PUERTO RICO DEBT RESTRUCTURING: ORIGINS OF A CONSTITUTIONAL AND HUMANITARIAN CRISIS

Elizabeth Whiting

I. INTRODUCTION

In 1917, Puerto Ricans formally became U.S. citizens, and the Jones-Shafroth Act empowered the island commonwealth of Puerto Rico to raise money by issuing tax-exempt bonds.[1] This law would come to set the stage for a severe future debt crisis raising constitutional and bankruptcy issues derived from Puerto Rico's precarious legal status as a territory. Federal finance policy on Puerto Rico's current debt crisis has developed in response to changing legal notions of territorial sovereignty but remains a symbol of the need to re-evaluate Puerto Rico's territorial status. The debt crisis raises specific legal territorial issues with respect to Puerto Rico's entitlement, if any, to self-governing autonomy as well as to the legitimacy of federal government interference in the sub-nation's domestic economy.[2] Given the September 2017 advent of Hurricane Maria and its near total decimation of Puerto Rican infrastructure, the commonwealth now faces legal and financial turmoil. This turmoil may not be resolved without a significant re-evaluation of Puerto Rico's status as a U.S. territory both in terms of the legitimacy of outside implementation of federal financial protections and Puerto Rico's lack of sufficient self-governing ability to pass economy-saving measures, such as authorizing its municipalities to declare bankruptcy.[3]

At $72 billion in debt and facing an additional $49 billion in unfunded pension obligations,[4] Puerto Rico's debt is more than one hundred percent of its gross national product.[5] The $85-90 billion

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[1] Jones-Shafroth Act, Pub. L. No. 64-368, § 3, 39 Stat. 951, 953 (1917).

[2] Mary Williams Walsh, *How Puerto Rico is Grappling With a Debt Crisis*, N.Y. TIMES (May 16, 2017), https://www.nytimes.com/interactive/2017/business/dealbook/puerto-rico-debt-bankruptcy.html.

[3] *Id*.

[4] Nick Brown, *Puerto Rico Budget to Protect Pension Payments: Governor*, REUTERS (May 31, 2017), https://www.reuters.com/article/us-puertorico-debt-budget/puerto-rico-budget-to-protect-pension-payments-governor-idUSKBN18R3C8.

[5] Rachel Greszler & Salim Furth, *An Economic Crisis Is the Heart of Puerto Rico's Financial Crisis*, HERITAGE (July 27, 2015), http://www.heritage.org/markets-and-finance/report/economic-crisis-the-heart-puerto-ricos-financial-crisis.

losses inflicted by Hurricane Maria[6] have structurally transformed the Puerto Rican economy and will exhibit lasting effects on Puerto Rico's ability to recover from its sub-sovereign debt crisis.[7] This economic turmoil now faces exacerbation by austerity measures resulting from the debt restructuring legislation passed by Congress in 2016, making the need for re-evaluation of colonial era laws and policies all the more relevant.

This paper will address the legal and economic implications of Puerto Rico's debt crisis and restructuring in the context of Puerto Rico's precarious territorial nature, as well as the background of colonialism in shaping the laws that have governed and now shape the development of the financial crisis. Further, humanitarian concerns stem from the island's current legal and financial turmoil in the wake of Hurricane Maria, the strongest hurricane to hit Puerto Rico since 1932.[8] The circumstances show the necessity of clarity in both policy and law in terms of legal re-evaluation of Puerto Rico's status in order to resolve one of the largest debt crises in U.S. history, while maintaining a semblance of Puerto Rican autonomy–even as a federal advisory board threatens to control the country's economic future.

Puerto Rico's debt crisis has reached its zenith in the wake of *Puerto Rico v. Sanchez Valle*, which reflected the conception of Puerto Rico as a sub-nation governed by and reliant on federal law without the opportunities for autonomy and self-government that states or independent sovereigns would likely enjoy.[9] In the 2016 decision, the Supreme Court determined that Puerto Rico, as an ex-

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[6] Nicole Friedman, *Hurricane Maria Caused As Much as $85 Billion in Insured Losses*, WALL ST. J. (Sept. 25, 2017), https://www.wsj.com/articles/hurricane-maria-caused-as-much-as-85-billion-in-insured-losses-air-worldwide-says-1506371305.

[7] Brad Setser, *Puerto Rico Before Maria*, COUNCIL ON FOREIGN RELATIONS (Oct. 2, 2017), https://www.cfr.org/blog/puerto-rico-maria.

[8] Samantha Schmidt, *Puerto Rico Entirely Without Power as Hurricane Maria Hammers Island With Devastating Force*, WASH. POST (Sept. 20, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/09/20/hurricane-maria-takes-aim-at-puerto-rico-with-force-not-seen-in-modern-history/?utm_term=.b4dd255f5914.

[9] Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016).

tension of the federal government, did not possess its own sovereignty as a subnational commonwealth.[10] The legal consensus of the debt crisis and federal intervention, in the context of Puerto Rico's territorial status, will be defining for Puerto Rico's economic, political, and humanitarian future. In the context of both Puerto Rico's territorial constitutional legal position and the PROMESA reforms, which contradict the guarantees of the 1952 Puerto Rican Constitution, Puerto Rico's debt crisis and bankruptcy declaration is a notable reflection of the continued legal controversy over what it means to be a U.S. territory and the dynamic nature of rights associated with U.S. territorial "sub-nationhood." The recent advent of the extreme financial losses suffered by Puerto Rico during Hurricane Maria makes this distinction between Puerto Rico as a territory and a state even more critical as the very ability of the commonwealth for internal governance comes into question as its financial crisis reaches its peak.

This article will address the debt restructuring and bankruptcy process in Puerto Rico, reviewing relevant constitutional provisions and historical background in order to analyze how the debt restructuring process in Puerto Rico is functioning after its May 2017 bankruptcy declaration, as well as structural effects on Puerto Rican legal autonomy and Puerto Rico's ability to meet basic governance needs in the wake of Hurricane Maria. In Part I, a comparison will be made between the form of bankruptcy and debt restructuring currently pursued in Puerto Rico as compared to the typical process pursued in the states and federal government jurisdictions, as well as precedent for treating unincorporated territories' debt. Part II of this article will discuss the economic historical background leading up to the current debt crisis in Puerto Rico and will identify moments where Puerto Rico has experienced significant economic turmoil or have led Puerto Rico to its financial precipice. This section will include an explanation of the Puerto Rican constitutional provisions that affect its economy, as well as the federal financial laws by which Puerto Rico is governed. Part III will address the political and legal history of Puerto Rico's status as a territory and how that categorization has impacted its financial condition and shaped its development, impacting the way that citizens experience daily life and

[10] *Id.*

the way that its local government functions. This section will discuss relevant political differences between Puerto Rico and the United States, as well as explain to what extent the history of colonialism has shaped the overarching legal framework now instituted in Puerto Rico. Part IV will address the new conception of the Puerto Rican debt crisis as determined by PROMESA, a legislative act, passed by Congress in 2016. Part IV will detail the changes that PROMESA will institute for the debt crisis, the legal dilemma that it presents for the Puerto Rican constitution, and the ability of Puerto Rico to recover from the debt crisis. Part V will discuss the impact of Hurricane Maria on Puerto Rico's administrative and self-governing capacity, as well as detail the concern that austerity measures may have on the population in the context of bankruptcy filing under PROMESA. Part VI will discuss, from a regional perspective, external effects that PROMESA may have in terms of the conception of the legal identity of the territories as a whole with respect to similar financial problems faced on a smaller scale by the U.S. Virgin Islands. Part VI and VII will also offer conclusions as to a possible re-conception of Puerto Rico's territorial status in the context of possible resolutions to the legal conflicts implicit in the debt restructuring crisis and offer brief regional comparisons in terms of future legal and economic solutions.

II. BACKGROUND

A. Puerto Rico's Colonial Background and Limited Political Autonomy

At the end of the Spanish-American War, the United States assumed control of the Spanish colony of Puerto Rico, along with Guam and the Philippines.[11] While the island of Puerto Rico was initially placed under military jurisdiction, Congress soon passed the Foraker Act (the Organic Act of 1900), declaring Puerto Rico an "unincorporated territory."[12] The Foraker Act provided a civilian

[11] Treaty of Peace between the United States and the Kingdom of Spain, art. II, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, 1889 ("Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies . . . .").

[12] Foraker Act (Organic Act of 1900), Pub. L. No. 56-191, 31 Stat. 77 (1900).

government for the territory, as well as a non-voting Resident Commissioner in Congress, and applied all federal laws to the island.[13] However, in 1901, in the landmark Supreme Court case *Downes v. Bidwell*, which has become known as one of the Insular Cases governing legal rights to the territories, the Supreme Court held, narrowly, that the newly annexed territories, including Puerto Rico, were not properly part of the United States for the purpose of the Constitution in the matters of revenues and administrative affairs.[14] The Court qualified its decision in *Bidwell* by noting that the constitutional guarantees of citizens' rights to liberties and property were applicable to all within the territories.[15] Thus, by the early 1900s, the legal status of Puerto Rico appeared increasingly oblique.[16]

In 1917, however, the Jones-Shafroth Act forever altered the landscape of U.S.-Puerto Rican relations by formally granting U.S. citizenship to anyone born in Puerto Rico on or after April 25, 1898.[17] The Act also entirely transformed Puerto Rico's territorial government, creating a structure with executive, legislative, and judicial branches – paralleling the internal government structure of states.[18] It also made the resident commissioner an elected position and established a bill of rights for the territory, a pre-cursor to its 1952 constitution.[19] Puerto Rico did, however, become subject to new legal restrictions related to its heretofore undefined territorial status. In 1920, following World War I, President Woodrow Wilson signed the Merchant Marine Act into law.[20] Section 27 of the Merchant Marine Act, popularly referred to as the Jones Act and codified as 46 U.S.C. § 55102, makes up part of the nation's "coastwise"

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[13] *Id.*

[14] Downes v. Bidwell, 182 U.S. 244, 260 (1901).

[15] *Id.*

[16] *See* T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15 (1994).

[17] Andrew Glass, *Puerto Ricans Granted U.S. Citizenship – March 2, 1917*, POLITICO (Mar. 2, 2012), https://www.politico.com/story/2012/03/puerto-ricans-granted-us-citizenship-073517.

