

## Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in *Aurelius*

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**ABSTRACT.** For seventy years, Puerto Ricans have been bitterly divided over how to decolonize the island, a U.S. territory. Many favor Puerto Rico's admission into statehood. But many others support a different kind of relationship with the United States: they believe that in 1952, Puerto Rico entered into a "compact" with the United States that transformed it from a territory into a "commonwealth," and they insist that "commonwealth" status made Puerto Rico a separate sovereign in permanent union with the United States. Statehood supporters argue that there is no compact, nor should there be: it is neither constitutionally possible, nor desirable as a goal of self-determination. Without even acknowledging the existence of this debate, Justice Sotomayor recently declared the existence of the "compact" in a concurrence in a case in which no one raised it. By doing so, Justice Sotomayor took sides in the divisive political debate over Puerto Rico's future.

### INTRODUCTION

Justice Sotomayor just took sides in the debate over Puerto Rican decolonization. It happened when no one was looking, on June 1, 2020, in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*.<sup>1</sup> The plaintiffs challenged the mechanism for selecting the members of the Financial Oversight and Management Board for Puerto Rico (FOMB), an entity created by Congress to address Puerto Rico's financial crisis, on the ground that the

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1. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020). The case, which consolidated challenges by Aurelius Investment, LLC and Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER), was closely watched, but not on the issue Justice Sotomayor addresses in her concurrence.

mechanism violated the Appointments Clause of the Constitution.<sup>2</sup> The Court unanimously upheld the appointments, but Justice Sotomayor concurred separately to despair that no one raised a far more fundamental challenge to the statute creating the FOMB. According to her concurrence, Puerto Rico has full local self-government pursuant to an irrevocable “compact” with the United States, which Congress may not unilaterally amend or repeal. Despite the compact, Congress created the FOMB, which wields “wide-ranging, veto-free authority over Puerto Rico.”<sup>3</sup> Since the FOMB is obviously at odds with the compact, the statute creating the FOMB should be declared “invalid.”<sup>4</sup> But she “reluctantly” concurred, evidently because the parties’ failure to raise this issue forced her to leave in place a statute that should have been struck down as a violation of the “compact” between Puerto Rico and the United States.<sup>5</sup>

Justice Sotomayor’s view on the compact echoes that of the *Partido Popular Democrático*, one of the two dominant political parties in Puerto Rico, which supports the island’s decolonization through an improved or “enhanced” version of its current “commonwealth” status. But the other dominant political party, the *Partido Nuevo Progresista*, which supports decolonization through the island’s admission into statehood (and with which I identify), does not share their view.<sup>6</sup> Our view is that there is no irrevocable compact guaranteeing Puerto Rico full local self-government. Instead, Congress has the power to grant Puerto Rico autonomy, as it has done extensively, but it also has the power to take some or all of that autonomy away, as it has also done. In other words, our view is that Puerto Rico is now, and for nearly one-and-a-quarter centuries has been, a colony of the United States.

Given the chance to respond to Justice Sotomayor’s concurrence, we would point to the FOMB as the latest addition to a mountain of evidence that the United States neither believes nor behaves as if it has an irrevocable compact with Puerto Rico. We would explain why the so-called compact is one in a long

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2. U.S. CONST., art. II, § 2, cl. 3 (“The President . . . , by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .”).

3. *Aurelius*, 140 S. Ct. at 1674 (Sotomayor, J., concurring in the judgment).

4. *Id.* at 1679 (Sotomayor, J., concurring in the judgment).

5. *Id.* at 1683 (Sotomayor, J., concurring in the judgment).

6. Nor does the island’s third political party, the *Partido Independentista Puertorriqueño*, which has the support of a small percentage of the population, and which advocates decolonization through independence. For an overview of the three decolonization alternatives by an outsider to the debate, see NANCY MORRIS, *PUERTO RICO: CULTURE, POLITICS, AND IDENTITY* (Praeger Publishers 1995). For more detail on the level of support for each decolonization option, see *infra* note 15.

list of examples of the federal government’s use of legal ambiguity to govern colonies while denying it has any. And we would argue that when anyone, let alone a Supreme Court Justice, proclaims the existence of this irrevocable compact, they do not bolster Puerto Rican sovereignty. Instead, they inadvertently perpetuate Puerto Rico’s status as a colony by enhancing the illusion that it is not. But there is no sign of our view in Justice Sotomayor’s concurrence, which fails even to acknowledge the existence of a contrary understanding of Puerto Rico’s status.

This Essay responds to Justice Sotomayor’s concurrence by making clear where she stands with respect to the debate over Puerto Rican decolonization, and explaining why her decision to shore up the “compact theory”<sup>7</sup> – in a Supreme Court concurrence, and without so much as a nod in the direction of the opposing point of view – not only diverts the judicial power to a political end, but also severely exacerbates the considerable legal ambiguity that has defined and prolonged Puerto Rico’s colonial condition for well over a century. My aim here is to mitigate the damage done by her concurrence, by exposing, explaining, and criticizing her decision not only to take sides in a political debate, but worse, to do so in a Supreme Court opinion, and worse still, to do so by ignoring the other side at every turn, without letting on that that is what she is doing.

First, I situate Justice Sotomayor’s concurrence in the context of the debate over Puerto Rican decolonization. Second, I examine her arguments one by one, and show that each has been subject to serious – arguably devastating – objections, none of which she engages. Third, I explain how her concurrence exacerbates the legal ambiguity that has trapped Puerto Rico in a colonial status for over a century. I conclude by arguing that the notion that Congress has the power to confer irrevocable autonomy upon a territory other than by admitting it into statehood or granting it independence is not only wrong as a matter of law, but also harmful as a matter of policy.

## **I. AURELIUS AND THE DEBATE OVER PUERTO RICAN DECOLONIZATION**

Legal ambiguity has been the defining feature of Puerto Rico’s constitutional status since 1898, when the island became an “unincorporated” territory of the

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7. Despite some parallels beyond the scope of this Essay, Puerto Rico’s “compact theory” is not to be confused with the more familiar “compact theory” associated with secessionist arguments in the Civil War era. See, e.g., Stephen C. Neff, *Secession and Breach of Compact: The Law of Nature Meets the United States Constitution*, 45 AKRON L. REV. 405 (2012). Parts I and II *infra* discuss Puerto Rico’s compact theory.

United States.<sup>8</sup> According to *Downes v. Bidwell*, the leading case in a series of early twentieth-century Supreme Court decisions known as the *Insular Cases*, unincorporated territories like Puerto Rico “belong[] to the United States, but [are] not a part of the United States.”<sup>9</sup> In other words, the United States is sovereign over Puerto Rico – that much we know – but Puerto Rico is neither here nor there; neither this nor that. A concurrence in *Downes* elaborated with the observation that the island is “foreign to the United States in a domestic sense.”<sup>10</sup> Needless to say, that supremely unhelpful formulation (foreign in a domestic sense?!) clarified nothing. One of the dissenting Justices in *Downes* summed it up in disbelief: “[T]he contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence, for an indefinite period.”<sup>11</sup> Indeed, the contention was exactly that.

Longing to decolonize, and realizing that in order to achieve consensus on what they should become, they need to understand who they are, Puerto Ricans have ceaselessly debated the question of their constitutional status. As of 1950, that debate has concerned the so-called compact.

#### A. *Legal Ambiguity and the Debate over the Compact*

The debate over whether Puerto Rico and the United States have an irrevocable compact has gone on endlessly and failed to yield a definitive result. This

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8. On the central role of legal ambiguity in U.S. imperialism, see SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* (2019) [hereinafter ERMAN, *ALMOST CITIZENS*]; Sam Erman, *Essential Legal Ambiguity of Empire*, 130 *YALE L.J.* (forthcoming 2020) (reviewing DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019)) [hereinafter Erman, *Essential Legal Ambiguity of Empire*] (discussing Puerto Rico’s “compact” as one example of the legal ambiguity that defines the island’s constitutional status). For a basic introduction to “unincorporated” U.S. territories, see U.S. GOV’T ACCOUNTABILITY OFF., *GAO/HRD-91-18, APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION: REPORT TO THE CHAIRMAN, COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES 4* (June 1991).
  9. 182 U.S. 244, 287 (1901); see *infra* Part III (discussing the *Insular Cases* and their relationship to the compact). The Court first used the term “unincorporated” with respect to U.S. territories in *Rasmussen v. United States*, 197 U.S. 516, 525 (1905). Today, the unincorporated U.S. territories include Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 8, at 43-52.
  10. *Downes*, 182 U.S. at 341 (White, J., concurring). Justice White’s concurrence set forth the doctrine of territorial incorporation and was eventually endorsed by a unanimous Court. See *Balzac v. Porto Rico*, 258 U.S. 298, 304-14 (1922).
  11. *Downes*, 182 U.S. at 372 (Fuller, C.J., dissenting).

is precisely because it concerns yet another instance of the federal government's use of deliberately confusing and unclear language to describe Puerto Rico's relationship to the United States: specifically, the phrase "in the nature of a compact," which appears in a 1950 federal statute authorizing Puerto Rico to adopt a Constitution.<sup>12</sup> That inscrutable phrase (is it a compact or not?) has caused unending disagreement, since it gives simultaneous support both to those who insist that there is a compact (it says "compact"! ) and to those who insist that there is not (it says "in the nature of"! ).<sup>13</sup>

For seventy years, legal scholars, politicians, and commentators have extensively debated the so-called compact theory.<sup>14</sup> As it stands now, the overwhelming majority of Puerto Ricans wish to remain in some form of union with the United States, but they are split as to what form that union should take. Roughly half of Puerto Rico's population favors the option of becoming a state of the Union, while the other half prefers to remain in its current "commonwealth" status, albeit with "enhancements." (A 1993 plebiscite shows that only a small percentage supports the island's independence.)<sup>15</sup>

