

CHECKS AND BALANCES: A FALLACY IN U.S. TERRITORIAL GOVERNANCE

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I. INTRODUCTION

By envisioning the checks and balances system, the drafters of the U.S. Constitution aimed to ensure a balanced distribution of power among the federal government's branches—an admirable undertaking by the early leaders of this nation's government.¹ However, few have analyzed the application of the checks and balances system as applied to the colonies, which the United States has collectively held since the late 1800s.² This Article offers a compelling exploration of the United States' foundational system of governance through the lens of its territories. At the heart of the American democratic experiment lies a complex architecture of checks and balances, designed by the nation's founders to prevent the concentration of power and protect democratic ideals.³ By scrutinizing historical texts, the *Federalist Papers*, and the spirited debates that shaped the U.S. Constitution, this Article unveils the depth of intention behind these mechanisms of mutual accountability. Yet, as this Article meticulously demonstrates, this well-crafted system encounters significant challenges when confronted with the reality that the U.S. territories' regions and their residents are often relegated to the periphery of American political life. Through an incisive examination of legislative, executive, and judicial engagements with these territories, this Article reveals stark disparities in representation, governance,

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1. John J. Patrick, *Judicial Independence in United States Government*, in JUDICIAL INDEPENDENCE: UNDERSTANDING THE COURTS AND THE CONSTITUTION 11, 11 (2002).

2. See PEDRO A. CABÁN, CONSTRUCTING A COLONIAL PEOPLE: PUERTO RICO AND THE UNITED STATES, 1898–1932, at 15–40 (Westview Press 1999).

3. Patrick, *supra* note 1, at 11.

and rights, shedding light on a profound democratic deficit that contradicts the very principles the founders sought to uphold.

Part II of this Article details the founders' inspiration and vision for the separation of powers and the checks and balances system as it existed in the Articles of Confederation, and later, the U.S. Constitution. Part III of this Article examines how the Territories Clause of the U.S. Constitution contradicts the foundational system of checks and balances. The separation of powers is lost when met with the reality of U.S. territories and the federal governance over them. Part IV exemplifies this contradiction through the lens of two cases: *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investments, LLC*⁴, decided by the Supreme Court in 2020, and *Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*,⁵ decided by the Supreme Court in 2023. An examination of these two cases exemplifies the unchecked federal legislative branch in the U.S. Territories.

II. CHECKS AND BLANCES: A DEFENSE AGAINST ARISTOCRACY

This Part delves into the history of the early Thirteen Colonies under colonial rule by the British Empire and examines how the colonies' plight for independence shaped the founders' vision for the United States of America at its inception. In order to understand what the checks and balances system was meant to accomplish and how it fails in the current U.S. territories, it is important to explore the founders' constitutional vision for separation of powers.

Most children educated in the U.S. public education system are taught about the American Revolution—a political movement for independence that took place in the British-settled colonies of the Americas.⁶ However, the complexities of the movement, beginning with early mercantilism, followed by imperial prosecution of local colonial crimes, and later taxing legislations,

4. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

5. *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176 (2023).

6. See *The American Revolution in Our Schools, 1783-Today*, AM. REVOLUTION INST., <https://www.americanrevolutioninstitute.org/teaching-the-revolution-today/the-american-revolution-in-our-schools/> (last visited Dec. 21, 2024).

are rarely compared to modern-day practices by the United States.⁷ In order to understand the entire history of the English colonization of the Americas, a discussion on the topic must include all of the aforementioned policies and practices. However, for the purposes of this Article and the examination of the ideas surrounding separation of powers, this Article will limit its discussion to exploring the mercantilism aspect of Britain's colonization of the Americas.