[18] Jones-Shafroth Act §§ 25-29.

[19] *Id.*

[20] JAMES S. OLSON & ABRAHAM O. MENDOZA, AMERICAN ECONOMIC HISTORY: A DICTIONARY AND CHRONOLOGY 392 (2015).

laws regulating domestic trade between ports in the United States.[21] Among the Jones Act's more controversial provisions is the mandate that all passengers or merchandise transported by water between U.S. ports be carried by vessels owned by U.S. citizens and registered under the U.S. flag with a coastwise endorsement, which in turn requires that the vessels be built in the United States.[22] Because the Jones Act requires U.S. flag registry, U.S. manning laws also apply, which means the vessels must be operated by predominantly U.S. citizen crews.[23]

Politically, however, Puerto Rico continued to develop and establish its own internal territorial government. By 1948, Puerto Rico elected its own governor for the first time while under U.S. control.[24] Most critically for both the debt crisis and Puerto Rico's continued issue of political sovereignty as a U.S. territory, in 1952, the United States approved the Constitution of Puerto Rico.[25] The Constitution established Puerto Rico's relationship to the United States as that of a commonwealth, which continues to be defined by the federal government to mean "an organized U.S. insular area, which has established with the Federal Government, a more highly developed relationship, usually embodied in a written mutual agreement."[26]

While it is clear that Puerto Rico retains some level of territorial autonomy, as Puerto Rico's legislature may pass laws that govern the territory without congressional approval,[27] the extent of Puerto

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[21] *Memorandum Opinion for the Assistant to the President for Domestic Affairs and Policy*, D.O.J. (Jan. 30, 1980), https://www.justice.gov/file/22446/download (citing 42 Op. Att'y Gen. 189, 196 (1963)).

[22] U.S. Gov't Accountability Off., GAO-13-260, *Characteristics of the Island's Maritime Trade and Potential Effects of Modifying the Jones Act* (2013), http://www.gao.gov/assets/660/653046.pdf.

[23] 46 U.S.C. § 55102(b)(1) (2012).

[24] Joanne Omang, *Luis Munos Marin, 4-Term Governor of Puerto Rico Dies*, WASH. POST (May 1, 1980), https://www.washingtonpost.com/archive/local/1980/05/01/luis-munoz-marin-4-term-governor-of-puerto-rico-dies/06ecd114-edb1-4908-98ab-4de668ee3f2d/?utm_term=.9d3a25e08053.

[25] *Puerto Rico: A Timeline*, PBS, http://www.pbs.org/wgbh/masterpiece/americancollection/woman/timeline.html (last visited Oct. 1, 2018).

[26] Office of Insular Affairs, *Definitions of Insular Area Political Organizations*, DEPARTMENT OF INTERIOR, https://www.doi.gov/oia/islands/politicatypes (last visited Oct. 1, 2018).

[27] *See* Puerto Rico v. Franklin California Tax-Free Tr., 136 S. Ct. 1938, 1949 (2016) (Sotomayor, J., dissenting).

Rican sovereignty as a sub-nation within the United States is an issue of historical and legal turmoil. In June 2016, in *Puerto Rico v. Sanchez Valle*, the Supreme Court decided that two defendants could not be charged in the territory of Puerto Rico after a federal conviction because Puerto Rico draws its "ultimate source" of prosecutorial power from the federal government, specifically the U.S. Congress, striking a major blow to Puerto Rico's conception of self-derived sovereignty.[28] There, the Court addressed the issue of the Double Jeopardy Clause, which does not bar successive prosecutions brought by separate sovereigns.[29] Under that approach, states are separate sovereigns from the federal government and each may accordingly bring prosecutions.[30] The government of Puerto Rico had appealed a decision against sovereignty made by the Puerto Rican Supreme Court and had claimed that Puerto Rico's 1952 constitution, conflicting congressional statements, and the evolution of its relationship with the federal government grants it a measure of sovereignty.[31] Regardless, the Supreme Court determined that Puerto Rico as a commonwealth, distinguishable from a state or a sovereign tribe, does not have its own self-derived sovereignty.[32]

For financial purposes, the distinction remains precarious. Puerto Rico has been in continuous recession since 2006.[33] In June 2016, the Court ruled that Puerto Rico is a "state" within the meaning of Chapter 9 of the Bankruptcy Code, preempting it from authorizing its municipalities to declare municipal bankruptcy, as well as ruling that Section 903(1) of the Bankruptcy Code preempted Puerto Rico's Recovery Act.[34] The Puerto Rico Recovery Act, passed by the government of Puerto Rico in 2014 had, until that point, authorized municipalities and public utilities within Puerto

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[28] Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016).

[29] *Id*. at 1868.

[30] *Id*. at 1871.

[31] *Id*. at 1879.

[32] *Id*.

[33] *Puerto Pobre*, THE ECONOMIST (Oct. 26, 2013), http://www.economist.com/news/finance-and-economics/21588364-heavily- indebted-island-weighs-americas-municipal-bond-market-puerto-pobre.

[34] Puerto Rico v. Franklin California Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016).

Rico, such as utility companies, to declare bankruptcy.[35] Hedge funds brought suit to enjoin the Act's enforcement, and the Act was ultimately struck down in *Puerto Rico v. Franklin California Tax-Free Trust* by the Supreme Court.[36] The decision exacerbated Puerto Rico's legal dilemma by leaving it unable to authorize municipalities and public utilities to file under Chapter 9 and unable to pass its own legislation to address the debt crisis.[37] As a territory within the United States, Puerto Rico also, unlike its neighbors, was unable to seek debt relief internationally as many of its Caribbean neighbors might otherwise do.[38]

Because, according to the *Franklin* decision, the "state" definition in the Bankruptcy Code disallowed Puerto Rico's and Puerto Rican municipalities' eligibility for relief as debtors under the Bankruptcy Code, Puerto Rico became limited to policy solutions outside of the bankruptcy arena, a development that has ultimately led to Puerto Rican dependency on PROMESA as a means of confronting its financial crisis.[39] Puerto Rico also faces the unique situation that while it does not have access to bankruptcy protection, its bonds fall within U.S. jurisdiction, so Puerto Rico has faced and will continue to face suits by creditors related to its inability to pay.[40] Further exacerbating this legal paradox is the fact of the sheer amount of debt held by private creditors, which often can paralyze renegotiation of

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[35] Arturo Porzecanski, *Why Chapter 9 for Puerto Rico is a Bad Idea*, THE HILL (Aug. 5, 2015), http://thehill.com/blogs/congress-blog/economy-budget/238104-why-chapter-9-for-puerto-rico-is-a-bad-idea; *see also* Ley para Cumplimiento con Las Deudas y para la Recuperación de las Corporaciónes Públicas de Puerto Rico [Puerto Rico Public Corporation Debt Enforcement and Recovery Act], 2014 P.R. Laws Act No. 71.

[36] *Franklin California Tax-Free Tr.*, 136 S. Ct. at 1950.

[37] *Id*. at 1947.

[38] Mary Williams Walsh, *How Puerto Rico Debt is Grappling With a Debt Crisis*, N.Y. TIMES (July 1, 2016), https://www.nytimes.com/interactive/2017/business/dealbook/puerto-rico-debt-bankruptcy.html ("Unlike sovereign nations . . . [Puerto Rico] can't seek emergency assistance from the International Monetary Fund.").

[39] *Franklin California Tax-Free Tr.*, 136 S. Ct. at 1949–50.

[40] Andrew Scurria, *Puerto Rico Creditors Sue Over Debt-Cutting Plans*, WALL ST. J. (May 2, 2017), https://www.wsj.com/articles/puerto-rico-hit-with-lawsuit-after-litigation-freeze-expires-1493732250.

debt by insisting on full repayment at face value.[41] It is estimated that perhaps 50% of Puerto Rican bond debt is held by hedge and "vulture" funds.[42]

B. Historical Development of Puerto Rico's Financial Crisis

In 1917, the Jones-Shafroth Act established that the island commonwealth was able to raise money by issuing tax-exempt bonds.[43] The law stipulated that no entity–state, county, city, the District of Columbia, or Puerto Rico itself–could tax the interest that Puerto Rico pays to investors who purchase Puerto Rico's general obligation bonds, making these bonds extremely attractive as a financial investment for mainland U.S. citizens.[44] Further, states and U.S. territories, like Puerto Rico, would not be allowed to declare bankruptcy – supposedly making Puerto Rico's high-yield debt extremely safe for investors.[45] In 1952, Puerto Rico promulgated its own constitution, which contained a provision guaranteeing that if there were insufficient funds to cover everything in the budget, then "all available resources" would first go to pay what was due on Puerto Rico's general-obligation bonds.[46] During the development spree that ensued following World War II, the constitutional provision ensured that investing in the general obligation bonds appeared an attractive enterprise.[47] Banks then flocked to Puerto Rico.[48] The tax-exempt constitutionally guaranteed debt shored up the economy for decades.[49]

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[41] Ed Morales, *How Hedge Funds and Vulture Funds Have Exploited Puerto Rico's Debt Crisis*, THE NATION (July 21, 2015), https://www.thenation.com/article/how-hedge-and-vulture-funds-have-exploited-puerto-ricos-debt-crisis/.

[42] *Id*.

[43] Jones-Shafroth Act § 3.

[44] *Id*.

[45] Mary Williams Walsh, *Puerto Rico: A Debt Problem that Kept Boiling Over*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/business/dealbook/puerto-rico-debt.html.

[46] *Id*.

[47] *Id*.

[48] Matt Egan, *Who Owns Puerto Rico's Mountain of Debt? You do*., CNN (Oct. 9, 2017), http://money.cnn.com/2017/09/27/investing/puerto-rico-debt-who-owns-trump/index.html.

[49] *Id*.