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12. Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319 (codified at 48 U.S.C. § 731 (2018)); *see infra* Section II.A.
  13. To be clear, this is just one point of contention in the debate over the compact. *See infra* Part II.
  14. *See generally* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (Yale Univ. Press 1997) (providing a historical survey of U.S.-Puerto Rico relations, including a discussion of the debate over the compact); MORRIS, *supra* note 6 (describing the debate over Puerto Rico's status; the description is based on numerous focus groups and interviews); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (U.P.R. Press 1985) (examining the Supreme Court jurisprudence that gave rise to Puerto Rico's current colonial status, including a discussion of the debate over the compact); José A. Cabranes, *Puerto Rico: Out of the Colonial Closet*, 33 FOREIGN POL'Y. 66 (1978-1979) (explaining why the compact appealed to many Puerto Ricans, and why it failed to decolonize Puerto Rico).
  15. A 1993 status plebiscite yielded 48.6% for commonwealth, 46.4% for statehood, and 4.5% for independence. *See* STAFF OF COMM. ON RES., 106TH CONG., 1ST SESS., THE RESULTS OF THE 1998 PUERTO RICO PLEBISCITE 41 (Comm. Print Nov. 19, 1999) (Appendix D) (providing figures for 1967, 1993, and 1998 plebiscites). I rely on the 1993 results because the results of subsequent plebiscites are more difficult to explain, but once one understands them, they yield roughly the same result. For example, a protest vote by commonwealth supporters in 1998 yielded a slim victory (50.2%) for "None of the Above," while statehood received 46.5%; a broader boycott in 2017 resulted in 97% support for statehood but only 23% voter turnout. *See id.* at 41 (1998 results); Christina Duffy Burnett [Ponsa-Kraus], *None of the Above Means More of the Same: Why Solving Puerto Rico's Status Problem Matters*, in NONE OF THE ABOVE: PUERTO RICANS IN THE GLOBAL ERA 73-83 (Frances Negrón Muntaner, ed., 2007) (explaining the 1998 results); José A. Delgado, "Desde Washington," *El Nuevo Día* (Sept. 22, 2018) (discussing 2017 results along with results of a 2018 poll by *The Washington Post* that yielded 48% for statehood, 26% for "territorial" status (a definition of commonwealth status rejected by

The compact theory lies at the center of the contest between statehooders and commonwealthers.<sup>16</sup> The reason is that, in order for Puerto Rico to cease being a colony, the terms of its union with the United States would have to bind Congress as much as they bind Puerto Rico. Otherwise, Puerto Rico is just a U.S. territory, with no guarantee of local control—and as everyone in this debate knows, “U.S. territory” is constitutional law-speak for “U.S. colony.”<sup>17</sup> Accordingly, commonwealthers argue that Puerto Rico is no mere territory, but rather has a mutually binding bilateral compact with the United States, which elevates its status to something analogous to, but different from, that of a state. Statehooders deny that a binding compact between the United States and a U.S. territory is constitutionally possible except of course through the territory’s admission into statehood. And they believe that such a compact is undesirable as a matter of policy, since it would permanently bind Puerto Rico to a union with the United States in which Puerto Ricans would continue to be denied equal voting representation in the federal government.<sup>18</sup>

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the Commonwealth Party), and 10% for independence, with 16% declining to express a preference. *See generally, e.g.*, Christina D. Burnett [Ponsa-Kraus], *The Case for Puerto Rican Decolonization*, 45 *ORBIS: A J. OF WORLD AFF.* 433, 441-46; Editors, *Errata*, 45 *ORBIS: A J. OF WORLD AFF.* 657 (2001) (explaining the status debate and the “enhancements” sought by supporters of “commonwealth” status, which include congressional recognition of the existence of the “compact”); Antonio Weiss & Brad Setser, *America’s Forgotten Colony: Ending Puerto Rico’s Perpetual Crisis*, *FOREIGN AFF.* (June 13, 2019), <https://www.foreignaffairs.com/articles/puerto-rico/2019-06-11/americas-forgotten-colony> [<https://perma.cc/TD53-MP47>] (situating Puerto Rico’s current crises in the context of the debate over status and arguing that both the former, shorter-term and the latter, longer-term problems need to be solved).

16. For a concise sampling of the arguments for and against the compact theory by leading exponents of each view, see the chapters by Juan R. Torruella and José Trías Monge in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* (Christina D. Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001), at 241, 244-46 (Torruella) and 226, 235-38 (Trías Monge) [hereinafter *FOREIGN IN A DOMESTIC SENSE*]. For more recent examples, compare Adam W. McCall, Note, *Why Congress Cannot Unilaterally Repeal Puerto Rico’s Constitution*, 102 *CORNELL L. REV.* 1367 (2017), which defends the compact theory, with Juan R. Torruella, *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 (2018) [hereinafter Torruella, *A Reply to the Notion of “Territorial Federalism”*], which criticizes the compact theory.
17. *See, e.g.*, Torruella, *A Reply to the Notion of “Territorial Federalism,” supra* note 16, at 77-89, *passim*; Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 *REVISTA JURDICA DE LA UNIVERSIDAD DE P.R.* 945, 954 (2011).
18. Some commonwealthers argue that this problem could be mitigated somewhat with a statute granting Puerto Rico representation in the U.S. House; statehooders respond that not only would such a grant be subject to repeal, but also, Puerto Ricans would still lack senators and the presidential vote, so their representation would remain unequal. For a debate over this proposal, see Christina Duffy Burnett [Ponsa-Kraus], *Two Puerto Rican Senators Stay Home*, 116 *YALE L.J. POCKET PART* 408 (2007); and José R. Coleman-Ti6, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 *YALE L.J.* 1389 (2007).

Meanwhile, the federal government’s contribution to the debate has been to confuse matters repeatedly while dodging its own responsibility to take measures to decolonize Puerto Rico – which it could do, for example, by enacting legislation providing for a process leading to clearly defined, noncolonial status options, and stating its willingness and intention to implement the results. Instead it substitutes action with hollow proclamations of the right to self-determination. Decrying this dynamic, one of the leading participants in Puerto Rico’s status debate had this sarcastic remark to offer on the centenary of the island’s annexation: “‘Let the Puerto Ricans choose,’ it is grandly said. Choose what?”<sup>19</sup>

Given the stakes of dignity and self-respect that Puerto Ricans rightly invest in the political status debate, it is no exaggeration to say that the term “compact” is a fightin’ word in Puerto Rico. The mystery, then, is why Justice Sotomayor would raise the compact theory when no one else did – and having raised it, why she would fail even to acknowledge, let alone engage, the extensive judicial, scholarly, and popular debate over each of compact theory’s very familiar and widely contested premises. Either she does not know the debate exists, which is inconceivable, or she does and ignores it, which is unforgivable.

To those of us who have lived this unending debate, laboring to articulate and defend our views thoroughly and with care, Justice Sotomayor’s *Aurelius* concurrence comes as a shock, though one imagines that those who just learned they have an ally on the Supreme Court bench will be pleased, and it would be understandable. Those of us who believe that the compact theory is not just wrong as a matter of law but harmful as a matter of policy, however, just found ourselves erased from the record this Supreme Court concurrence creates.

### *B. Aurelius, Justice Sotomayor, and the Compact*

The federal statute creating the FOMB, the Puerto Rico Oversight, Management, and Stability Act (PROMESA), provides for the appointment of Board members without the advice and consent of the Senate.<sup>20</sup> Aurelius Investment, LLC (Aurelius) challenged these appointments on the ground that the members of the FOMB are “Officers of the United States” and therefore their appointment requires Senate confirmation. The Supreme Court rejected the challenge, reasoning that the members of the FOMB are not Officers of the United States, but

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19. TRÍAS MONGE, *supra* note 14, at 3.

20. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101).

rather territorial officers, whose appointment need not comply with the requirements of the Appointments Clause.<sup>21</sup>

The decision was unanimous, with Justice Breyer writing for the Court and Justices Thomas and Sotomayor writing separate concurrences. Justice Breyer's and Justice Thomas' opinions are straightforward enough: they ask whether the members of the FOMB are Officers of the United States or territorial officers, agree on the answer, and disagree on how to get there. Justice Sotomayor, however, takes up an entirely different issue – one that, by her own account, no one raised or discussed.<sup>22</sup>

While Justice Sotomayor agrees that the Board members are territorial officers, her surprising contribution to the discussion is the argument that Congress does not have the power to appoint territorial officers in Puerto Rico at all, because Puerto Rico has a mutually binding bilateral “compact” with the United States, by virtue of which Congress permanently and irrevocably relinquished its sovereignty over the island's internal affairs seventy years ago.<sup>23</sup> As a result, PROMESA itself – a statute that rather aggressively takes charge of the island's internal affairs – may be “invalid.”<sup>24</sup> Although her argument would seem to lead inexorably to that conclusion, Justice Sotomayor stops short of reaching it outright, claiming that her hands are tied because the plaintiffs did not raise the issue.<sup>25</sup> Instead, because she agrees that the FOMB members are territorial officers, to whom the requirements of the Appointments Clause do not apply, she “reluctantly” concurs.<sup>26</sup>

Justice Sotomayor presents Puerto Rico's “compact” as if it were a self-evidently legitimate basis for striking down PROMESA, on a par with the Appointments Clause itself. To read her concurrence, you would think the parties, the amici, and the eight other Justices unaccountably missed the constitutional elephant in the courtroom.

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21. The First Circuit agreed with the plaintiffs but upheld the actions of the Board under the de facto officer doctrine. *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 856, 862 (1st Cir. 2019). Because the Supreme Court disagreed, there was no need to reach the de facto officer issue. See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1654 (2020).

