the categorical, formalist differences between territories and states that arise from a textualist reading of the Eleventh Amendment, the majority’s assumption obviated any consideration of another relevant political entity critical to the question of immunity: Congress. Instead of distinguishing between Puerto Rican self-governance and governance by Congress through the Board, the Court collapsed the two and effectively avoided resolving the sovereign immunity questions that have arisen from its jurisprudence on Puerto Rico’s colonial relationship to the United States, a doctrine rife with contradictions and ambiguities to the continuing detriment of the island’s inhabitants.⁵⁶

While facially an “entity within” the Puerto Rican territorial government,⁵⁷ the Board and its enacting legislation are arguably of unilateral and singular congressional design.⁵⁸ With Congress acting

⁵¹ *Id.*

⁵² *Id.* at 1187.

⁵³ *Id.* at 1187–88.

⁵⁴ *Id.* at 1188. The government, in its supporting brief, argued that Puerto Rico enjoys “common-law immunity” that can be invoked in federal court by territories. *Id.* However, the Board did not raise this argument itself, and therefore it remained unaddressed.

⁵⁵ This issue will likely be decided on remand instead. See *id.* at 1186 (majority opinion); Brief for the United States as Amicus Curiae Supporting Vacatur at 31, *FOMB*, 143 S. Ct. 1176 (No. 22-96) (“Because Puerto Rico has the power to subject its government entities to suit, a conclusion that [PROMESA] itself does not abrogate the Board’s sovereign immunity would not fully resolve whether the Board is amenable to suit here.”).

⁵⁶ See Claribel Morales, *Constitutional Law — Puerto Rico and the Ambiguity Within the Federal Courts*, 42 W. NEW ENG. L. REV. 245, 257 (2020).

⁵⁷ 48 U.S.C. § 2121(c)(1).

⁵⁸ See Zoé C. Negrón Comas, *Puerto Rico’s Eleventh Amendment Sovereign Immunity and the Financial Oversight Board*, 54 REV. JURÍDICA UNIVERSIDAD INTERAMERICANA DE P.R. 1, 7

simultaneously as a branch of the federal government and the creator of the Board as part of the discrete Puerto Rican territorial government,⁵⁹ the application of the underlying state-federal relationship protected by Eleventh Amendment immunity is more complex and sui generis than the Court's assumption, or even Justice Thomas's textualist analysis, suggested.⁶⁰ Given the majority's focus on Congress's intent to abrogate the immunity of a nonfederal entity, the Court should have recognized that the Board's explicitly federal, non-Puerto Rican origins were relevant to establishing a presumption of its immunity as an extension of the territory of Puerto Rico.⁶¹

Failing to address Congress's role in the Board's unique genesis — and instead merely presuming the Board's nominal position within the territorial government — obscures a critical distinction between acts of Puerto Rican self-governance and the exercise of U.S. federal governance over its territories through legislation like PROMESA. This distinction is central to the underlying claim at issue in *FOMB*: the release of various documents regarding the Board's work and members' potential conflicts of interest.⁶² CPI's claim arose directly from Puerto Rico's constitutional guarantee of a right to access public records,⁶³ and the Puerto Rican government has itself waived immunity from such claims⁶⁴ — a clear act of self-governance that the Court in *FOMB*

(2019); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1680 (2020) (Sotomayor, J., concurring in the judgment) (“And here, the Board members indisputably are selected by the Federal Government, under a statute passed by Congress that specifies not just their governance responsibilities but also the priorities of their decisionmaking.”).

⁵⁹ See Negrón Comas, *supra* note 57, at 23–24.

⁶⁰ See Analisa Dillingham, Casebrief, *Reaching for Immunity: The Third Circuit's Approach to the Extension of Eleventh Amendment Immunity to Instrumentalities as Arms of the State in Benn v. First Judicial District of Pennsylvania*, 51 VILL. L. REV. 999, 1003 (2006) (“When determining whether a state instrumentality can enjoy the state's immunity, the Court examines the relationship between the state and the instrumentality and whether the instrumentality acts or should be treated as an ‘arm of the state.’ Particularly important in the Court's analysis are (1) ‘the essential nature and effect of the proceeding’ and (2) the ‘nature of the entity created by state law.’” (footnotes omitted) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945))).

⁶¹ See Rafael Cox-Alomar, *The Puerto Rico Constitution at Seventy: A Failed Experiment in American Federalism?*, 57 NEW ENG. L. REV. F. 1, 19 (2022) (“It is precisely in the exercise of its unbridled authority under the Territorial Clause that Congress placed Puerto Rico's local governance in the hands of an unelected Financial Oversight and Management Board . . . without any consent from its people.”); Ponsa-Kraus, *supra* note 4, at 123; Negrón Comas, *supra* note 57, at 19.