In 1984, Congress formally passed an amendment to the bankruptcy code, barring the commonwealth of Puerto Rico, along with the District of Columbia, from taking shelter from creditors in Chapter 9 bankruptcy law, which applies to cities and counties.[50] This makes Puerto Rico and its municipalities ineligible to file for bankruptcy. In 2006, Puerto Rican officials proceeded to issue a new type of government bond, "*COFINAs*," which stands for Corporación del Fondo de Interés Apremiante (Puerto Rico Urgent Interest Fund Corporation).[51] While the bonds themselves are referred to as COFINAs, the Puerto Rico Urgent Interest Fund Corporation is a government-owned corporation, created by Law No. 291 of 2006,[52] that serves as a subsidiary of the Puerto Rico Government Development Bank, the principal entity through which the government of Puerto Rico channels its issued bonds.[53] The Puerto Rican Urgent Interest Fund Corporation (COFINA) was devised to pay for and refinance the public debt of Puerto Rico. The bonds issued in order to refinance the debt are themselves also called COFINAs and currently represent approximately $16 billion of Puerto Rico's outstanding debt.[54] In 2008, when the Federal Reserve lowered interest rates following the U.S. financial crisis in order to combat the crash, Puerto Rican bonds grew more desirable as the bonds were supposedly safe and paying risk premiums.[55]

As of 2014, Puerto Rico's economy began declining, signaling a future need for a bankruptcy-like solution.[56] Puerto Rico issued one last large batch of general obligation bonds in order to make

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[50] *See* 11 U.S.C. § 101(52) (excluding Puerto Rico from the definition of "state" for the purposes of defining chapter 9 debtors).

[51] Aaron Kuriloff, *'Safe' Puerto Rican Debt Stirs Worries*, WALL ST. J. (Dec. 27, 2015), http://www.wsj.com/articles/safe- puerto-rican-debt-stirs-worries-1451266037.

[52] Law No. 291 (An Act), H. B. 3163, http://www.oslpr.org/download/en/2006/A-0291-2006.pdf.

[53] *See generally Puerto Rico Sales Tax Financing Corporation (COFINA)*, GOV'T DEV. BANK FOR P.R., http://www.gdb.pr.gov/investors_resources/cofina.html (last visited Oct. 1,2018).

[54] Law No. 291 (An Act), H. B. 3163, http://www.oslpr.org/download/en/2006/A-0291-2006.pdf.

[55] Mary Williams Walsh, *Puerto Rico: A Debt Problem that Kept Boiling Over*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/business/dealbook/puerto-rico-debt.html.

[56] *Id*.

payments on older bonds.[57] By this time, Puerto Rico's credit had plummeted and most of Puerto Rico's general debt had been formally downgraded to "junk" status.[58] In 2015, the governor of Puerto Rico finally announced that Puerto Rico had more debt than the commonwealth could possibly re-pay and would be in need of a moratorium on bond payments.[59] On January 4, 2016, Puerto Rico defaulted on $174 billion of non-general obligation bonds.[60] Last year, the Supreme Court ruled that Puerto Rico would not be able to seek Chapter 9 bankruptcy access.[61]

In June 2016, Congress, under the Obama Administration, passed the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA").[62] As a U.S. territory, Puerto Rico had no legal framework for debt restructuring until PROMESA.[63] Most notably, the Act provided for a federal oversight board to supervise the island economy.[64] President Obama appointed seven total members to the oversight board in August 2016.[65] At an essential level, PROMESA protects the island from being sued for not paying the

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[57] *Id*.

[58] *Fitch becomes third agency to cut Puerto Rico to junk*, REUTERS (Feb. 11, 2014), http://www.reuters.com/article/munis-puertorico- ratings-idUSWNAB046DO20140211.

[59] Michael Corkery & Mary Williams Walsh, *Puerto Rico's Governor Says Island's Debts Are Not Payable*, N.Y. TIMES (June 28, 2015), https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html.

[60] Mary Williams Walsh, *Puerto Rico Defaults on Debt Payments*, N.Y. TIMES (Jan. 4, 2016), http://www.nytimes.com/2016/01/05/business/dealbook/puerto-rico-defaults-on-debt-payments.html?_r=0.

[61] *Franklin California Tax-Free Tr.*, 136 S. Ct. at 1949.

[62] Mike DeBonis & Steven Mufson, *Puerto Rico Rescue Bill Clears Congress Days Before Debt Cliff*, WASH. POST (June 29, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/06/29/senate-poised-to-act-on-puerto-rico-debt-days-before-debt-cliff/?utm_term=.47fabb8cbd93.

[63] *Issues to Expect in a Title III Puerto Rico Restructuring*, LAW360 (Mar. 8, 2017), https://www.law360.com/articles/898663/issues-to-expect-in-a-title-iii-puerto-rico-restructuring.

[64] *See* Governance Information, The Financial Oversight and Management Board for Puerto Rico, https://juntasupervision.pr.gov/index.php/en/home/ (last visited Oct. 1, 2018).

[65] Susan Cornwell & Nick Brown, *Puerto Rico Oversight Board Appointed*, REUTERS (Aug. 31, 2016), https://www.reuters.com/article/us-puertorico-debt-board/puerto-rico-oversight-board-appointed-idUSKCN11628X.

nearly $2 billion in bond payments that were due in June 2016.[66] PROMESA's Title III, which now governs in U.S. territories that want to shield themselves from bankruptcy, creates an exception to the general rule that territories cannot declare bankruptcy.[67]

PROMESA enables the commonwealth's government to enter a bankruptcy-like restructuring process, halting litigation in case of default on payments.[68] PROMESA created two restructuring frameworks–Title III, which constitutes a broad-based in-court proceeding, and Title IV, which establishes voluntary negotiations, similar to collective action clauses.[69] PROMESA's established oversight board has limited the amount available for "debt service" to $800 million per year for the next five years, despite the fact that approximately $3.5 billion will soon become due.[70] At a total of $119 billion in bond and unfunded pension debt, and with a population size of just 3.5 million, the island territory currently owes about $34,000 in debt per citizen.[71]

Investors in general obligation bonds have responded to PROMESA by arguing that they bought the bonds with the constitutional guarantee that the bonds would be paid back and that PROMESA does not give Puerto Rico the right to suspend its own constitution, which guarantees the priority payment of those general obligation bonds.[72] Creditors have since filed suit based on denial of due process, under the Fourteenth Amendment of the United States and Commonwealth of Puerto Rico Constitutions.[73] Other general obligation bond investors have filed suit, asserting that the PROMESA Control Board is unconstitutional under the U.S. and

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[66] *Puerto Rico's Fiscal Crisis: What You Need to Know*, OBAMA ADMINISTRATION WHITE HOUSE ARCHIVES (June 7, 2016), https://obamawhitehouse.archives.gov/blog/2016/06/07/puerto-ricos-fiscal-crisis-what-you-need-know.

[67] Mary Williams Walsh, *Puerto Rico: A Debt Problem that Kept Boiling Over*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/business/dealbook/puerto-rico-debt.html.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*.

[72] Andrew Scurria, *Puerto Rico's Bondholders File First Suit Against Uncle Sam*, WALL ST. J. (July 20, 2017), https://www.wsj.com/articles/puerto-ricos-bondholders-file-first-suit-against-uncle-sam-1500587205.

[73] *Id*.

Puerto Rican Constitutions because the control board members were not approved by the U.S. Senate, as required by the standard appointment procedures outlined in the appointments clause of the U.S. Constitution.[74] Hedge fund Aurelius Capital Management, which holds $466 million in general obligation bonds issued by the territory, argues that the bankruptcy-like cases that the board has initiated should therefore be dismissed.[75]

Arguably, the oversight board of PROMESA voids the constitutional powers of Puerto Rico's political branches, giving fiscal control of Puerto Rico to appointed board members. Essentially, the oversight board can be understood to have "sovereign" powers that trump decisions by Puerto Rico's legislature, governor, and other public authorities flowing from the federal government's power "to make all needful rules and regulations" in the U.S. territories.[76]

Still, in the wake of Hurricane Maria, the fragile island economy faces other challenges exacerbated by the natural disaster that make dependency on the decisions of the advisory board controversial. This summer, Puerto Rico Electric Power Authority (PREPA) filed for bankruptcy, attempting to avoid liability for billions of dollars in debt.[77] Just months after that filing, PREPA, the island's main utility company, remains in deep debt.[78] PROMESA continues to treat Puerto Rico as a legal anomaly – not a state nor a municipality – and, given the lack of safeguards protecting Puerto Rican political power, risks failing to deal with the structural economic issues that result from Puerto Rico's lack of statehood and sovereign independence.

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[74] *Id*.

[75] Mary Williams Walsh, *Hedge Fund Sues to Have Puerto Rico's Debt Case Thrown Out*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/business/dealbook/puerto-rico-debt-oversight-board.html?mtrref=www.google.com.

[76] U.S. CONST. art. IV, § 3, cl. 2.

[77] Lauren Hirsch & Nick Brown, *Puerto Rican Power Utility Files For Bankruptcy*, REUTERS (July 2, 2017), https://www.reuters.com/article/us-puertorico-debt-prepa/puerto-rican-power-utility-files-for-bankruptcy-idUSKBN19O02F.

[78] *Id*.

III. THE PUERTO RICAN CONSTITUTION, PROMESA, AND THE ILLEGITIMACY OF THE PUERTO RICAN RECOVERY ACT AS INTERPRETED BY THE SUPREME COURT

In order to understand how the debt restructuring process works in Puerto Rico, it is necessary to evaluate the Puerto Rican Constitution, PROMESA, and a few generalities of the U.S. bankruptcy process, as well as various Supreme Court decisions. By evaluating these legal sources in relation to one another, it will be possible to fully analyze the fundamental differences in the rights accorded to investors and creditors, the rights accorded to Puerto Rico in maintaining its territorial autonomy, and the rights accorded to the federal government over Puerto Rican affairs.

What is readily apparent is that the Puerto Rican Constitution's provision that makes Puerto Rican debt not subject to declarations of bankruptcy cannot be reconciled with PROMESA's Title III exceptions for bankruptcy declarations of territories. A prominent issue now is that of the devastation wrought on the Puerto Rican economy by Hurricane Maria. Hurricane Maria, the tenth-largest Atlantic hurricane on record and the fifth-largest hurricane to ever hit the United States, struck Puerto Rico on September 20, 2017,[79] causing approximately 80 billion in damages and a possible death toll of 2,975.[80] For weeks following the hurricane, the majority of the population of Puerto Rico suffered from flooding, electrical black-outs resulting from the devastated power grid, and a lack of access to potable water or cell service.[81] As of this writing, the Puerto Rican on-the-ground situation remains dire, as much of the power grid is yet to be restored, and the island faces an immense recovery, both with respect to its basic infrastructure and habitability, as well its

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[79] Brian Resnick, *Why Hurricane Maria is such a nightmare for Puerto Rico*, VOX (Sept. 22, 2017), https://www.vox.com/science-and-health/2017/9/21/16345176/hurricane-maria-2017-puerto-rico-san-juan-meteorology-wind-rain-power.