22. See also *Aurelius*, 140 S. Ct. at 1665 (“[A]s Justice Sotomayor recognizes . . . we need not, and therefore do not, decide questions concerning the application of the Federal Relations Act and Public Law 600. No party has argued that those Acts bear any significant relation to the answer to the Appointments Clause question now before us.”).

23. *Id.* at 1671-72 (Sotomayor, J., concurring in the judgment).

24. *Id.* at 1679 (Sotomayor, J., concurring in the judgment).

25. *Id.* (Sotomayor, J., concurring in the judgment).

26. *Id.* at 1683 (Sotomayor, J., concurring in the judgment).



The Justice explains her decision to discuss the so-called compact on the ground that this “unexplored” issue “may well call into doubt the Court’s conclusion that the members of the [FOMB] are territorial officers not subject to the ‘significant structural safeguards’ embodied in the Appointments Clause.”<sup>27</sup> But nothing in Justice Sotomayor’s concurrence raises any doubt about that conclusion. On the contrary, she assumes the Board members are territorial officers and concurs with the holding that their appointment did not violate the Appointments Clause. What the compact theory calls into question instead is the validity of PROMESA itself. What she accomplishes with her concurrence, then, is not to call into doubt the Court’s conclusion, but to give the compact theory a boost: her concurrence amounts to nothing less than an emphatic, standing invitation to challenge PROMESA on the ground that it violates the compact.

The question whether any U.S. territory could have, let alone whether Puerto Rico does have, a mutually binding bilateral “compact” with the United States could not be more legally controversial or politically divisive in Puerto Rico. Justice Sotomayor wades into this morass with a concurring opinion that declares the existence of the purported compact as if it were a given. She does this without even mentioning the existence of the highly contentious debate over that very question. In doing so, she has bestowed a gift of immeasurable rhetorical value on the pro-commonwealth party in its bitter and divisive contest with the pro-statehood party, and exacerbated the legal ambiguity that has trapped Puerto Rico in an indefinite colonial status. Does she not know there is a debate over the compact that defines the island’s major political parties? Or is she attempting to resolve the debate by pretending that the commonwealthers won? It is impossible to tell from reading her opinion.

Puerto Ricans desperately need a clear path forward. What Justice Sotomayor has given them instead is yet another head-spinningly inconclusive exercise in question-begging by a federal official with outsized power over their fate.

## II. RESPONDING TO JUSTICE SOTOMAYOR’S DEFENSE OF THE “COMPACT THEORY”

Anyone familiar with Puerto Rico’s contentious debate over the compact theory can see that Justice Sotomayor plants an unmistakably partisan flag from the very first sentence of her concurrence:

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27. *Id.* at 1671 (Sotomayor, J., concurring in the judgment) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)).

Nearly 60 [sic] years ago, the people of Puerto Rico embarked on a project of constitutional self-governance after entering into a compact with the Federal Government. At the conclusion of that endeavor, the people of Puerto Rico established, and the United States Congress recognized, a republican form of government pursuant to a constitution of the Puerto Rican population's own adoption. One would think the Puerto Rican home rule that resulted from that mutual enterprise might affect whether officers later installed by the Federal Government are properly considered officers of Puerto Rico rather than "Officers of the United States" subject to the Appointments Clause.<sup>28</sup>

To the uninitiated, this opening paragraph sounds like a simple statement of fact followed by a modest suggestion that the fact might have consequences. But it is nothing of the sort, because it ignores the well-known and deeply held conviction of roughly half of Puerto Rico's population: that there is no compact between Puerto Rico and the United States. The term "compact" in this context means something very specific: a binding bilateral agreement, unalterable except by mutual consent. For Justice Sotomayor to begin by simply declaring its existence is no less striking than were she to begin an opinion in an abortion case by asserting that the fetus is a person, and that one would think the existence of that human life might affect whether a woman has the right to terminate her pregnancy, without offering even a hint of a suggestion that someone out there might disagree. There is nothing simple or modest about it.

The discussion that follows in the concurrence echoes the commonwealthers' longstanding defense of the compact theory. Several familiar arguments make an appearance. First, there is a brief history of U.S.-Puerto Rico relations that treats the early 1950s as the climactic moment in which the vaunted compact came into being. Here, the claim is that events occurring in 1950-1952 transformed Puerto Rico from a nonsovereign U.S. territory into a separate sovereign "commonwealth" in union with the United States.<sup>29</sup> Second, there's a string of quotations describing Puerto Rico's autonomy as comparable to that of the states. Here, the claim is that Puerto Rico's transition to commonwealth status should be considered analogous to prior territories' admission into the Union as states – which are bound to each other in a permanent union.<sup>30</sup> Third, there's an

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28. *Id.* at 1679 (Sotomayor, J., concurring in the judgment) (internal quotation marks, brackets, and citations omitted). The events to which Justice Sotomayor refers here occurred in 1950-52, which is seventy years ago.

29. *Id.* at 1683 (Sotomayor, J., concurring in the judgment). As discussed below, *see infra* note 48, Justice Sotomayor simultaneously concedes that Congress retains some power to govern Puerto Rico under the Territory Clause.

30. *Id.* (Sotomayor, J., concurring in the judgment).

account of representations made by U.S. delegates to the United Nations in the immediate aftermath of the events of 1950-1952, arguing that since Puerto Rico attained full local self-government, it should be removed from the United Nations' Decolonization Committee's list of non-self-governing territories – which it was.<sup>31</sup> Here, the claim is that these delegates' statements, followed by the U.N.'s removal of Puerto Rico from the list, must prove that the change that occurred in Puerto Rico's status was not merely a change in degree, but a change in kind.<sup>32</sup> Fourth, there's a reference to the Northwest Ordinance, which contained several “articles of compact . . . forever . . . unalterable, unless by common consent,” cited as “precedent” for Puerto Rico's modern-day compact.<sup>33</sup> Here, the claim is that if Congress could bind the United States to a compact with the original territories, surely it can do the same with Puerto Rico.<sup>34</sup> Fifth, there's the most important point of all: the argument that Congress may not unilaterally revoke what it granted Puerto Rico in 1950-1952.<sup>35</sup> This final point is absolutely critical to the compact theory, for if Congress has the power to take away what it has given, then the compact does not bind. If the compact does not bind, then Puerto Rico is not sovereign. If Puerto Rico is not sovereign, then it remains a nonsovereign U.S. territory, subject to the plenary power of Congress under the Territory Clause, which is to say, a colony.<sup>36</sup>

It is uncontroversial that the events Justice Sotomayor describes occurred. What is controversial is their interpretation. Yet her opinion presents them as if there were no controversy. An exploration of these “unexplored” issues would look nothing like this concurrence. In what follows, I suggest what it might have

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31. See G.A. Res. 748 (VIII) (Nov. 27, 1953).

32. *Aurelius*, 140 S. Ct. at 1673 (Sotomayor, J., concurring in the judgment).

33. An Ordinance for the Government of the Territory of the United States North-west of the River Ohio, 1 Stat. 50, 51 n.(a) (1789).

34. *Aurelius*, 140 S. Ct. at 1679 n.3 (Sotomayor, J., concurring in the judgment).

35. *Id.* at 1677 (Sotomayor, J., concurring in the judgment).

36. Trías Monge, the leading compact theorist and an architect of Puerto Rico's commonwealth status, makes all of the arguments described in this paragraph in his book, except for one: he stops short of citing the Northwest Ordinance as precedent for the compact, and simply describes the debate among supporters of the compact over whether to borrow the language of the Northwest Ordinance. TRÍAS MONGE, *supra* note 14, at 111. In an article published the following year, Trías Monge went further and offered his own view that the Northwest Ordinance was precedent for Puerto Rico's compact. José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Condition of Puerto Rico*, 68 REVISTA JURDICA DE LA UNIVERSIDAD DE P.R. 1, 21-22, 28 (1999). For other examples of the arguments described above in support of the compact theory, see also, for example, Casellas, *supra* note 17; Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What is Puerto Rico?*, 94 IND. L.J. 1 (2019); and McCall, *supra* note 16. See also *infra* Sections II.A-E (discussing arguments in support of the compact theory).

looked like, examining what Justice Sotomayor includes and identifying what she leaves out as she makes each of the five arguments described above.<sup>37</sup>

*A. The Argument Based on the Events of 1950-1952*

Justice Sotomayor begins with a brief history of Puerto Rico's relationship with the United States from 1898 to 1952.<sup>38</sup> We learn that the island was annexed by the United States in 1898 and subjected to military rule for nearly two years, until, in 1900, Congress passed the Foraker Act, an organic act establishing a civil government on the island.<sup>39</sup> The concurrence does not describe that government, but in a nutshell, it included a Governor and eleven-member Executive Council, all appointed by the President of the United States with Senate confirmation, and a territorial legislature with representatives chosen by popular election.<sup>40</sup> Over time, the concurrence continues, Congress granted Puerto Rico "incremental measures of autonomy," such as Congress' conferral of U.S. citizenship