⁶² *CPI Requests Court to Declare the Fiscal Control Board In Contempt*, CENTRO DE PERIODISMO INVESTIGATIVO (Jan. 16, 2019, 4:52 PM), <https://periodismoinvestigativo.com/2019/01/cpi-requests-court-to-declare-the-fiscal-control-board-in-contempt> [<https://perma.cc/E6S4-G6GR>]; see also Financial Oversight and Management Board Integrity Act of 2023, S. 922, 118th Cong. § 2.

⁶³ The constitutional guarantee in question and its underlying value of transparency are grounded in a long-standing history of political repression and secret surveillance in Puerto Rico. See *Soto v. Muñoz*, 112 P.R. Dec. 477, 493 (1982); see also Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 71–74 (2000).

⁶⁴ *Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 35 F.4th 1, 19 n.16 (1st Cir. 2022).

ignored. Further, blurring the lines between congressional governance and self-governance by accepting the extension of Puerto Rican immunity to the Board leads to an absurd result: that the Board is not party to the Puerto Rican waiver of immunity for constitutional disclosure claims, because PROMESA's jurisdictional provisions force the Board's litigation into federal court instead of Puerto Rican court.⁶⁵ So, the Board benefits from a form of selective immunity granted by Congress from which the Puerto Rican government does not similarly benefit.⁶⁶

Thus, the Board, rather than functioning as a bona fide arm of the Puerto Rican government and being held accountable under the island's constitution,⁶⁷ firmly occupies a place above the territorial government — with as much sovereignty as the states but much less constitutional accountability. Glossing over these differences between territorial self-governance and congressional governance by proxy, the Court treated what was ostensibly a case of first impression as otherwise.⁶⁸ For example, in conducting her analysis of PROMESA under the clear statement rule, Justice Kagan relied on and drew analogies to precedent governing the federal government's relationship to political entities, such as Native nations, whose sources of sovereignty are critically different from Puerto Rico's.⁶⁹ In refuting CPI's assertion that Congress's plenary power over the territories distinguished Puerto Rico from the rule, Justice Kagan refused to "lightly assume"⁷⁰ that Congress had intended to abrogate either tribes' or territories' sovereign immunity, all the while *lightly assuming* the precedentially sufficient condition for the clear statement rule: that "a defendant [Puerto Rico] enjoys sovereign immunity" in the first place.⁷¹ This selective assumption-making does not cohere with previous Puerto Rico-specific precedent in which Justice Kagan has drawn relevant sovereignty-based and historical distinctions between Puerto Rico and Native nations, such as the source of each entity's political power.⁷² It stands to reason then that the real legal issue at the heart of *FOMB*, and what the Court studiously avoided

⁶⁵ 48 U.S.C. § 2126(a).

⁶⁶ See Brief of Asociación de Periodistas de Puerto Rico as Amicus Curiae in Support of Centro de Periodismo Investigativo at 3, *FOMB*, 143 S. Ct. 1176 (No. 22-96).

⁶⁷ Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1683 (2020) (Sotomayor, J., concurring in the judgment).

⁶⁸ See *FOMB*, 143 S. Ct. at 1180.

⁶⁹ *Id.* at 1183; see *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). This precedent is relatively silent as to the question raised by this comment because the immunity discussion was largely centered on the nature of the suit brought against tribal sovereigns (for example, those arising from off-reservation activity) rather than general abrogation of immunity.

⁷⁰ *FOMB*, 143 S. Ct. at 1183.

⁷¹ *Id.*

⁷² *E.g.*, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016) ("Originally, this Court has noted, 'the tribes were self-governing sovereign political communities,' . . . The 'ultimate source' of a tribe's 'power to punish tribal offenders' thus lies in its 'primeval' or, at any rate, 'pre-existing' sovereignty: A tribal prosecution, like a State's, is 'attributable in no way to any delegation . . . of federal authority.'" (quoting *United States v. Wheeler*, 435 U.S. 313, 320, 322–23, 328 (1978))).

deciding, is the ambiguous and contradictory relationship between the United States and the territory of Puerto Rico. That is, how can the Court reconcile the unique form of sovereignty that the United States embodied in “compact”⁷³ with the actual practice of federal governance in distributing Social Security,⁷⁴ in controlling the criminal legal system,⁷⁵ and, now, in overseeing economic restructuring?

It cannot — at least, not without acknowledging how colonialism has informed the historical and contemporaneous constitutional doctrine on Puerto Rico.⁷⁶ Notably, Justice Kagan circled this issue in a brief footnote discussion, highlighting precedent in which the Court has declined to answer this question⁷⁷ and further hinting at why the Court specifically avoided this question in *FOMB*: namely, that Puerto Rico itself was not even a party to or present in the case.⁷⁸ However, the Court could have easily invited Puerto Rican authorities to submit a brief discussing territorial sovereign immunity, yet the Court chose not to do so.⁷⁹ Thus, the absence of such a solicitation in *FOMB*, even though the Court partly justified circumscribing the case’s question by pointing to Puerto Rico’s lack of involvement, further illustrates the Court’s broader approach of steering clear of any discussion clarifying or harmonizing its doctrine on territorial sovereignty.⁸⁰ And in so doing,

⁷³ Cf. Ponsa-Kraus, *supra* note 4, at 102 (criticizing Justice Sotomayor’s concurrence in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020), for perpetuating the myth that the territory “has full local self-government pursuant to an irrevocable ‘compact’ with the United States, which Congress may not unilaterally amend or repeal”).