[80] Peter S. Green, *Puerto Rico's grim prognosis: The island may never recover*, CBS (Sept. 21, 2018), https://www.cbsnews.com/news/puerto-rico-hurricane-maria-by-the-numbers-cbsn-originals.

[81] *See* Elizabeth Elizalde, *Hurricane Maria is Largest Blackout in U.S. History*, N.Y. DAILY NEWS (Oct. 26, 2017), http://www.nydailynews.com/news/national/hurricane-maria-largest-blackout-u-s-history-article-1.3591417.

structural financial woes.[82] It is estimated, for example, that due the devastation caused by Hurricane Maria, Puerto Rico's gross national product could take twelve to thirteen years to reach pre-recession levels.[83]

The natural disaster raises new issues for how that economic recovery will take place. Given the austerity measures that would likely be instituted under Puerto Rican bankruptcy and the extent of the suffering of the island economy, along with the complete decimation of Puerto Rico's infrastructure during the hurricane, PROMESA appears to approach the financial affairs of Puerto Rico as that of a colony indebted to the United States and eligibility for bankruptcy-like proceedings only at the behest of federal will.[84] This leads to a conflict of Constitutions; Puerto Rico's ability to self-govern under its Constitution can be compromised at any time for the sake of federal law preferences. The financial quagmire has spawned a seemingly insurmountable on-the-ground situation of uncontrolled debt. It also presents major legal ramifications in terms of the reconciliation of the island's territorial political and financial status. PROMESA indicates that, barring a broad re-conception of Puerto Rico's status as a territory as heretofore established by controlling legal precedent, Puerto Rico's political sovereignty must be sacrificed for its future financial security.

Puerto Rico is currently experiencing its most severe debt crisis since the Great Depression.[85] However, the debt restructuring plan currently pursued with respect to Puerto Rico differs from traditional bankruptcy. At its core, the primary problem facing the resolution of the Puerto Rican debt crisis and the legal crisis that has been spawned by PROMESA is that since an amendment passed by

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[82] NBC12 Newsroom, *Dominion Energy crews continue to assist in rebuilding Puerto Rico power grid*, NBC (Jan. 11, 2018), http://www.nbc12.com/story/37248965/dominion-energy-crews-continue-to-assist-in-rebuilding-puerto-rico-power-grid.

[83] Fred Imbert, *Puerto Rican Economy Recovery May Take More Than a Decade*, CNBC (Oct. 9, 2017), https://www.cnbc.com/2017/10/09/puerto-rico-economic-recovery-may-now-take-more-than-10-years.html.

[84] CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/colony (last visited Oct. 1, 2018) (defining "colony" as "a country or area controlled politically by a more powerful country").

[85] Jorge Duany, *Puerto Rico in Crisis*, OXFORD UNIVERSITY PRESS (July 1, 2017), https://blog.oup.com/2017/07/puerto-rico-in-crisis/.

Congress in 1984, Puerto Rico has been entirely unable to authorize its municipalities to file for traditional bankruptcy under Chapter 9.[86] The debt restructuring plan as formulated in PROMESA is reflective of Puerto Rico's historical inferiority relative to the incorporated states, pegged to federal decision-making that burdens on the island's manufacturing and shipping competitiveness, provides little agency to the Puerto Rican territorial government and still fails to account for safeguarding the small and vulnerable economy in the case of financial crisis.

A. Traditional Bankruptcy Relative to Puerto Rican Debt Restructuring

In the United States, the bankruptcy process is generally governed by federal law.[87] In 1978, Congress adopted the Bankruptcy Reform Act, which is now codified in Title 11 of the U.S. Code and comprises the majority of current bankruptcy legal protections.[88] These provisions are often referred to as the "Bankruptcy Code," which at a basic level provides protection to debtors by removing them from the reach of their creditors.[89] As an example of this protection, one portion of the Bankruptcy Code, § 362, imposes what is referred to as an "automatic stay" from the time of filing a bankruptcy petition.[90] The automatic stay prohibits the enforcement of actions and judgments against a debtor for the collection of a claim arising prior to the filing of the petition, signifying that creditors

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[86] Mary Williams Walsh, *Puerto Rico Fights for Chapter 9 Bankruptcy in Supreme Court*, N.Y. TIMES (Mar. 22, 2016), https://www.nytimes.com/2016/03/23/business/dealbook/puerto-rico-fights-for-chapter-9-bankruptcy-in-supreme-court.html.

[87] U.S. CONST. art. I, § 8, cl. 2.

[88] Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-700 (1979)).

[89] *See generally An Overview of Chapter 9 of the Bankruptcy Code: Municipal Debt Adjustments*, JONES DAY (Aug. 2010), http://www.jonesday.com/an-overview-of-chapter-9-of-the-bankruptcy-code-municipal-debt-adjustments-08-15-2010/.

[90] Kirkland & Ellis, *An Overview of the Automatic Stay*, AM. BANKR. INST. J., https://www.kirkland.com/siteFiles/kirkexp/publications/2430/Document1/Friedland%20-%20An%20Overview%20of%20the%20Automatic%20Stay.pdf (last visited Oct. 1, 2018).

cannot continue to attempt collection of debts of those entities that are so financially fragile as to qualify for bankruptcy protection.[91]

It is generally acknowledged that state governments themselves cannot use the federal bankruptcy system to account for the debt of state governments because such an arrangement would violate the Contracts Clause of the Constitution, which prohibits state governments from impairing the obligation of contracts.[92] While today the Court's approach towards the Contract Clause is significantly more flexible in allowing state legislatures to pass private and public debt relief laws,[93] state governments still remain outside the purview of the U.S. Bankruptcy Code.[94] Nevertheless, since 1937, the federal bankruptcy code has allowed municipalities to declare bankruptcy under Chapter 9 of Title 11 of the Bankruptcy Code. The definition of a "municipality" encompasses cities, counties, school districts, and public improvement districts.[95] For example, Orange County, California declared bankruptcy in 1994, and the City of Detroit, Michigan declared bankruptcy in 2013.[96] The Court reiterated in 1970 that a state "cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money (on something else)."[97]

One of the questions that the Puerto Rican situation raises is whether, when allowing Puerto Rico to undergo a "bankruptcy-like" process, such a process would now ultimately be available to the

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[91] *Id*.

[92] U.S. CONST. art. I, § 10, cl. 1.

[93] *See, e.g.*, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437 (1934).

[94] Annie Lowrey, *Bankrupt Reasoning*, SLATE (Jan. 24, 2011), http://www.slate.com/articles/business/moneybox/2011/01/bankrupt_reasoning.html.

[95] *See generally* Floyd Norris, *Orange County's Bankruptcy: The Overview*, N.Y. TIMES (Dec. 8, 1994), https://www.nytimes.com/1994/12/08/business/orange-county-s-bankruptcy-the-overview-orange-county-crisis-jolts-bond-market.html; Brad Plumer, *Detroit just filed for bankruptcy. Here's how it got there.*, WASH. POST (July 18, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/18/detroit-just-filed-for-bankruptcy-heres-how-it-got-there/?noredirect=on&utm_term=.64d49a34ec2a.

[96] *Id.*

[97] Jennifer Burnett, *3 Questions on State Bankruptcy*, CSG, http://www.csg.org/pubs/capitolideas/enews/issue65_3.aspx (last visited Oct. 1, 2018).

states. PROMESA, as a means of "bankruptcy" without the formal Chapter 9 declaration, makes for a confounding standard as applied to the remainder of the fifty states and, even more so, the District of Columbia. One of the points of massive contention has always hinged upon whether Puerto Rico qualifies as a "state" for the purpose of the federal bankruptcy code. As per 11 U.S.C. 101 § 52, amended in 1984, "the term 'state' includes the District of Columbia and Puerto Rico, except for the purposes of defining who may be a debtor under Chapter 9 of this title."[98] This phrase in the code ostensibly prohibits both the District of Columbia and Puerto Rico from writing their own municipal bankruptcy laws, and it has been suggested that the arbitrary exclusion of the District of Columbia and Puerto Rico from bankruptcy protections was likely the result of fears that those two territories, the most indebted territories "by a lot," might write laws disfavoring their creditors, which, in the case of Puerto Rico, consisted mainly of U.S. citizens throughout the mainland United States.[99] Nevertheless, the exact meaning of the "except for the purpose of defining clause" phrase has been the subject of debate.[100]

The meaning of this was definitively explored in *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, in which the Court ultimately determined that the clause signified that Puerto Rico could not authorize its municipalities to seek Chapter 9 bankruptcy relief.[101] It follows that, without such authorization, the municipalities themselves would not qualify as Chapter 9 debtors, "until Congress intervenes."[102] Nevertheless, the Court qualified in that decision that "Puerto Rico remains a 'state' for other purposes," an assertion that remains decidedly ambiguous and captures the tension

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98 11 U.S.C. § 101(52) (1984).

99 *See* Williams Walsh, *Puerto Rico: A Debt Problem That Kept Boiling Over*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/business/dealbook/puerto-rico-debt.html?mtrref=www.google.com; Mary Williams Walsh, *Puerto Rico Fights for Chapter 9 Bankruptcy in Supreme Court*, N.Y. TIMES (Mar. 22, 2016), https://www.nytimes.com/2016/03/23/business/dealbook/puerto-rico-fights-for-chapter-9-bankruptcy-in-supreme-court.html.

100 *Id*.

101 *Franklin California Tax-Free Tr.*, 136 S. Ct. at 1949.

102 *Id*. at 1947.

with respect to Puerto Rico's undefined nature as a sub-nation without the legal protections, financial and otherwise, generally afforded to the fifty incorporated states.[103]

Because of Puerto Rico's characterization as a non-state for the purposes of the bankruptcy code, the way in which Puerto Rico and its municipalities may seek relief is, for the most part, dependent on U.S. congressional action. As discussed, in 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), creating a Financial Oversight Board to supervise the Puerto Rican government.[104] The essential and immediate effect of PROMESA is to shield Puerto Rico from a flurry of competing creditor claims in the context of Puerto Rico's inability to pursue traditional bankruptcy protection as per the Bankruptcy Code.[105] The long-term effects, however, are to re-affirm that Puerto Rico retains no territorial government control in the process of reforming its economy or providing for its citizens' economic well-being, cementing the relationship of the United States to Puerto Rico as one of modern economic colonialism.