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37. For arguments against the compact theory, see, for example, 1-2 GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, *BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1300-02* (Editorial de la Universidad de Puerto Rico 1984); TORRUELLA, *supra* note 14; Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 870-77 (2005); David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REVISTA JURÍDICA DE LA UNIVERSIDAD DE P.R. 255, 307 (1952); Carlos R. Soltero, *Is Puerto Rico a "Sovereign" for Purposes of the Dual Sovereignty Exception to the Double Jeopardy Clause?*, 28 REVISTA JURÍDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 183, 194-97 (1994); Juan R. Torruella, *¿Hacia Dónde Vas, Puerto Rico?*, 107 YALE L.J. 1503, 1522 (1998); and Torruella, *A Reply to the Notion of "Territorial Federalism," supra* note 16.
38. *Aurelius*, 140 S. Ct. at 1670-73 (Sotomayor, J., concurring in the judgment). Commonwealths sometimes begin a little earlier, describing Puerto Rico's "Autonomic Charter of 1897" as precedent for the compact. See, e.g., TRÍAS MONGE, *supra* note 14, at 12-16, 107. Spain created a Charter of Autonomy for Puerto Rico (and another for Cuba) on the eve of the United States's intervention in the war with Spain in 1898. It supposedly could not be amended without Puerto Rico's consent, but the proposition was never tested because the Charter was in place for less than a year. See generally Christina Duffy Ponsa [Ponsa-Kraus], *When Statehood Was Autonomy*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (examining "the nearly two-year period following Puerto Rico's annexation, during which there existed virtually unanimous support among the island's political leaders for Puerto Rico's admission into the United States as a state of the Union").
39. An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, 31 Stat. 77 (1900).
40. *Id.* §§ 17-32. The Executive Council served as the upper house of the legislature; the elected body was the lower house.

upon Puerto Ricans in the Jones Act of 1917.<sup>41</sup> This is a questionable example of increased “autonomy,” though, since it was followed by a Supreme Court decision holding that the grant of citizenship had changed nothing about Puerto Rico’s status.<sup>42</sup>

This brings Justice Sotomayor to the early 1950s, the crucial moment in which, on the pro-compact account, Congress finally and irrevocably relinquished all of its sovereignty over Puerto Rico’s internal self-government.<sup>43</sup> In 1950, Congress passed Public Law 600, a federal statute that recognized and affirmed the principle of government by consent, described itself as a law “in the nature of a compact,” and authorized the people of Puerto Rico to adopt their own constitution.<sup>44</sup> Public Law 600 was submitted to the Puerto Rican electorate, who voted in favor of it and elected delegates to a constitutional convention. The convention drafted a constitution and submitted it to Congress, which in a second law, Public Law 447, approved it with several modifications, and with the caveat that it would become effective only after the people of Puerto Rico themselves approved it by “formal resolution.”<sup>45</sup> They approved it by popular ratification.<sup>46</sup>

Compact theorists (i.e., commonwealthers) have been unclear as to when, exactly, the mutually binding bilateral compact allegedly came into being. Justice Sotomayor’s concurrence does not make it any clearer. Was it when Congress passed Public Law 600, which described itself as “in the nature of a compact”? Or when the Puerto Rican electorate approved the process prescribed in Public Law 600? Or when Congress approved their Constitution? Or when the people of Puerto Rico ratified it?

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41. *Aurelius*, 140 S. Ct. at 1671 (Sotomayor, J., concurring in the judgment); see An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones Act of 1917), ch. 145, § 5, 39 Stat. 951, 953.

42. See *Balzac v. Porto Rico*, 258 U.S. 298, 304-14 (1922). On the complicated history of U.S. citizenship in Puerto Rico, see JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS* (1979); and ERMAN, *ALMOST CITIZENS*, *supra* note 8.

43. See, e.g., TRÍAS MONGE, *supra* note 14, at 107-18; Casellas, *supra* note 17, at 946-48.

44. Public Law 600, ch. 446, § 1, 64 Stat. 319, 319 (1950). Although Justice Breyer’s opinion for the Court declines to discuss the effect of Public Law 600 on the Appointments Clause issue, see *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020), his opinion for the Court does explain that Public Law 600 adopted and substantially (but not entirely) repealed the Jones Act of 1917, renaming it the Federal Relations Act.

45. Joint Resolution, Approving the Constitution of the Commonwealth of Puerto Rico Which Was Adopted by the People of Puerto Rico on March 3, 1952, Pub. L. No. 447, 66 Stat. 327, 328 (1952).

46. TRÍAS MONGE, *supra* note 14, at 115.

Critics of the compact theory of course do not deny that these events occurred. They simply argue that none of them produced a mutually binding bilateral compact because Congress had neither the intent nor the power to do so.<sup>47</sup> Agreeing that the events of 1950-1952 were a watershed moment in Puerto Rican history, critics nevertheless argue that Congress merely did what Congress has always had the power to do under the Territory Clause: it conferred upon Puerto Rico a significant degree of autonomy—greater autonomy than any territory before it—but it did not relinquish U.S. sovereignty under the Territory Clause, nor could it have. There is no hint of this competing interpretation in Justice Sotomayor’s account.<sup>48</sup>

### B. *The Argument Based on Suggestive Quotations*

Turning to the second argument, the concurrence builds the case for the compact theory with a series of quotations, mainly from federal court opinions, referring to the compact and describing Puerto Rico as having achieved a degree of autonomy comparable to that of the states of the Union.<sup>49</sup> These quotations

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47. See, e.g., Torruella, *A Reply to the Notion of “Territorial Federalism,”* *supra* note 16, at 77-89.

48. Justice Sotomayor concedes that Congress retains some power under the Territory Clause, but states (without explanation) that such power can be reconciled with the compact. See *Aurelius*, 140 S. Ct. at 1679 (Sotomayor, J., concurring in the judgment). For a long time, commonwealthers argued that in 1952, Puerto Rico ceased to be a “territory,” based on the (correct) understanding that territorial status and the compact theory are incompatible. See, e.g., Casellas, *supra* note 17, at 948. This argument has become less common in the wake of overwhelming evidence that the federal government still considers Puerto Rico a territory. See, e.g., *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875-77 (2016). The Court’s decision in *Sanchez Valle* (from which Justice Sotomayor dissented) was a blow to compact theory insofar as the Court assumed that Puerto Rico is a territory, and held that Puerto Rico is not a separate sovereign for purposes of double jeopardy. While the holding was purportedly limited to the double-jeopardy context, the parties’ briefs and the Court’s reasoning made clear that the case had ramifications beyond that limited context. Recognizing this problem, the late pro-commonwealth Governor of Puerto Rico and leading compact theorist, Rafael Hernández Colón, published an article on *Sanchez Valle* trying to salvage the compact theory. He did this by overreading the *Sanchez Valle* Court’s observation that “Puerto Rico . . . [is] sovereign ‘in one commonly understood sense of that term’” (which in context clearly meant that it has local powers of self-government), and arguing that the case stands for the proposition that Puerto Rico is a separate sovereign—in other words, that it stands for the opposite of what it held. See Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U. L. REV. 587, 600 (2017). Justice Sotomayor cites Hernández Colón in this passage, as she breathes new life into the compact theory by attempting to reconcile it with the undeniable fact, affirmed in *Sanchez Valle*, that Puerto Rico remains a nonsovereign U.S. territory.

49. *Aurelius*, 140 S. Ct. at 1655; see, e.g., Casellas, *supra* note 17, at 952-58; Issacharoff et al., *supra* note 36, at 11-12.

appear over the course of a two-page passage following Justice Sotomayor's description of the events of 1950-1952. There is little text between one quote and the next except for citations to their sources. They create the strong impression that there is an avalanche of support for the compact theory.

Critics of the compact theory, however, could supply plenty of quotations in support of their point of view.<sup>50</sup> And they would have arguments to make in response to the quotations on Justice Sotomayor's list, starting with the very first one: "In 1952, 'both Puerto Rico and the United States ratified Puerto Rico's Constitution.'"<sup>51</sup> This quotation comes from the dissenting opinion in *Sanchez Valle v. Puerto Rico*, which Justice Sotomayor joined.<sup>52</sup> While she does acknowledge it was a dissent, the objection to the quoted statement would be that, out of context, it is misleading – in a way that has significant implications for the compact theory. We all know what "ratified" implies: it implies a popular act of constitution-making, as opposed to an ordinary act of legislation. Compact theorists describe 1952 as a popular act of constitution-making, and it was – in Puerto Rico, where the people ratified their Constitution. But the United States did not "ratify" anything, in a constitution-making sense, in 1952. Congress approved Puerto Rico's constitution through ordinary legislation. The United States did not amend its own Constitution, nor did it take any measure that could be confused with an amendment. Thus, it is incorrect to say that "Puerto Rico and the United States ratified Puerto Rico's Constitution."<sup>53</sup>

But the battle of the quotes is a dead end anyway. For every statement that Puerto Rico has "a measure of autonomy comparable to that possessed by the States," there is a competing statement that "Congress retains all essential powers set forth under our constitutional system, and it will be Congress and Congress alone which ultimately will determine the changes, if any, in the political status of the island."<sup>54</sup> Moreover, the list of quotations provided here is problematic in yet another way: no matter how many court opinions or official texts one

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50. Torruella, *A Reply to the Notion of "Territorial Federalism," supra* note 16, at 79-84 (collecting a number of them).

51. *Aurelius*, 140 S. Ct. at 1672 (Breyer, J. dissenting) (quoting *Commonwealth of Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1881 (2016)).

52. *Sanchez Valle*, 136 S. Ct. at 1881 (Breyer, J., dissenting).

53. See also Weiss & Setser, *supra* note 15 (arguing that a commonwealth arrangement that truly decolonized Puerto Rico "would arguably require an amendment to the U.S. Constitution, as over a century of federal actions and judicial decisions, including two recent Supreme Court cases, have suggested that Congress will continue to have absolute authority over Puerto Rico under the current constitutional arrangement . . ."). The two Supreme Court cases to which the quotation refers to are presumably *Sanchez Valle* and *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016).