⁷⁴ See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1542 (2022).

⁷⁵ See *Sanchez Valle*, 136 S. Ct. at 1868.

⁷⁶ See Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 YALE L.J.F. 312, 314 (2020).

⁷⁷ *FOMB*, 143 S. Ct. at 1183 n.2; see also *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993).

⁷⁸ *FOMB*, 143 S. Ct. at 1183 n.2; see also Negrón Comas, *supra* note 57, at 17.

⁷⁹ Cf., e.g., Brief of the Commonwealth of Puerto Rico as Amicus Curiae in Support of Respondent at 1, *Vaello Madero*, 142 S. Ct. 1539 (No. 20-303). It is unclear whether this amicus brief was explicitly invited, as the Court is notoriously opaque in its impetus and criteria for amicus solicitation. See Katherine Shaw, Essay, *Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations*, 101 CORNELL L. REV. 1533, 1536 (2016) (arguing that amicus invitations “occur at the intersection of two important recent critiques of the Court”: the dominance of a small group of elite lawyers and “the Court’s status as perhaps the least transparent institution in American public life”).

⁸⁰ This avoidance extends beyond the specific and contingent circumstances of Puerto Rico and the congressionally appointed Board managing the debt crisis. Earlier in the Term, the Court also denied certiorari in a case that would have compelled it to reconsider the *Insular Cases* and address the legacy of colonialism in American territories; in that case, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022), the territory in question was American Samoa. See Willie Santana, *The New Insular Cases*, 29 WM. & MARY J. RACE GENDER & SOC. JUST. 435, 437–38 (2023) (arguing that the Court has “engaged in a project of establishing *new* Insular Cases,” *id.* at 437, through *Franklin*; *Aurelius*; *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016); *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022); and *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), the last of which, similar to *Fitisemanu*, was brought by Samoan plaintiffs and was summarily denied certiorari by the Court in 2016, *id.* at 454–55).

the Court invariably avoided addressing the inveterate practice of American colonialism that the sovereignty discussion implicates.⁸¹

This jurisprudential dance around American colonial governance in *FOMB* prompts the question of why exactly the Court should address this issue head on.⁸² But when *FOMB* is situated in the evocative and disreputable circumstances of the Puerto Rican debt crisis,⁸³ the Court's avoidance begins to have clearly normative implications. Perpetuating the myth that the U.S.-Puerto Rico relationship exists in a post-imperial context — as the Court's silence on the sovereignty issue does — obscures many of the causes of the fiscal emergency Congress created the Board to face.⁸⁴ In fact, Puerto Rico has undergone decades of colonial extraction and exploitation perpetrated by the U.S. federal government in the form of tax, bankruptcy, and disaster relief policies that have economically debilitated and demoralized the island and its inhabitants.⁸⁵ While the Court cannot effectuate direct measures to alleviate structural exploitation in *FOMB*, expressly addressing the imperialist relationship between Puerto Rico and the United States is a necessary first step to doctrinal coherence. But, instead of clarifying the direct relationship between the imperialist cause of Puerto Rico's economic problems and the federally mandated solution of PROMESA, the Court's avoidance both “effectively decides the outcome of this case”⁸⁶ and enables the Board to continue to antidemocratically impose austerity measures on a population already vulnerable to disaster capitalism⁸⁷ and already crushed by the systematic disempowerment of 125 years under American rule.

⁸¹ Cf. Torruella, *supra* note 3, at 66.

⁸² See Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157, 167 (2008) (“The Supreme Court could decide the question of the status of Puerto Rico if it chose to do so, but it chooses not to decide. This is a classic question of judicial will.” (footnotes omitted)).

⁸³ See Bannan, *supra* note 1, at 288, 295.

⁸⁴ See, e.g., Pedro Cabán, *Puerto Rico, Colonialism in.*, in 3 OXFORD ENCYCLOPEDIA OF LATINOS AND LATINAS IN THE UNITED STATES 516, 519–20 (Suzanne Oboler & Deena González eds., 2005) (describing the myth of decolonization following the establishment of the Commonwealth).

⁸⁵ Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1269–73 (2019).

⁸⁶ *FOMB*, 143 S. Ct. at 1186 (Thomas, J., dissenting).

⁸⁷ See generally NAOMI KLEIN, *THE BATTLE FOR PARADISE: PUERTO RICO TAKES ON THE DISASTER CAPITALISTS* (2018) (arguing that austerity and privatization measures implemented to resolve the debt crisis have both exacerbated and exploited the humanitarian crisis on the island after the 2017 destruction of Hurricane Maria).