B. PROMESA in the Context of Puerto Rico's Economic History

Puerto Rico is currently experiencing a brutal recession that has lasted for the last ten years.[106] However, its dismal economic state is not the result of out-of-control borrowing so much as it is a product of the unique political and territorial circumstances in which Puerto Rico functions.

For nearly all of its modern history, the Puerto Rican economy has been greatly influenced by federal decision-making. One critical example of its unique circumstances is the federal Merchant Marine Act of 1920, often called the Jones Act. The Jones Act was enacted to safeguard the country's shipbuilding industry and seafaring labor

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[103] *Id*. at 1942.

[104] Heather Long, *President Obama signs Puerto Rico rescue bill*, CNN (June 30, 2016, 5:00 PM), http://money.cnn.com/2016/06/29/investing/puerto-rico-debt-promesa/index.html.

[105] *Id*.

[106] *See id*.

force following World War I.[107] Not only does the Jones Act place costly, punitive requirements on shipping between Puerto Rico and U.S. ports, requiring all ships carrying goods to be American-flagged, as well as built, crewed, and owned by American citizens, Section 27 of the Act also requires any foreign-registered vessel to pay tariffs, fees, and taxes, affecting the price of Puerto Rico consumer goods.[108] The Jones Act also originally limited the amount of debt that Puerto Rico could take on.[109] In 1952, when Puerto Rico's Constitution was promulgated, a new constitutional debt limit was established.[110] Federal decision-making is also responsible for the tax incentives that propped up the Puerto Rican manufacturing industry for much of its modern political history, and whose relatively recent withdrawal may be most responsible for the lingering downturn that has outlasted the U.S. recession that began in 2007-2008.[111]

In the 1950s, attempting to transform Puerto Rico from a largely agrarian island[112] into a manufacturing hotspot for U.S. manufacturers, U.S. lawmakers implemented a series of tax breaks, called Section 936.[113] One of those tax breaks, enacted in 1976, allowed U.S. manufacturers to avoid corporate income taxes on profits made in U.S. territories, like Puerto Rico.[114] The Puerto Rican per capita

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[107] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-260, CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 1, 28 (2013), http://www.gao.gov/assets/660/653046.pdf.

[108] *Id.* at 13–16.

[109] *See* Bonnie D. Fors, The Jones Act for Puerto Rico (Dec. 1975), (Ph.D. dissertation, Loyola University Chicago), https://ecommons.luc.edu/luc_diss/1438/.

[110] *See generally supra* note 107, at 2–3.

[111] *See generally The Origins of the Financial Crisis*, ECONOMIST (Sept. 7, 2013), https://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article.

[112] John W. Schoen, *Here's how an obscure tax law sank Puerto Rico's economy*, CNBC (Sept. 26, 2017, 4:17 PM), https://www.cnbc.com/2017/09/26/heres-how-an-obscure-tax-change-sank-puerto-ricos-economy.html ("As of 1940, per capita income in Puerto Rico was just $122, and seventy percent of the population lived in rural areas.").

[113] *Id.*

[114] *Id.*

gross national product grew tenfold between 1950 and 1980.[115] Disposable income and educational attainment also increased.[116] However, the tax expansion had the effect of shifting the focus solely towards the development of sectors with significant tax advantages: manufacturing.[117]

As a result of the promotion of U.S. manufacturing corporations, industrialization on the island was led by large multinational firms with little participation from local suppliers or firms, inhibiting the development of a robust local economic sector.[118] After agitation during the 1990s that the tax subsidy for manufacturers was an undesirable form of corporate welfare, in 1996, President Bill Clinton signed a bill into law that would begin to phase out Section 936 over a period of ten years, ending in 2006.[119] This had nearly instantaneous results: between 2006 and 2014, Puerto Rico lost nearly half of its manufacturing jobs.[120] By 2006, employment peaked and began to dwindle.[121] Since 2006, the economy has been in a decade-long slump caused essentially by the removal of the tax incentives.[122]

Puerto Rico's economic crisis has basic roots in a number of structural factors that have become more entrenched since the end of Section 936. The structural factors include the mass exodus of the population, higher labor costs compared to their Caribbean sovereign counterparts, and a housing market slump. These economic factors accompany the territorial government's issuance of a large

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115 *Id*.

116 *Id*.

117 Sergio M. Marxuach, *The Puerto Rican Economy: Historical Perspectives and Current Challenges*, CENTER FOR THE NEW ECONOMY (Mar. 13, 2007), http://grupocne.org/wp-content/uploads/2012/02/FLMM.pdf.

118 *Id*.

119 Scott Greenberg & Gavin Ekins, *Tax Policy Helped Create Puerto Rico's Fiscal Crisis*, TAX FOUNDATION (June 30, 2015), https://taxfoundation.org/tax-policy-helped-create-puerto-rico-s-fiscal-crisis/.

120 Dave Graham et al., *Puerto Rico's fragile economy dealt new blow by Maria*, REUTERS (Sept. 25, 2017, 7:38 AM), https://www.reuters.com/article/legal-us-storm-maria-puertorico/puerto-ricos-fragile-economy-dealt-new-blow-by-maria-idUSKCN1C01FT.

121 John W. Schoen, *Here's how an obscure tax law sank Puerto Rico's economy*, CNBC (Sept. 26, 2017, 4:17 PM), https://www.cnbc.com/2017/09/26/heres-how-an-obscure-tax-change-sank-puerto-ricos-economy.html.

122 *Id*.

amount of municipal bonds on the bond market to private U.S. creditors. A report commissioned by Puerto Rican Governor García Padilla and drafted by a team of former International Monetary Fund officials noted high energy and labor costs, a weak housing market, and population loss as factors in Puerto Rico's greater economic decline.[123] From 2004 until 2017, the island lost nearly a tenth of its population, leaving the territory with an older, poorer population that is more dependent on government provisions and less able to work.[124] While the presence of an informal economy may play a role, it is estimated that Puerto Rican weekly wages are approximately half those in the United States, providing steady pressure on Puerto Ricans to leave the island.[125] At the same time taxes have risen.[126] During 2015, the island's sales tax increased sharply from 7 to 11.5 percent.[127]

Borrowing has played a role in accounting for the massive debt as well, though not to the extent that most nations' significant debt is generated by country-to-country borrowing.[128] In Puerto Rico's case, the bulk of the debt has been generated by private borrowing–selling municipal bonds to private investors such as hedge funds.[129] Between 2006 and 2013, as a result of the dwindling population and tax base, the Puerto Rican government used COFINA bonds to stimulate growth in response to the downturn, borrowing $15.2 billion

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[123] Anne Krueger et al., *Puerto Rico – A Way Forward*, GOV'T DEV. BANK FOR P.R. (June 29, 2015), http://www.bgfpr.com/documents/PuertoRicoAWayForward.pdf.

[124] *Id*.

[125] *See* Sergio Marxuach, *The Puerto Rican Economy: Historical Perspectives*, CENTER FOR THE NEW ECONOMY (Mar. 13, 2007), http://grupocne.org/wp-content/uploads/2012/02/FLMM.pdf; Dara Lind, *Puerto Rico's debt crisis, explained in 11 basic facts*, VOX (Aug. 3, 2015, 5:09 PM), https://www.vox.com/2015/7/10/8924517/puerto-rico-bankrupt-debt.

[126] *See* Dara Lind, *Puerto Rico's debt crisis, explained in 11 basic facts*, VOX (Aug. 3, 2015, 5:09 PM), https://www.vox.com/2015/7/10/8924517/puerto-rico-bankrupt-debt.

[127] *Id*.

[128] *Puerto Rico: An Island's Exodus*, FINANCIAL TIMES (Aug. 25, 2016), https://www.ft.com/content/f9251a80-652b-11e6-a08a-c7ac04ef00aa.

[129] *Id*.

in total.[130] Also in order to stimulate growth, the Government Development Bank attempted to fund a series of projects, including hotels, convention centers, and golf courses, of which several failed.[131]

As stated, in terms of manufacturing, Puerto Rico has remained at a competitive disadvantage throughout its history due to the fact that shipping to and from Puerto Rico must comply with the 1917 Jones Act, which requires that all goods transported by water between U.S. ports be carried on U.S.-flag ships constructed in the U.S., owned by U.S. citizens, and crewed by U.S. citizens and permanent residents.[132] These mandates make the shipping of goods between the U.S. and Puerto Rico significantly more expensive than those shipped from nearby ports in foreign locales such as the Dominican Republic and Haiti.[133] The fact that Puerto Rico is subject to U.S. laws further diminishes its competitive advantage relative to other Caribbean island nations.[134] Puerto Rico's wage scales are higher than its neighbor competitors, creating higher labor costs, because Puerto Rico is subject to U.S. minimum-wage laws.[135] The introduction of the minimum wage constitutes a barrier to job opportunities for the least educated; it is estimated that due to the disparity in prevailing wages between the United States and Puerto Rico, a U.S. minimum wage of $5.15 translates to a value of approximately $10.00 in Puerto Rico.[136] The structural economic issues facing Puerto Rico will continue to plague the economy and

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[130] David Martin, *Back story on Puerto Rico's debt crisis*, THE HILL (Sept. 4, 2015), http://thehill.com/blogs/congress-blog/economy-budget/252723-back-story-on-puerto-ricos-debt-crisis.

[131] *Puerto Rico: An Island's Exodus*, FINANCIAL TIMES (Aug. 25, 2016), https://www.ft.com/content/f9251a80-652b-11e6-a08a-c7ac04ef00aa.

[132] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-260, CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 1, 1–2 (2013), http://www.gao.gov/assets/660/653046.pdf.

[133] *Id*. at 28–29.

[134] *See generally* Sergio Marxuach, *The Puerto Rican Economy: Historical Perspectives*, CENTER FOR THE NEW ECONOMY (Mar. 13, 2007), http://grupocne.org/wp-content/uploads/2012/02/FLMM.pdf.