54. *Aurelius*, 140 S. Ct. at 1673 (Sotomayor, J., concurring in the judgment) (quoting *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976)); Torruella, *A*

finds mentioning the compact and extolling the virtues of self-government it purportedly represents, one will not find any actually holding that Congress' grant of autonomy to Puerto Rico was *irrevocable*. The irrevocability of the compact is essential to the compact theory, which is why commonwealthers insist that the compact is mutually binding: again, if Congress retains the power to modify or withdraw from the compact, then Congress retains ultimate control over Puerto Rican self-government, and Puerto Rico remains a colony.

*C. The Argument Based on Representations Made to the United Nations*

Justice Sotomayor next turns to statements made by U.S. representatives to the United Nations in 1953, to the effect that because Puerto Rico had achieved local self-government the previous year, it should now be removed from the list of non-self-governing territories.<sup>55</sup> Frances P. Bolton and Mason Sears usually make an appearance at this point, and here they are in Justice Sotomayor's concurrence. The concurrence identifies Bolton as the "U.S. Rep. to the General Assembly." To be clear, however, she was an Ohio congresswoman appointed by President Eisenhower to join the U.S. delegation to the United Nations in 1953, not the U.S. Ambassador to the United Nations, whose words would arguably have carried greater weight. Sears, meanwhile, served as the U.S. delegate to the Committee on Information.<sup>56</sup>

As part of the U.S. effort to get Puerto Rico removed from the list, both Bolton and Sears definitely made statements supportive of the compact theory. Bolton claimed that Puerto Rico and the United States had entered into "a compact of a bilateral nature whose terms may be changed only by common consent," and Sears claimed that "[a] compact . . . is far stronger than a treaty [because a] treaty can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other."<sup>57</sup> Compact theorists quote these statements as further evidence in support of the argument that Congress must have meant to enter into a binding relationship with Puerto Rico in

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*Reply to the Notion of "Territorial Federalism," supra* note 16, at 80 (quoting 96 CONG. REC. 9595 (1950), and describing the statement as reflective of the apparent "general consensus" on Public Law 600 during the debate on the House floor).

55. *Aurelius*, 140 S. Ct. at 1675-77 (Sotomayor, J., concurring in the judgment); see, e.g., TRÍAS MONGE, *supra* note 14, at 123; Casellas, *supra* note 17, at 948.
56. On the practice of appointing sitting members of Congress to serve on a one-time basis as delegates to sessions of the United Nations General Assembly, see CONG. RSCH. SERV., IF10464, UNITED NATIONS ISSUES: CONGRESSIONAL REPRESENTATIVES TO THE GENERAL ASSEMBLY (2020).
57. *Aurelius*, 140 S. Ct. at 1677-78 (Sotomayor, J., concurring in the judgment). See 29 Dept. State Bull. 802, 804 (Dec. 7, 1953) (Bolton statement); 29 Dept. State Bull. 329, 329 (Sept. 21, 1953) (Sears statement).



1950-1952. As Justice Sotomayor puts it, if these representations to the United Nations were “merely aspirational,” not only would “the United States’[s] compliance with its international obligations be in substantial doubt,” but Congress would have made Puerto Rico an “empty promise.”<sup>58</sup> And so, the argument goes, the compact theory must be true.<sup>59</sup>

These arguments misunderstand the problem with Bolton’s and Sears’s statements. The problem is not that their statements were “merely aspirational,” but that they were incorrect. Congress did not make an “empty promise,” because Congress did not promise Puerto Rico a mutually binding bilateral compact.<sup>60</sup> If anything, the word “aspirational” more accurately captures the language of Public Law 600 itself, which avoids a clear and direct reference to a compact, instead using the bet-hedging phrase “in the nature of a compact.”

Bolton and Sears were simply mistaken when they claimed that the United States had entered into a mutually binding bilateral compact with Puerto Rico. The argument that their representations must be true because their falsity would mean that the United States might be in violation of its international obligations rests on the self-evidently flawed premise that one can avoid legal jeopardy by the expedient of treating false propositions as true. If recognition of their falsity places the United States in violation of its international obligations, the solution is not to claim that their statements must be true, but to insist that the United Nations put Puerto Rico back on the list of non-self-governing territories until the United States actually decolonizes the island.

Moreover, whether the events of 1952 met an international standard sufficient to remove Puerto Rico from the list of non-self-governing territories is an entirely separate question from whether the U.S. Constitution even permits an irrevocable compact in the first place, let alone whether Congress offered or entered into such a compact in 1950-1952.<sup>61</sup> The views of representatives sent to the United Nations as part of an effort to remove Puerto Rico from a list of colonies have no bearing on the latter, purely legal question.

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58. *Aurelius*, 140 S. Ct. at 1678 (Sotomayor, J., concurring in the judgment).

59. Probably the best-known example of the “empty promise” point is an oft-cited opinion by First Circuit Judge Calvert Magruder, who responded to arguments against the compact theory by refusing to “impute to the Congress the perpetration of such a monumental hoax.” *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956). Torruella, *A Reply to the Notion of “Territorial Federalism,” supra* note 16, at 85-89, borrows the phrase “monumental hoax” to criticize Bolton’s and Sears’s statements, in an implicit reference to Judge Magruder’s opinion.

60. For an argument that is sympathetic to some form of intermediate status for Puerto Rico, such as “associated statehood,” yet nevertheless questions the accuracy of these representations to the United Nations, see Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1153-57 (2009).

61. *See id.* at 1152-53.

*D. The Argument Based on the Northwest Ordinance*

Another familiar argument invokes the Northwest Ordinance of 1789 as precedent establishing the power of Congress to enter into a binding compact that it may not alter or withdraw from unilaterally.<sup>62</sup> Sure enough, there it is in Justice Sotomayor’s concurrence.<sup>63</sup> She relegates this argument to a footnote, and there is a satisfying symmetry here: the Northwest Ordinance itself is in a footnote, at page 51 of the first volume of the *Statutes at Large*.<sup>64</sup> That’s right: the *Statutes at Large*, a compilation of ordinary legislation passed by Congress and requiring no more than a simple majority to enact – or repeal.

The Northwest Ordinance introduces the six articles that comprise its second half in the following language: “That the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent.”<sup>65</sup> Justice Sotomayor quotes this language in support of the proposition that “Public Law 600 was not entirely without precedent,” adding that “proponents of Public Law 600 were vocal in their reliance on the Northwest Ordinance as a model.”<sup>66</sup> They were indeed, and they still are.<sup>67</sup> But opponents of the compact have a voice too, even if it is not represented in this concurrence. We disagree with the argument that the Northwest Ordinance provides precedent for a compact that actually, as opposed to aspirationally, binds.<sup>68</sup>

For one thing, while the Northwest Ordinance contains language seemingly supportive of the compact theory, that language refers to a compact with the

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62. See, e.g., Trias Monge, *Plenary Power*, *supra* note 36, at 28; *Hearing on H.R. 900 and H.R. 1230 Before the H. Comm. on Nat. Res. S. Comm. on Insular Affairs*, 110th Cong. 3-4, at 40-44 (March 22, 2007) (written testimony of Richard H. Pildes, Sudler Family Professor of Constitutional Law, New York University School of Law).

63. See *Aurelius*, 140 S. Ct. at 1678 n.3 (Sotomayor, J., concurring in the judgment).

64. 1 Stat. 51 n(a). As the text accompanying the footnote explains, the first Congress reenacted the Northwest Ordinance, which had originally been enacted by the Continental Congress, with revisions “so as to adapt the same to the present Constitution of the United States.” *Id.* at 50-51.

65. 1 Stat. at 53 n.(a) (preamble to articles).

66. *Aurelius*, 140 S. Ct. at 1678 n.3 (Sotomayor, J., concurring in the judgment).

67. See sources cited *supra* note 62.

68. Admittedly, the critics’ views on this particular argument are harder to find in writing, but Justice Sotomayor might have mentioned former Attorney General Richard Thornburgh’s writing on this question. See, e.g., RICHARD THORNBURGH, *PUERTO RICO’S FUTURE: A TIME TO DECIDE* (2007) (describing the ways in which the treatment of twentieth century territories broke with the pattern set by the Northwest Ordinance); Richard Thornburgh, *The Northwest Ordinance: No Precedent*, *SAN JUAN STAR* (Oct. 11, 2001).

“people and *States* in the said territory,” which strongly suggests that any promises made here are inextricably intertwined with statehood, and have nothing to do with alternatives to statehood.<sup>69</sup> For another, the entire nineteenth-century history of the admission of territories into statehood confirms this impression.<sup>70</sup>

Moreover, it is not at all clear what Justice Sotomayor means by “precedent,” and she does not elaborate.<sup>71</sup> If she means that the Northwest Ordinance provides an earlier example of Congress’s use of the term “compact” in a statute, it does, though what leaps out at the reader is the stark contrast between the forcefulness of the language in the Ordinance (“articles of compact . . . forever . . . unalterable”) and the timidity of the language in Public Law 600 (“in the nature of a compact”). If she means that the Ordinance provides a precedent with weight somehow comparable to that of a judicial decision – which is what the term “precedent” implies – then it would require far more than bare assertion to support the claim.

For example: On the one hand, the Ordinance does use language that is not just forceful, but that purports to make a binding commitment. And one might add that the First Congress, whose views on the meaning of the Constitution arguably carry particular weight,<sup>72</sup> enacted it. On the other hand, one cannot reach a conclusion about what this language means without reckoning with the

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69. 1 Stat. at 53 n.(a) (emphasis added).

70. See generally PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* (Univ. of Notre Dame Press 2019) (1987).

71. Indeed, not only does Justice Sotomayor relegate her argument based on the Northwest Ordinance to a footnote, but she does nothing more than describe it as “precedent,” add that it was “the only extant precedent” for Public Law 600, and cite two articles that themselves provide rather weak support for this argument. *Aurelius*, 140 S. Ct. at 1678 n.3 (Sotomayor, J., concurring in the judgment). She cites one of them, Lawson & Sloane, *supra* note 60, for the proposition that the term “compact” rarely appears in U.S. law except in the Northwest Ordinance and several subsequent organic statutes. But as noted above, see *supra* note 60, Lawson and Sloane themselves question the argument that Puerto Rico’s compact is binding, see *id.* at 1131. And Lawson adds the suggestion that if the Northwest Ordinance is an example of congressional entrenchment, it could be due to the Engagements Clause, U.S. CONST. art. VI, cl.1 (“All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.”), which obviously would have no bearing on Puerto Rico. Lawson & Sloane, *supra* note 60, at 1153 n.163. As for the second source, TRÍAS MONGE, *supra* note 14, she cites it for its discussion of the debate over whether Public Law 600 should borrow the language of the Northwest Ordinance, rather than for an argument in support of it as precedent (though, as noted above, Trías Monge does make the argument for the Northwest Ordinance as precedent for the compact elsewhere, see *supra* note 36).

72. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401-02 (1819). Specifically, the First Congress reenacted it, with revisions intended to make it consistent with the U.S. Constitution. See *supra* note 64.

subsequent history of congressional action with respect to the territories. Congress did keep the promise of statehood, but not without unilaterally altering—over the full-throated protests of the affected territorial inhabitants—the boundaries set forth in the fifth of those “unalterable” articles of compact.<sup>73</sup> And that is not even to mention the fate of the promises in the third:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, right and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.<sup>74</sup>

It would be a wild understatement to say that the United States, which went on to renege on every one of these assurances, turned out not to consider itself bound by them.<sup>75</sup>

In short, not only is Congress’s unequivocal language in the Northwest Ordinance unlike its noncommittal language in Public Law 600, but even language as unequivocal as that does not establish Congress’s power to make binding promises. Subsequent practice here swamps textual inferences. When it comes to the question whether Congress intended and believed that the Northwest Ordinance would create a legally irrevocable compact, Congress’s words point in one direction, but its subsequent actions point emphatically in another.

#### *E. The Argument that One Congress Can Bind Another*

The most important argument in compact theory, and therefore in Justice Sotomayor’s concurrence, directly tackles the question whether Congress has the power to take away what it has given.<sup>76</sup> It is at this point in her concurrence that Justice Sotomayor comes closest to acknowledging the existence of an opposing point of view, in the following three sentences:

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73. See ONUF, *supra* note 70, at 67-87.

74. 1 Stat. at 52 n.(a) (Art. III).

75. See, e.g., STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION (2017).

76. *Aurelius*, 140 S. Ct. at 1677-78 (Sotomayor, J., concurring in the judgment); see, e.g., TRÍAS MONGE, *supra* note 14, at 171; McCall, *supra* note 16.

Of course, it might be argued that Congress is nevertheless free to repeal its grant of self-rule, including the grant of authority to the island to select its own governmental officers. And perhaps, it might further be said, that is exactly what Congress has done in PROMESA by declaring the Board “an entity within the territorial government” of Puerto Rico. §101(c)(1), 130 Stat. 553. But that is not so certain.<sup>77</sup>

No citations have been omitted from this quotation. Justice Sotomayor simply gestures at the counterarguments as if they were possibilities, rather than actualities.<sup>78</sup> She then proceeds to make the case against them, arguing that PROMESA did not implicitly repeal the grant of self-rule, and that Congress does not have the power to do so expressly.

On the first point, she argues that PROMESA is a “temporary” statute passed to address an economic crisis, not an “organic statute clearly or expressly purporting to renege on Congress’ prior gran[t] . . . [of] a measure of autonomy comparable to that possessed by the States.”<sup>79</sup> True, PROMESA does not expressly purport to renege on a prior grant of autonomy, though why it matters that it is temporary is unclear. According to the compact theory, Congress lacks the power to repeal the grant of self-rule, period. If it can do so for even a minute, then the compact is not irrevocable and compact theory fails. And for what it’s worth, organic acts are all temporary.<sup>80</sup>

At any rate, the far more serious problem here is that PROMESA obviously reneges on a prior grant of autonomy, even if it does not do so by saying so. Indeed, Justice Sotomayor’s own description of the Board’s powers renders the conclusion inescapable. The Board, she tells us, “oversee[s] the island’s finances and restructure[s] its debts.” She continues:

The Board’s decisions have affected the island’s entire population . . . . It is under the yoke of [the Board’s] austerity measures that the island’s 3.2 million citizens now chafe . . . . Despite the Board’s wide-ranging, veto-

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77. *Aurelius*, 140 S. Ct. at 1677 (Sotomayor, J., concurring in the judgment).

78. For these counterarguments, see sources cited *supra* note 37. See also Lawson & Sloane, *supra* note 60, at 1131 (“[T]he weight of authority suggests that neither Congress nor the executive branch understood Public Law 600 as an irrevocable delegation of Congress’s otherwise plenary authority under the Territories Clause, even assuming that such a statute would be constitutional.”); *id.* at 1153-57.

79. *Aurelius*, 140 S. Ct. at 1677 (Sotomayor, J., concurring in the judgment) (internal quotation marks and citations omitted).

80. A territory’s organic act is displaced by a state constitution upon the territory’s admission into statehood; many nineteenth-century organic acts expressly described the governments they created as “temporary.” See Burnett [Ponsa-Kraus], *supra* note 37, at 825 n.127 (quoting titles of nineteenth-century organic acts).

free authority over Puerto Rico, the solitary role PROMESA contemplates for Puerto Rican-selected officials is this: The Governor of Puerto Rico sits as an ex officio Board member without any voting rights. No individual within Puerto Rico's government plays any part in determining which seven members now decide matters critical to the island's fate.<sup>81</sup>

How is this not a blatant repeal of the grant of self-rule? Making the case for the compact several pages later, Justice Sotomayor remarks that “[i]t would seem curious to interpret PROMESA as having [renege]d on Congress’ prior grant of autonomy] indirectly, simply through its characterization of the Board ‘as an entity within the territorial government.’”<sup>82</sup> Surely it would be, but no one argues that it is “simply” those words that had this effect. It is, rather, the brutal reality of the Board’s “wide-ranging, veto-free authority,” as Justice Sotomayor herself describes it, that implicitly, because necessarily, repealed the grant of self-rule.

There is still the matter of whether Congress could expressly repeal the grant of self-rule, if one persists in denying that Congress already did so through PROMESA. Acknowledging the “truism” that “one Congress cannot bind a later Congress,”<sup>83</sup> Justice Sotomayor points out that there are exceptions to that rule, citing as examples Congress’ grant of independence to the Philippines and its

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81. *Aurelius*, 140 S. Ct. at 1674 (Sotomayor, J., concurring in the judgment). It should be noted that the Board arguably has somewhat narrower powers than this passage in Justice Sotomayor’s concurrence suggests. See *Vázquez Garced v. Fin. Oversight & Mgmt. Bd. for P.R.*, 945 F.3d 3, 7 (1st Cir. 2019) (“There are certainly policies and actions that can be adopted and pursued only with the Governor’s approval. And even with respect to matters on which the Board needs no consent . . . PROMESA favors collaboration when possible.”). That said, my focus here is on the inconsistency between Justice Sotomayor’s description of the Board’s powers and her claim that an irrevocable compact exists, though the tension would persist even on a narrower understanding of the Board’s powers, insofar as the Board would still constitute a substantial and unilateral modification of Puerto Rico’s self-government. See also *id.* at 6-7 (holding that even after the Governor rejects a recommendation by the Board, the Board has the power to implement it unilaterally). I am grateful to Patricio Martínez Llompart for drawing my attention to this case.

82. *Aurelius*, 140 S. Ct. at 1677 (Sotomayor, J., concurring in the judgment) (citation omitted).

83. *Id.* (Sotomayor, J., concurring in the judgment) (quoting *Dorsey v. United States*, 567 U.S. 260, 274 (2012)).

grants of land or other vested interests.<sup>84</sup> She does not elaborate on either example, nor does she suggest that anyone might disagree. But one might.<sup>85</sup> Philippine independence “binds” Congress because the Philippines is a sovereign and independent nation-state, which the United States would have to (re)conquer in order for the grant of independence to be undone. And although it has not always been the case, these days international law prohibits conquest.<sup>86</sup> As for land grants and other vested interests, the mere mention of them begs the question whether Puerto Rico has an analogous property interest in the “compact.”<sup>87</sup>

Justice Sotomayor does go on to say that “[p]lausible reasons may exist to treat Public Law 600 and the Federal Government’s recognition of Puerto Rico’s sovereignty as similarly irrevocable, at least in the absence of mutual consent.”<sup>88</sup> But the reasons she offers once again turn out to consist entirely of suggestive quotations, led by Public Law 600, which, yes, we know, describes itself as “in the nature of a compact.”<sup>89</sup>

These quotations are not nothing. But equally plausible reasons exist not to interpret the grant of self-rule as irrevocable, and instead, to recognize it as what it is: the current arrangement between the United States and Puerto Rico, which Congress can unilaterally modify by exercising its power under the Territory Clause – say, by creating a federal board to oversee and manage Puerto Rico’s government, appointing its members however Congress sees fit, calling it an entity within the territorial government despite the fact that Congress neither needed nor sought Puerto Rico’s consent for its creation, empowering it to supervise the territorial government and override its decisions, and forcing Puerto Rico to pay for it.

This, of course, is PROMESA: a federal statute that unceremoniously foisted a Board of overseers atop the government created by the Constitution of Puerto Rico, entirely disregarding the vaunted so-called mutually binding bilateral

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84. *Id.* (Sotomayor, J., concurring in the judgment); *see, e.g.*, sources cited *supra* note 76; *see also* Issacharoff et al., *supra* note 36, at 14 (observing the “tension” between binding territorial decisions of Congress and the “old truism that one Congress cannot bind another”).