[135] *Id*.

[136] *Id*.

PROMESA will not likely address factors beyond the debt reorganization that are responsible for the financial crisis other than the municipal bonds.

C. Political and Legal History of Puerto Rico's Modern Colonialism

The political and legal history of Puerto Rico's arguably inferior territorial status has resulted in unique legal difficulties that it faces in terms of structural economic and humanitarian problems. Puerto Rico's legal territorial status has shaped its development–both in terms of how citizens experience life and how the territorial government in Puerto Rico has limited capabilities.

Beginning with the Insular Cases, which ruled that Puerto Rican citizens are not afforded the full protections of the Constitution, but only the most fundamental of rights,[137] Puerto Rico's territorial status relative to the United States has been shaped by a history of inferior, even racist, political and legal treatment by the federal government.[138] Unlike other territories, like the Colorado Territory, that were labeled incorporated and therefore on the path to statehood, Puerto Rico faced an uncertain legal fate from its beginnings. The legal opinions in the Insular Cases argued that Puerto Rican citizens could not understand "Anglo-Saxon principles,"[139] and therefore, Puerto Rico became an "unincorporated territory" without hope of eventual statehood.[140] Notably, employers in Puerto Rico are required to pay most federal U.S. taxes, including payroll, Social Security, and Medicaid taxes, with the exception of federal personal income tax.[141]

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[137] Downes v. Bidwell, 182 U.S. 244, 260 (1901).

[138] *Id*.

[139] *Id*. at 287.

[140] Tim Webber, *What Does Being a U.S. Territory Mean for Puerto Rico?* NPR (Oct. 13, 2017, 4:39 AM), https://www.npr.org/2017/10/13/557500279/what-does-being-a-u-s-territory-mean-for-puerto-rico.

[141] *Topic Number: 903 – U.S. Employment Tax in Puerto Rico*, IRS, https://www.irs.gov/taxtopics/tc903; *see also* Reuters Staff, *Puerto Rico hopes to gain from U.S. healthcare reform*, REUTERS (Sept. 24, 2009, 4:13 PM), https://www.reuters.com/article/us-healthcare-puertorico/puerto-rico-hopes-to-gain-from-u-s-healthcare-reform-idUSTRE58N5X320090924.

While the Insular Cases have formed the basis for Puerto Rico's political inferiority, its political treatment by the United States remains uneven and often harmful. It is clear, as demonstrated by the sudden removal of tax breaks shielding Puerto Rico's economy from freefall, that federal policy with respect to the territory is often inconsistent with the territory's best interests. The decision to award Puerto Ricans citizenship in 1917 was even motivated by use of the island as a potential store of troops for World War I.[142] Puerto Ricans remain unable to vote for U.S. presidents or elect voting U.S. senators or representatives to Congress; instead, Puerto Ricans may elect a nonvoting Resident Commissioner of Puerto Rico to the U.S. House of Representatives.[143] While the District of Columbia received the right to vote in presidential elections in 1961 with the Twenty-Third Amendment, Puerto Rico, as well as the rest of the unincorporated territories, still remains without representation.[144] As a result of this inequality, Puerto Ricans do not have a voice in Congress even when it comes to legislation directly affecting Puerto Rico. This has come to be exemplified by the advisory board promulgated by PROMESA and appointed by a President that Puerto Ricans are unable to vote for in elections.

The federal government's natural disaster response to Puerto Rico's suffering following Hurricane Maria has lagged too when compared to that of Texas following Hurricane Harvey and Florida following Hurricane Irma.[145] Immediately following the crisis, Puerto Rico witnessed slow distribution of disaster relief resources,

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[142] History.com Editors, *Puerto Ricans Become U.S. Citizens are Recruited for U.S. War Effort*, HISTORY CHANNEL (Nov. 16, 2009), https://www.history.com/this-day-in-history/puerto-ricans-become-u-s-citizens-are-recruited-for-war-effort.

[143] *See* Jones-Shafroth Act §§ 25-29, *supra*, note 18; *see also* Tim Webber, *What Does Being a U.S. Territory Mean for Puerto Rico?* NPR (Oct. 13, 2017, 4:39 AM), https://www.npr.org/2017/10/13/557500279/what-does-being-a-u-s-territory-mean-for-puerto-rico.

[144] Becky Little, *Puerto Rico's Complicated History with the United States*, HISTORY CHANNEL (Sept. 22, 2017), http://www.history.com/news/puerto-ricos-complicated-history-with-the-united-states.

[145] Ben Fox & Danica Coto, *Nothing, Nothing, Aid Lags in Hurricane-Torn Puerto Rico*, AP (Sept. 27, 2017), https://apnews.com/134576eb8a1b40688fb6bf20aaa0da73.

and President Trump vacillated for several days in deciding to eliminate the restrictions of the Jones Act in order to facilitate the easier shipment of relief resources.[146] This is but one example of "alien" status that shapes attitudes towards Puerto Rico's debt and humanitarian crisis and symbolizes the weaknesses the U.S. government exhibits with respect to the legal equality (or lack thereof) experienced by the territories.

The influence of colonialism has shaped the U.S. treatment of Puerto Rico's economic downturn and attempt at writing its own bankruptcy laws. It is clear that the PROMESA advisory board infringes on Puerto Rico's "sovereign" political autonomy and on the guarantees of the Puerto Rican constitution.[147] PROMESA is but one more example of the way in which Puerto Rico is treated in isolation as compared to the legal standards and protections afforded to the United States. The federal advisory board runs entirely contrary to the ideals of democratic self-determination upheld in the nation's foundations.

IV. CONSTITUTIONAL ISSUES PROMPTED BY PROMESA

While PROMESA's real effects in being able to ameliorate the debt crisis remain to be seen, its legal ramifications are real and create fundamental legal issues in terms of preempting Puerto Rico's constitution and subjecting Puerto Rico's population to the whims of federal decision-making, which is a trend that is decidedly undemocratic and an example of modern economic colonialism. Congress bases its power over the Territories in the Territory Clause of the Constitution, which provides that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to

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[146] Niraj Chokshi, *Trump Waives Jones Act for Puerto Rico, Easing Hurricane Aid Shipments*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/us/jones-act-waived.html.

[147] *Id*.; *see also* Agustin Rodriguez Lopez, *The Promise of Colonialism for Puerto Rico*, HARVARD REVIEW (Jan. 30, 2017), http://hir.harvard.edu/article/?a=14498.

Prejudice any Claims of the United States, or of any particular State."[148]

PROMESA stands to be re-evaluated in light of Hurricane Maria. Whether there are alternative solutions for Puerto Rico's extreme financial woes as well as legal alternatives, remains a point of contention. Puerto Rico's bar on authorizing its municipalities to declare bankruptcy prompts a constitutional question in terms of the uniformity clause and the bankruptcy clause of the Constitution. While it is true that states, like Puerto Rico, cannot themselves seek bankruptcy relief, states can and do authorize their municipalities to seek Chapter 9 bankruptcy relief.[149] Since 1984, Puerto Rico has been unable do so.[150] This is despite the fact that from 1938 until at least 1978, the term "state" had not been defined to exclude Puerto Rico, and thus, Puerto Rico could indeed authorize its municipalities to declare bankruptcy.[151] This, of course, changed with the addition of Section 101(52), excluding Puerto Rico from being able to authorize municipalities' declaration of bankruptcy under Chapter 9.[152]

This differential bankruptcy treatment also presents constitutional issues. Article I of the Constitution includes the power to enact "uniform laws on the subject of bankruptcies."[153] In his concurring opinion in the First Circuit Court of Appeals Decision *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, which ultimately resulted in the Supreme Court case upholding the unequal treatment of Puerto Rico in the bankruptcy laws, First Circuit Court of Appeals Judge Juan R. Toruella first raised the possibility that "non-uniform treatment" might violate the bankruptcy clause, arguing that Puerto Rico should be free to authorize its municipalities to file for bankruptcy protection under the existing Chapter 9 provisions.[154] In this case, non-uniform treatment would result from Congress' failure to "uniformly" delegate to the states

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148 U.S. CONST. art. IV, § 3, cl. 2.

149 STEPHEN PARSONS, THE ABCS OF DEBT: A CASE STUDY APPROACH TO DEBTOR/CREDITOR RELATIONS 653–54 (Aspen College 4th ed. 2016).

150 11 U.S.C. § 101(52) (1984).

151 Matthew T. Repetto, *Whether Puerto Rico's Exclusion is Non-Uniform*, 8 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 22 (2016).

152 *Id*.

153 *Id*.

154 *Id*.

the power to determine the substantive laws of bankruptcy, disallowing Puerto Rico to make its own bankruptcy laws.

In August 2017, hedge fund Aurelius Capital, a holder of Puerto Rico's general obligation bonds, sued to have Puerto Rico's bankruptcy case thrown out, arguing that the federal oversight board created by PROMESA was unconstitutionally established and citing the Appointments Clause.[155] The Appointments Clause calls for all principal officers of the federal government to be appointed by the president, and then confirmed by the Senate.[156] The board members were instead chosen by individual members of Congress who then made recommendations to President Barack Obama, who later confirmed those choices.[157] No Senate confirmation hearings occurred.[158] Aurelius has requested that the federal court in San Juan lift the stay of PROMESA, which prevents Puerto Rico's creditors from suing the government.[159] Aurelius argues that the history of recess appointments signifies that the Appointments Clause applies to the territories because the President cannot appoint an individual under the Recess Appointments Clause unless the individual is a federal officer subject to the Appointments Clause in the first place.[160]

Aurelius further points to the fact that presidents have followed the procedure of the Appointments Clause throughout history in commissioning governors in Puerto Rico and, historically, in the Illinois Territory, the Mississippi Territory, and the Southwest Territory.[161] Because, in the case of Puerto Rico, the Foraker Act did not provide for the commissioning of a governor, Aurelius argues that the President must have been acting pursuant to constitutional authority when commissioning Puerto Rican governors, who can only

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[155] Mary Williams Walsh, *Hedge Fund Sues to Have Puerto Rico's Bankruptcy Case Thrown Out*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/business/dealbook/puerto-rico-debt-oversight-board.html?mtrref=www.google.com.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] Reply in Support of Objection and Motion of Aurelius to Dismiss Title III Petition at 16, In re The Financial Oversight and Management Board of Puerto Rico, 318 F. Supp. 3d 537 (D.P.R. 2018) (No. 17 BK 3283-LTS).