85. *See, e.g.*, John R. Hein, *Born in the U.S.A., but Not Natural Born: How Congressional Territorial Policy Bars Native-Born Puerto Ricans from the Presidency*, 11 U. PA. J. CONST. L. 423, 451-52 & nn.196-97 (2009); Lawson & Sloane, *supra* note 60, at 1153 n.163.

86. *See* Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (Oct. 24, 1970). On how it used to be, *see*, for example, ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 100-14 (2005); and MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 98-178 (2009).

87. *See also infra* note 91.

88. *Aurelius*, 140 S. Ct. at 1678 (Sotomayor, J., concurring in the judgment).

89. Act of July 3, 1950, ch. 446, Pub. L. No. 600, 64 Stat. 319 (codified at 48 U.S.C. § 731 (2018));

compact. No amount of compact theorizing can change that fact, nor will ignoring those of us willing to come out and say it. Far from being unalterable except by mutual consent, the so-called compact is, as critics have argued since the beginning, unilaterally alterable by congressional fiat.<sup>90</sup>

The compact theorists' script runs out here.<sup>91</sup> It is here that Justice Sotomayor concludes – almost – that PROMESA is invalid.<sup>92</sup> Of course, as a claim about the validity of a federal statute, “invalid” can only mean “unconstitutional.” There is no other sense in which a federal statute can be invalid. Moreover, that PROMESA is unconstitutional seems to be what she has in mind: “May Congress,” she asks, “ever simply cede its power under [the Territory Clause] to legislate for the Territories, and did it do so nearly 60 [sic] years ago with respect to Puerto Rico? If so, is PROMESA itself invalid, at least as it holds itself out as an exercise of Territories Clause authority?”<sup>93</sup> If Congress lacked the authority to enact PROMESA under the Territory Clause, and there is no other source for that authority, then PROMESA is unconstitutional. Yet despite the logic of her argument, Justice Sotomayor tells us she has no choice but to settle for suggesting that it is “invalid,” since, as she noted at the outset, the compact issue has not been litigated. Instead of dissenting, she must “reluctantly” concur.<sup>94</sup>

Despite her asserted reluctance, though, her decision to concur instead of dissent gives even greater force to what is already a ringing endorsement of compact theory. That is because suggestive quotations emanating from authoritative

90. See also, e.g., Lawson & Sloane, *supra* note 60, at 1153-54 (“As a textual matter, except by major and questionable inferences from the ambiguous phrase ‘in the nature of a compact,’ it is at best strained to read the law as purporting to lock into place in perpetuity a relationship between Puerto Rico and the United States, which may not be modified without the former’s mandatory consent.” (footnote omitted)).

91. To be fair, Justice Sotomayor devotes a couple of sentences to an argument based on the words “dispose of” in the Territory Clause, to which compact theorists themselves do not devote much attention. See U.S. CONST. art. IV, § 3, cl. 2 (“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 . . . .”); *Aurelius*, 140 S. Ct. at 1679 (Sotomayor, J., concurring in the judgment); see also Casellas, *supra* note 17, at 960. The first sentence asserts that the power to “dispose of” territories “necessarily encompasses the power to relinquish authority to legislate for them.” No one denies this, but it should go without saying that the fact that Congress has the power to relinquish its authority tells one nothing about whether it has the power to do so by entering into a mutually binding bilateral compact. The second sentence quotes a source that in turn refers to other sources “strongly argu[ing]” that when Puerto Rico became a commonwealth, “Congress lost general power to regulate the internal affairs of Puerto Rico.” Again, no one denies this: the question is whether Congress retained the power to resume regulating those internal affairs.

92. *Aurelius*, 140 S. Ct. at 1679 (Sotomayor, J., concurring in the judgment).

93. *Id.* (Sotomayor, J., concurring in the judgment).

94. *Id.* at 1683 (Sotomayor, J., concurring in the judgment).



federal sources play an outsized role in the drama that is Puerto Rico's status debate. This is not surprising, insofar as it is a debate over how to decolonize a marginalized people. Deprived of a voice in the government that holds the key to their fate, Puerto Ricans borrow the voices of officials within that government, be it this federal judge or that congressional report or some other remark by the latest Grand Poohbah of the United States of We Know What's Best for Puerto Rico. Puerto Ricans battle each other over their island's future by hurling these quotations at each other, and at anyone who will listen, in the desperate hope of compensating for their own lack of an equal voice and recruiting allies to their respective causes. Given all of this, the fact that Justice Sotomayor's views on the compact theory appear in a concurrence rather than a dissent means that she has given the commonwealthers the most precious gem of them all: not just one or two suggestive quotations, but a paean to the compact theory, in nothing less than an opinion by a Justice of the Supreme Court of the United States, which will now and forever span several pages of the United States Reports, and which they can quote without having to cite a dissent. Not an opinion for the Court, true, but the next best thing.

### III. THE COMPACT: IMPERIALISM REDUX

To put forward the view of only one side in a debate as if it were a settled and uncontested truth is bad enough; to do so in a concurring Supreme Court opinion is even worse. But the problems with this concurrence do not end there. By invoking the compact theory, Justice Sotomayor has exacerbated the already profound and oppressive legal ambiguity that has trapped Puerto Rico in a colonial status for a century and a quarter.<sup>95</sup> She has done so by (perhaps inadvertently) breathing new life into the *Insular Cases*—by far the most notoriously offensive and contentious Supreme Court opinions addressing Puerto Rico's constitutional status. And she has done so despite the *Aurelius* Court's effort to render these cases irrelevant.<sup>96</sup>

You may have heard of the *Insular Cases*, a series of Supreme Court decisions handed down between 1901 and 1922 concerning the status of the territories annexed by the United States in 1898: Puerto Rico, the Philippines, and Guam.<sup>97</sup>

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95. See ERMAN, *ALMOST CITIZENS*, *supra* note 8, at 6-7; Erman, *Essential Legal Ambiguity*, *supra* note 8 (manuscript at 28-29).

96. *Aurelius*, 140 S. Ct. at 1665 (“[W]e need not consider the request by some of the parties that we overrule the much-criticized ‘Insular Cases’ and their progeny.”).

97. The issue of exactly which cases belong in the series has been the subject of some dispute, but everyone agrees that the series begins with nine decisions handed down in 1901, and that the most important one was *Downes v. Bidwell*, 182 U.S. 244 (1901). See generally EFRÉN RIVERA

If you're like most people, you know the *Insular Cases* are bad news, but you are not quite sure why. You think it has something to do with the idea that the Constitution does not “follow the flag” to Puerto Rico, but you are pretty sure that cannot really be right. And it is not. But it is not exactly wrong, either.

Like pretty much everything else affecting Puerto Rico's status, what exactly the *Insular Cases* held has been the subject of much debate.<sup>98</sup> But for present purposes, suffice it to say that, according to the standard account, they held that the Constitution did not apply in the territories annexed by the United States in 1898—the “unincorporated” territories—except for its “fundamental” provisions.<sup>99</sup> The *Insular Cases* left the question of which provisions did apply to these territories to case-by-case determination, giving rise to enormous confusion and uncertainty about both the applicability of the Constitution there and their future status: would these territories ever be admitted into statehood? Would they become independent? Could they be held indefinitely as colonies? Although, over time, the Court held that nearly all the provisions that came before it applied in those territories, the confusion and uncertainty generated by the *Insular Cases* persists to this day.

It might seem obvious that the Appointments Clause “applies” in Puerto Rico—or, rather, that it does not really apply in any geographic location as such, but instead applies to the appointment of officers of the United States, no matter where on the planet they may end up. But because the *Insular Cases* created for Puerto Rico and other unincorporated territories a constitutional status defined by ambiguity, Puerto Ricans are never quite sure if any given constitutional provision “applies” there.

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RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 73-142 (2001); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 72-91 (2009); BARTHOLOMEW SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006) [hereinafter SPARROW, THE INSULAR CASES]; TORRUELLA, *supra* note 14, at 40-84; TRÍAS MONGE, *supra* note 14, at 44-50; Burnett [Ponsa-Kraus], *supra* note 37; Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 803-10 (2010).

98. See, e.g., GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 72-94 (1996); Burnett [Ponsa-Kraus], *supra* note 37, at 800-03; Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 155-63 (2011). One round in this longstanding debate is currently playing out in litigation over whether the Citizenship Clause of the Fourteenth Amendment applies in the U.S. territory of American Samoa. See *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *appeal docketed*, No. 20-4017 (10th Cir. Feb. 7, 2020). On the history of U.S. citizenship in Puerto Rico, see CABRANES, *supra* note 42; and ERMAN, ALMOST CITIZENS, *supra* note 8.

99. For discussions of the standard account and challenges to it, see *supra* note 98. On the label “unincorporated,” see *supra* notes 8-9.

That is why the *Insular Cases* came up in the *Aurelius* litigation. If you read the briefs in *Aurelius*, you know that at least one of the parties, the Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER), and several amici urged the Court to overrule the *Insular Cases* out of concern that those decisions would somehow render the Appointments Clause inapplicable in Puerto Rico.<sup>100</sup> If you heard the oral arguments, you know that the Court allocated ten minutes to UTIER’s lawyer, during which she described the *Insular Cases* as a “dark cloud hovering over this case” and implored the Court to overrule them.<sup>101</sup> Justice Breyer’s reaction at argument was sympathetic but puzzled. “I agree they’re a dark cloud,” he remarked, but “it doesn’t matter here because the provision of the Constitution does apply.”<sup>102</sup> Chief Justice Roberts echoed the sentiment.