[161] *Id*.

be federal officers of the United States subject to the Appointments Clause.[162] Aurelius claims that the opposing parties rely on the Insular Cases to make the claim that the Territories Clause forces out the relevance of the Appointments Clause by "appl[ying] a different set of constitutional rules for those of 'alien races' differing from us."[163]

There are additional constitutional concerns that accompany the mandate of the advisory board under PROMESA. The governor of Puerto Rico has capped the available amount of money to repay bonds of any type, which does not provide sufficient funds to repay both general obligation and COFINA creditors.[164] Given the limited resources available for repayment, it is expected that bondholders will attempt to assert a variety of claims to assert their positions for repayment. The hierarchy of creditors is unclear, and this is an unprecedented legal situation because of the severity of Puerto Rico's debt crisis and the unprecedented nature of instituting bankruptcy-like procedures within a U.S. territory.[165] Clearly, PROMESA risks impinging on the guarantees of Puerto Rico's 1952 constitution, which assures that general obligation bond debt will be paid before all others.[166]

Because of the general obligation bond prioritization in the Puerto Rican constitution, general obligation creditors can be expected to engage in litigation related to the constitutionality of Puerto Rico not paying the full amount of general obligation debt.

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[162] *Id*.

[163] *Id*. (citing Downes v. Bidwell, 182 U.S. 244, 279–80 (1901)); *id*. at 302, 306 (explaining different rules for an "uncivilized race" of "fierce, savage, and restless people"); Dorr v. United States, 195 U.S. 138, 148 (1904) (arguing that the jury-trial right does not extend to a territory of "savages").

[164] Mary Williams Walsh, *Puerto Rico Faces 'Humbling' Scope of Its Woes in First Court Hearing*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/business/dealbook/puerto-rico-faces-humbling-scope-of-its-woes-in-first-court-hearing.html.

[165] Colin Dwyer, *Puerto Rico Makes Unprecedented Move to Restructure Billions in Debt*, NPR (May 3, 2017), https://www.npr.org/sections/thetwo-way/2017/05/03/526750751/puerto-rico-makes-unprecedented-move-to-restructure-tens-of-billions-in-debt.

[166] Emma Ore & Michelle Kaske, *Puerto Rico Bondholders Deny Legitimacy of Each Other's Debt*, BLOOMBERG MARKETS (May 23, 2017), https://www.bloomberg.com/news/articles/2017-05-23/puerto-rico-bondholders-say-everybody-and-nobody-has-valid-claim.

As discussed, the Puerto Rican debt crisis generally involves two classes of creditors: general obligation creditors, who purchased Puerto Rico's municipal general obligation bonds, and COFINA creditors, who more recently purchased the refinancing debt issued by the Puerto Rico Urgent Interest Fund Corporation.[167] General obligation creditors, under Puerto Rico's constitution, may argue, for example, that their bonds constitute a "lien" on all general revenues received by Puerto Rico.[168] As per the Puerto Rican Constitution, Article VI, Section 8, "[i]n case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law."[169] This position is re-affirmed in the Management and Budget Office Act of 1980, which established priority guidelines that place first the "payment of interest and amortization corresponding to the public debt."[170]

Nevertheless, COFINA creditors likewise insist on priority payment.[171] COFINA creditors argue that they have a property interest in the sales tax on the bonds that they are to be paid.[172] Because the extinction of a lien may qualify as the taking of a property interest, this conflict may potentially implicate the takings clause of the Fifth Amendment of the Constitution.[173] Contract clause issues may also come into play. In 1977, in *United States Trust Company v. New Jersey*, the Court held that legislation removing a bond obligation,

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[167] Richard Epstein, *A Political and Constitutional Analysis of Puerto Rico's Debt Crisis*, FORBES (Nov. 6, 2017), https://www.forbes.com/sites/richardepstein/2017/11/06/a-political-and-constitutional-analysis-of-puerto-rican-debt-crisis/#3ff7042b6211.

[168] *Id*.

[169] P.R. CONST., art. VI, § 8.

[170] Management and Budget Office, Organic Act No. 147 of June 18, 1980, as amended, https://www2.pr.gov/ogp/Bvirtual/leyesreferencia/PDF/Y%20-%20Ingl%C3%A9s/147-1980.pdf.

[171] *See* Armstrong v. United States, 364 U.S. 40, 48 (1960).

[172] Mary Williams Walsh, *Puerto Rico Faces 'Humbling' Scope of Woes in First Court Hearing*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/business/dealbook/puerto-rico-faces-humbling-scope-of-its-woes-in-first-court-hearing.html.

[173] *See id*.

which prohibited the diversion of funds dedicated to a defined purpose to another purpose, was an unlawful impairment of the obligation of the contract in violation of Article 1, Section 10, of the U.S. Constitution.[174] Here, similar removal of Puerto Rico's bond obligations is likely to inspire similar contracts clause allegations on the part of COFINA and general obligation creditors alike.

Creditors also argue that the approach of the advisory board is at odds with the Puerto Rican constitution because the oversight board's five-year plan, formulated before Hurricane Maria hit, calls for deep reductions in bond payments across the board, including those payments to general obligation bondholders.[175] The oversight board hopes to use these savings to finance the operations of the Puerto Rican government itself throughout the recovery period.[176] This would clearly fail to honor the commitment made in the Puerto Rican constitution, which is binding and assures Puerto Rico's general obligation bondholders.[177] This plan would present similar issues in terms of violating the obligation of contract and the takings clause.

It remains to be seen whether additional constitutional issues will arise. While generally the Court leaves issues of economic and contract importance to the legislature to decide, laws implicating commercial affairs are still subject to rational basis scrutiny, which requires a legitimate government objective with means reasonably tailored to achieve that purpose.[178] If this law is determined to implicate a free speech or due process right, it is possible still that the

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174 United States Trust Company v. New Jersey, 431 U.S. 1, 17 (1977).

175 Richard V. Reeves, *Keeping Our Promesa: What the U.S. Can Do About Puerto Rico's Fiscal Crisis*, BROOKINGS (Sept. 11, 2017), https://www.brookings.edu/research/keeping-our-promesa-what-the-u-s-can-do-about-puerto-ricos-fiscal-crisis/.

176 *See id*.

177 Nick Brown, *Puerto Rico Bondholders in for Bumpy Bankruptcy Ride*, REUTERS (May 4, 2017, 11:48 AM), https://www.reuters.com/article/us-puertorico-debt-bankruptcy-analysis/puerto-rico-bondholders-in-for-bumpy-bankruptcy-ride-idUSKBN18022T.

178 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

legislation might be found unconstitutional under an applied standard of strict scrutiny.[179] Given that, since *Sorrell v. IMS Health*, all commercial transactions constitute speech protected by the First Amendment, it is potentially possible that PROMESA, which exists outside the exceptions provided in the bankruptcy code, might present with free speech issues in terms of precluding the enforcement of a debt.[180]

V. HUMANITARIAN CONCERNS AS RELEVANT TO PROMESA

There are humanitarian and basic self-government concerns for implementing any kind of austerity measures that would severely compromise the ability of the territorial Puerto Rican government to provide for its citizens. On September 20, 2017, Hurricane Maria, a powerful Category 4 storm became the most powerful storm to hit Puerto Rico in more than eighty years.[181] The hurricane caused damages that are currently estimated at more than $94 billion, decimating buildings, wrecking the island's electrical grid, destroying all of the island's cell towers, and causing significant flooding throughout Puerto Rico that has continued to spawn disease and destruction.[182] After the hurricane, the Puerto Rican poverty rate stood at 45%, the pension system on which many Puerto Ricans relied was nearly insolvent, and a Medicaid insurance program for the poor suffered from a chronic lack of funding.[183]

Access to clean water, electricity, sewage treatment, cell phone service, and medical treatment remains a concern as Puerto Rico has

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[179] Boos v. Barry, 485 U.S. 312, 312 (1988) (explaining that laws involving content-based speech are subject to strict scrutiny and must evidence narrow tailoring).

[180] Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

[181] Samantha Schmidt, *Forceful Storm Knocks Out All of Power to Puerto Rico*, WASH. POST (Sept. 20, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/09/20/hurricane-maria-takes-aim-at-puerto-rico-with-force-not-seen-in-modern-history/?utm_term=.4f85ec8ea808.

[182] *Id*.

[183] John W. Schoen, *Here's How An Obscure Tax Law Sank Puerto Rico's Economy*, CNBC (Sept. 26, 2017, 4:17 PM), https://www.cnbc.com/2017/09/26/heres-how-an-obscure-tax-change-sank-puerto-ricos-economy.html.

faced a slow response to the massive impact of Maria.[184] By late October 2017, nearly a month after the storm, eighty percent of the island's electrical grid was still not functioning; nearly a third of Puerto Ricans did not have access to running water; all of those with access to running water were required to boil their water before consumption in order to avoid disease; 40% of residents did not have access to a cell phone signal; nearly 40% of sewage-treatment plants on the island were not functioning; and close to half of the hospitals on the island were without electricity.[185] As of January 2018, 40% of the Puerto Rican population still do not have access to electrical power.[186]

The effects of living in such inhospitable conditions, combined with the acute financial hardship, are fueling lawlessness. A lack of police presence remains a critical issue. The island's government has fallen behind on millions of dollars in overtime payments to police officers, and overworked and unpaid police officers have begun calling in sick in waves.[187] As a result, approximately 2,000 of the island's 13,600 police officers are absent from work per day, and police stations have begun to close from anywhere ranging from several hours to a number of days to lack of manpower.[188] In the first weeks of 2018, the island's murder rate surged: thirty-two people were killed in Puerto Rico in the first eleven days of 2018; a number twice that of the same period last year.[189] Drug and gang-related violence, a long-standing issue in Puerto Rico, has similarly

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184 Patricia Mazzei & Omaya Sosa Pascual, *Why Puerto Rico Is Still Suffering a Month After Hurricane Maria*, MIAMI HERALD (Oct. 19, 2017, 2:17 PM), http://www.miamiherald.com/news/weather/hurricane/article179744081.html.

185 David Leonhardt, *Puerto Rico's Crisis, By the Numbers*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/opinion/puerto-ricos-crisis-by-the-numbers.html.

186 NBC12 Newsroom, *Dominion Energy crews continue to assist in rebuilding Puerto Rico power grid*, NBC (Jan. 11, 2018, 8:09 PM), http://www.nbc12.com/story/37248965/dominion-energy-crews-continue-to-assist-in-rebuilding-puerto-rico-power-grid.

187 Istra Pacheco, *Puerto Rico Police Stage Sickout*, NBC (Jan. 8, 2018, 3:09 PM), https://www.nbcnews.com/storyline/puerto-rico-crisis/puerto-rico-s-police-stage-sickout-over-unpaid-overtime-n835111.

188 *Id*.

189 Danica Coto, *Murders in Puerto Rico Surge*, TIME (Jan. 11, 2018), http://time.com/5099781/puerto-rico-murder-rate-hurricane-maria/.

risen in a grab for territory following the desertion of entire neighborhoods made inhabitable in the storm and as a result of the extreme disruption and disorganization caused by the hurricane.[190]

The physical costs of the storm are known, but the structural effects on the individuals who make up the population of Puerto Rico will be felt for years to come, especially the financial costs. Already impoverished as a result of the ten-year recession,[191] much of the population will likely face risks related to their ability to financially provide for themselves and earn a living in the wake of the disaster. Whether this will come to affect Puerto Rico's financial solvency as a territory remains a distinct concern.

Black Knight Inc., a data firm, has estimated that, as a result of the hurricane, approximately 90,000 mortgage borrowers in Puerto Rico became delinquent.[192] In an island with a total homeownership population of 425,000, approximately one-third of homeowners are behind on their mortgage payments.[193] Due to Puerto Rico's 35 % foreclosure and delinquency rate, compared to that of the just 14.4 % national rate of foreclosure, fears of a looming housing crisis remain pertinent.[194] While the federal government has imposed a temporary moratorium on foreclosures and many lenders have agreed to waive missed payments during the moratorium, the moratorium is scheduled to terminate in early 2018, which may spark a surge of foreclosures.[195] Because Hurricane Maria has triggered a wave of emigration from Puerto Rico–more than 140,000 of the island's population of 3.4 million are believed to have left in the two months following the hurricane[196]–the exodus will likely continue to cause

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190 David Ovalle, *Police Struggle to Rein in San Juan Crime*, MIAMI HERALD (Oct. 20, 2017), http://www.miamiherald.com/news/weather/hurricane/article179863816.html.

191 Matthew Goldstein, *Next Crisis for Puerto Rico: A Crush of Foreclosures*, N.Y. TIMES (Dec. 16, 2017), https://www.nytimes.com/2017/12/16/business/puerto-rico-housing-foreclosures.html.

192 *Id*.

193 *Id*.

194 *Id*.

195 *Id*.

196 Danica Coto, *Hurricane Maria Relief Efforts Set Off Fierce Debate About Leaving Puerto Rico*, USA TODAY (Nov. 9, 2017, 8:13 PM), https://www.usatoday.com/story/news/nation/2017/11/09/hurricane-maria-puerto-rico-debate/850820001/.

problems for the Puerto Rican housing market. Demands for housing have slumped significantly even following a housing slump that has lasted a decade.[197] From 2007 onward, housing prices have fallen twenty-five percent and the incidence of court-ordered foreclosures has risen 33 percent.[198]

Puerto Rico is thus facing a watershed moment, whose outcome will be determined entirely by external actors. At a time of extreme systemic economic woes, those Puerto Rican individuals who are most vulnerable to the effects of the economic crisis have already suffered extreme personal economic hardship, a condition that can only spiral. To impose austerity would exacerbate the structural problems endemic to Puerto Rico's problems. Such measures would almost certainly mean a worsening of the island's already fragile mortgage situation and increase difficulties surrounding the island's decimated power grid and national infrastructure.

One of the original stated benefits of the advisory board enacted by PROMESA is that a program of financial control at an arm's length from Puerto Rico would relieve local governors and politicians from being forced to make painful cuts to economic programs. However, this is a signal that the advisory board program risks being out of touch with the needs of a burgeoning humanitarian crisis.[199] Clearly, the approach to Puerto Rico's financial affairs would benefit from much needed re-orientation in terms of being amenable to the increasingly adverse situation faced by those most suffering in the damaged island.

Ideally, the federal government will seek to help Puerto Rico recover from the storm while also allowing some kind of debt restructuring process to continue in parallel. Systemic reform to the underlying issues, including the artificially high minimum-wage, the housing crisis, and cuts to pensions must not infringe on the ability of the most vulnerable actors, Puerto Ricans still suffering from a

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197 Matthew Goldstein, *Next Crisis for Puerto Rico: A Crush of Foreclosures*, N.Y. TIMES (Dec. 16, 2017), https://www.nytimes.com/2017/12/16/business/puerto-rico-housing-foreclosures.html.

198 *Id*.

199 *See* Reuters, *The Board Has Spoken: Puerto Rico To Be Hit With Painful Austerity*, BUSINESS INSIDER (Feb. 21, 2017), http://www.businessinsider.com/the-board-has-spoken-puerto-rico-to-be-hit-with-painful-austerity-measures-2017-2.

loss of basic living essentials like power and potable water, to be subordinated to the priority of creditors. At the same time, the constitutional issues brought to light by the debt crisis makes necessary the careful re-evaluation of Puerto Rico's legal treatment and a modernized view of its economic ties to the United States outside the boundaries of colonialism.

VI. ENGINEERING A RE-CONCEPTION OF PUERTO RICO'S TERRITORIAL STATUS

Notwithstanding the foregoing, such acute changes in Puerto Rico's economic and basic functioning status means that there are surely opportunities for the re-conceptualization of Puerto Rico's territorial status. It may be possible to evaluate potential economic solutions for Puerto Rico's crisis as relative to those countries that have suffered from similar debt crises.

Argentina provides one relatively recent comparison in terms of recovering from paralyzing debt. That country experienced a debt crisis that lasted from 2001 until 2016,[200] during which Argentina held significant reserves and, regardless, refused to pay its creditors.[201] However, hedge funds who invested in Argentinean debt were ultimately successful in the Argentinean debt crisis litigation, obtaining better terms on the return of their bond payments than those eventually offered by the government.[202] Here, however, unlike Argentina, the legislation passed by Congress in the form of PROMESA could undercut the legal protections underlying hedge funds' assertion of first claims on Puerto Rico's revenue.

Another comparison to be made is that of the U.S. Virgin Islands. The U.S. Virgin Islands ("USVI"), another territory whose bonds are exempt from taxation, is similarly struggling to provide for its own government payroll and has likewise lost normal access to the capital markets.[203] The USVI has only $2.3 billion of bond

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200 *Special Report: Argentina's Collapse, A Decline without Parallel*, ECONOMIST (Feb. 28, 2002), http://www.economist.com/node/1010911.

201 *Id.*

202 *Id.*

203 Mary Williams Walsh, *Puerto Rico: A Debt Problem that Kept Boiling Over*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/business/dealbook/puerto-rico-debt.html.

debt outstanding, a fraction of Puerto Rico's. The outstanding debt still comprises $23,000 per capita debt burden, which is very similar to Puerto Rico's.[204]

It seems clear, though not likely to be easily implemented, that the best way to deal with the increasing financial vulnerability of the territories involves long-term changes in the way that the federal government relates to the territories. Federal decision-making must practice restraint in intervening in territorial economies and take fewer liberties with respect to applying inconsistent tax policy as well as work to eliminate the archaic shipping regulations that serve as a stranglehold on territorial manufacturing and import sectors to manage what appears to be increasing territorial financial vulnerability in the long term.

While distinguishing the *Franklin* decision on the grounds of the uniformity and bankruptcy clauses would be ideal in order to allow territories like Puerto Rico to authorize their municipalities to authorize bankruptcy, in the short-term, the federal government might focus on democratizing the oversight board's purview. For example, the federal government may expand it to include democratically elected members to represent Puerto Rico. In lieu of allowing Puerto Rico to authorize its municipalities to declare bankruptcy, the most practicable solution would likely involve changing the interest rates of the bonds, changing their maturity terms, and reducing the amount owed, dismaying to investors in the constitutionally guaranteed bonds. A re-vitalization of Puerto Rico's relationship with the United States would likely involve the federal government acknowledging responsibility in the crisis in the form of guaranteeing that debt and avoiding protracted litigation on the merits of the constitutional guarantees of a territorial government as well as avoiding yet another rebuke of Puerto Rican administrative self-governance.

Though perhaps a distant goal, it is essential that Puerto Rico ultimately be allowed outside the bounds of its continued colonial status. The humanitarian crisis currently endemic to Puerto Rico belies another obligation to the country: the U.S. advisory board must avoid entangling disaster recovery and financial recovery, while similarly acknowledging, in its formulation of the resolution of the financial crisis, that austerity measures imposed on the island would

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204 *Id.*

likely lead to severe humanitarian woes, worsening a potential mortgage crisis and ultimately setting back the island in its recovery.

VII. CONCLUDING THOUGHTS

At this stage in its political government, Puerto Rico remains the U.S.'s oldest colony, privy to all of the burdens of its U.S. relationship and none of the benefits of statehood, including the declaration of municipal bankruptcy. The near constant manipulation of Puerto Rico's economy, both in terms of the restraint of its manufacturing and import and export sectors under the Jones Act and the external imposition of a multinational manufacturing industry that failed in the wake of removal of tax subsidies, falls on the federal decision-making apparatus, which is largely responsible for Puerto Rico's current fiscal catastrophe. The United States must acknowledge the fact that Puerto Rico's modern economic circumstances rely entirely on the U.S. and can choose to bring Puerto Rico into the fold by allowing it some democratic influence in the context of the oversight advisory board or by allowing Puerto Rico the opportunity to authorize its municipalities to default through recognizing its inclusion within the Constitutional laws on bankruptcy uniformity. The current tension with Puerto Rico's ambiguous legal status cannot continue to stand, and the changes currently wrought upon the Puerto Rican economy afford the United States the opportunity to recognize that the continued upholding of this tenuous legal status quo will only result in continued constitutional quandaries and broaden Puerto Rico's vulnerability to a humanitarian crisis.