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100. See Brief for Appellant Union de Trabajadores de la Industria Electrica y Riego (UTIER) at 15-16, 56-66, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334) (arguing that the opposing parties were relying on the *Insular Cases* “without admitting it,” and urging the Court to overrule them). Actually, the FOMB did admit its reliance on the *Insular Cases* before the District Court. See The Financial Oversight and Management Board’s Opp’n to the Mot. to Dismiss the Title III Petition at 23-27, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334) (arguing in the alternative that the Appointments Clause is not “fundamental,” and citing the *Insular Cases*). But by the time the case reached the Supreme Court, the FOMB had dropped this argument. Sharing UTIER’s concern that the Supreme Court would take it up anyway, several amicus briefs argued that the Supreme Court should either narrow the scope of, decline to extend, or outright overrule the *Insular Cases*. See Brief of Former Federal and Local Judges as *Amici Curiae* Supporting the First Circuit’s Ruling on the Appointments Clause, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334); Brief of *Amicus Curiae* Virgin Islands Bar Association Supporting the Ruling on the Appointments Clause, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334); Brief for *Amicus Curiae* Equally American Legal Defense and Education Fund In Support of Neither Party, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334); Brief *Amici Curiae* of the American Civil Liberties Union and the ACLU of Puerto Rico, Supporting the First Circuit’s Ruling on the Appointments Clause Issue, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334). Another amicus brief stopped short of calling on the Court to overrule the *Insular Cases*, but criticized them. See Brief of Elected Officers of the Commonwealth of Puerto Rico as *Amici Curiae* Supporting the Appointments Clause Ruling, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334). Another (which I co-authored) argued that the *Insular Cases* did not govern the issue in *Aurelius*, and in the alternative, that they should be overruled. See Brief for *Amici Curiae* Scholars of Constitutional Law and Legal History Supporting the First Circuit’s Ruling on the Appointments Clause Issue, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334).

101. Transcript of Oral Argument at 82, 86-87, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334).

102. *Id.* at 82.

“None of the other parties rely on the *Insular Cases* in any way,” he observed. “So it would be very unusual for us to address them in this case, wouldn’t it?”<sup>103</sup>

If you then read the opinion for the Court in *Aurelius*, you know that the dark cloud should have passed, at least for the time being. Justice Breyer begins with the unequivocal statement that “the Appointments Clause governs the appointments of all officers of the United States, including those located in Puerto Rico.” In case that is not enough, he later expressly rejects UTIER’s request that the Court overrule the *Insular Cases*, not by affirming them, but by declaring them irrelevant. “Those cases,” he explains, “did not reach this issue, and whatever their continued validity we will not extend them in this case.”<sup>104</sup> Done and done.

Justice Sotomayor’s concurrence never mentions the *Insular Cases*, which would seem to indicate that she is on board with the Court’s stance on them. But by bringing up the compact theory, she does call into doubt the Court’s conclusion after all—just not the one she claims she does. What she calls into doubt is the Court’s conclusion that the *Insular Cases* are irrelevant.

Here’s how: compact theorists have put the *Insular Cases* to use by way of an argument for their “reappropriation.”<sup>105</sup> The idea is that since the *Insular Cases* held most of the Constitution inapplicable in Puerto Rico, the Constitution should impose no constraints upon Congress when it comes to devising new forms of self-government there. This means that if Congress wishes to enter into a mutually binding bilateral compact with Puerto Rico, the Constitution will not stand in the way.

It is a clever argument, which attempts to repurpose the legal ambiguity those decisions made the defining feature of Puerto Rico’s constitutional status, turning it away from the imperialist ends it originally served, and toward the

103. *Id.* at 86. As to whether the other parties were relying on the *Insular Cases* or not, the FOMB did so in the alternative before the District Court, and UTIER accused them of doing so tacitly throughout the litigation. See *supra* note 100.

104. *Aurelius*, 140 S. Ct. at 1665. It is worth mentioning that Justice Breyer’s opinion for the Court offers a pellucid account of what is known as Congress’ “plenary power” over U.S. territories (though he does not use that phrase). Eschewing the common but mistaken understanding that, somehow, “plenary power” means most of the Constitution does not “apply,” Justice Breyer explains that Congress’s plenary power allows it to legislate for the territories both as the federal government and as the territorial government, but does *not* exempt it from the constitutional limitations that would ordinarily constrain the relevant exercise of power. The point is clear from the very first paragraph, which states unequivocally that the Appointments Clause applies to the appointment of all federal officers, including those appointed to serve in Puerto Rico, even as the Territory Clause empowers Congress to create local offices for Puerto Rico. See *id.* at 1654.

105. See, e.g., Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 16, at 197; Alexander T. Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 37-38 (1994); Issacharoff et al., *supra* note 36, at 13, 34-49.

end of self-determination – at least as the compact theorists conceive of that end. But you will not be surprised to learn that not everyone agrees with this revisionist interpretation of the *Insular Cases*. To the arguments already outlined above, critics of the compact theory would add an understanding of the *Insular Cases* according to which, whatever else they did, they certainly did not empower Congress to enter into mutually binding bilateral compacts with nonstate territories.<sup>106</sup> To say otherwise not only exacerbates the confusion and uncertainty that has haunted Puerto Rico since the *Insular Cases*, but prolongs the island’s colonial condition, by revitalizing the jurisprudence that subjected Puerto Rico to a subordinate status in the first place.

None of this is explicit in Justice Sotomayor’s concurrence. Again, it is unclear whether she is unaware of it, or whether she is aware, but disagrees. But once one understands the relationship between the *Insular Cases* and the compact theory, one realizes that it is now the Justice’s concurrence that hangs like a dark cloud over this case, and over Puerto Rican decolonization itself.

## CONCLUSION

This Essay has focused on the constitutional debate over the compact theory: the debate over whether it is constitutionally possible for Puerto Rico and the United States to enter into a mutually binding bilateral compact, which Congress may not unilaterally alter or repeal. I have shown that Justice Sotomayor’s concurrence makes the argument in favor of the “compact theory,” without acknowledging, let alone engaging, the opposing point of view. I have given voice to that opposition, by identifying and briefly describing the arguments we would make (and have long made) in response. I do not purport to offer a comprehensive account of the views on both sides, but rather to correct the misimpression, created by Justice Sotomayor’s concurrence, that the compact theory is a settled fact, as opposed to just one side in a bitter, longstanding, and high-stakes debate.

Justice Sotomayor writes as if she is not only making a constitutional argument, but also defending Puerto Rican dignity and empowerment. Doubtless, that is what she believes she is doing. But we critics of the compact theory would also disagree with that characterization of her concurrence. As noted at the outset, we critics – most of us statehooders – do not just believe that the compact theory is wrong as a legal matter. We also believe it is harmful as a matter of political aspiration. To hear Justice Sotomayor tell it, the compact fulfilled the goal of self-determination for Puerto Rico by transforming the island from the

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106. See, e.g., Burnett [Ponsa-Kraus], *supra* note 37, at 797–98 (arguing that the *Insular Cases* did the opposite of making possible an irrevocable compact, because what they actually established was Congress’ power to de-annex territory); Torruella, *supra* note 16, at 78.

degraded status of a nonsovereign colony of the United States to the exalted status of a separate sovereign in a binding relationship with the United States. Or as commonwealthers often put it, the compact permanently secured for Puerto Rico the “best of both worlds,” where those “worlds” are statehood and independence.

Statehooders do not merely disagree with this characterization of the compact. We recoil from it.<sup>107</sup> Were the compact not a fiction but a reality, it would mean that Puerto Rico willingly bound itself to the United States in a permanent union under which federal law continues to apply in Puerto Rico with few exceptions, yet Puerto Ricans remain completely denied voting representation in the federal government. Yes, completely: both before and after 1952, the U.S. citizens of Puerto Rico have not had the right to vote in U.S. presidential elections, or to elect U.S. Senators, or to elect voting Representatives in the U.S. House, where the island’s only representation consists of one single nonvoting “Resident Commissioner.”<sup>108</sup>

Statehooders believe that to be denied an equal voice in making the law that governs you is to be a colony. We believe it is wrong for the United States to have subjected Puerto Rico to this subordinate status indefinitely. We also believe it is wrong for our fellow Puerto Ricans to have perpetuated the island’s colonization by continuing to vote for a “compact” that creates the illusion of political equality while prolonging the reality of second-class citizenship. We believe that the right to self-determination does not include a right to self-subordination. And we believe that as long as Puerto Rico remains neither an independent nation nor a state of the Union, it is a U.S. territory, which is to say, a U.S. colony. Whatever label you attach to Puerto Rico’s current relationship with the United States, the island belongs back on that list of non-self-governing territories until it is no longer a colony. Puerto Rico was a colony in 1898. And in 1917. And in 1952. And in 1953. It was a colony when Congress enacted PROMESA in 2016. And it is a colony today.

*George Welwood Murray Professor of Legal History, Columbia Law School. I’m grateful to José A. Cabranes, Adriel Cepeda Derieux, Edda P. Duffy, Lawrence Duffy, Sam*

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107. We do realize that a vote for commonwealth status in 1952 was a vote for the only way Congress was willing to allow Puerto Rico to achieve full local self-government under its own constitution at that time. What I say in this passage applies with greater force to continued support for the “compact” in the decades that followed.

108. See sources cited *supra* note 18; see also *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010) (explaining that because Puerto Rico is not a state, residents of Puerto Rico do not have the right to vote for congressional representatives); *id.* at 595 (same with respect to presidential elections); 48 U.S.C. § 891 (2018) (providing for the election of the Resident Commissioner).

POLITICAL WINE IN A JUDICIAL BOTTLE

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