The English colonized the Americas for several reasons, including religious and strategic motivations.⁸ However, one of the primary reasons was the pursuit of economic opportunity and gain.⁹ The success of the Spanish in finding gold and silver in the New World spurred English hopes of finding similar wealth.¹⁰ Additionally, the Americas offered new resources like tobacco, sugar, rice, indigo, and cotton, which could be exploited for profit.¹¹ Colonization also provided a solution to England's problem of overpopulation and unemployment by relocating people to the colonies.¹² The English also believed there was opportunity for

7. See JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 4–27 (1943) (detailing the final “Intolerable Acts,” which pushed the Revolution to come to a head); see Robert P. Thomas, *A Quantitative Approach to the Study of the Effects of British Imperial Policy upon Colonial Welfare: Some Preliminary Findings*, 25 J. ECON. HIST. 615, 615–19 (1964) (discussing the effects of British imperial regulation on the American colonies in the pre-revolutionary period).

8. *Motivations for Colonization*, NAT'L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/motivations-colonization/> (last visited Nov. 5, 2024). Historians have noted that the early colonization efforts of England were driven by a combination of economic ambitions and religious motivations:

Like the other European countries, England was motivated in part by the lure of both riches and the Northwest Passage. In 1606, King James I granted a charter to colonize Virginia to the Virginia Company of London, a joint-stock company of investors who believed there was a profit to be made. . . . The settlement of [some of] these colonies was motivated by religion.

Id.

Religious motivations played a significant role, particularly for groups like the Pilgrims and Puritans who sought freedom from the religious persecution they faced in England. *Id.* These groups aimed to establish communities where they could practice their faith freely and create a society based on their religious beliefs. *Id.*

9. *Id.*

10. See *16,000 BCE to 1622 CE Exploration of the New World*, VA. MUSEUM HIST. & CULTURE, <https://virginiahistory.org/learn/story-of-virginia/chapter/exploration-new-world> (last visited Nov. 10, 2024).

11. *Motivations for Colonization*, *supra* note 8; *Triangular Trade in Colonial America 1607-1763*, AM. HIST. CENT., <https://www.americanhistorycentral.com/entries/triangular-trade/> (last visited Oct. 13, 2024).

12. The significant population growth in England between 1550 and 1650 had profound social and economic effects:

profit with the chance to expand international trade and markets by opening up trade routes to and from the Americas.¹³ These motivations combined to drive English colonization efforts, playing a crucial role in the expansion of the British Empire.¹⁴

From the onset of this colonization, England adopted the use of protectionism to increase export revenue and decrease imports going in and out of the English-American colonies.¹⁵ Once English colonies were firmly established in the Americas, the English Empire forced colonies to limit exports to lands that were foreign to England, such as tobacco, in order to tighten England's economic control over its colonies and build profits for the crown, rather than for the local colonial subjects.¹⁶ One effect of these policies was that farmers and producers of raw materials and products (the colonists on the ground in the Americas) lost competition—they could not charge higher prices to foreign traders.¹⁷ Moreover, under these policies, merchants and importers were prohibited from importing various foreign goods, products, and materials from lands outside the English Empire, which resulted in more expensive materials and loss of profits for the colonies.¹⁸ Sustained British efforts to tax the colonies, particularly through the Molasses Act of 1733,¹⁹ and policies after the Seven Years' War, such as the Royal

England's population grew rapidly between 1550 and 1650, rising from approximately three million people in 1551 to over four million in 1601, and over five million by 1651. This rapid expansion, unusual by pre-modern standards, led to a fall in real wages, and high levels of unemployment and vagrancy. These conditions convinced England's rulers that the realm was overpopulated, making overseas colonization an attractive proposition for relieving population pressure at home. Meanwhile diminished opportunities encouraged ordinary English men and women to migrate to the Americas in search of a better life.

The Population of England and Europe, AM. REVOLUTION, <https://www.ouramericanrevolution.org/index.cfm/page/view/p0107> (last visited Sept. 19, 2024).

13. *Motivations for Colonization*, *supra* note 8.

14. *See generally id.* (indicating English motivations for the colonization of the Americas included religious motives and strategic interests).

15. "Mercantilism, economic theory and practice common in Europe from the 16th to the 18th century that promoted governmental regulation of a nation's economy for the purpose of augmenting state power at the expense of rival national powers." *Mercantilism*, BRITANNICA MONEY, <https://www.britannica.com/money/mercantilism> (Nov. 6, 2024); *Protectionism*, BRITANNICA MONEY, <https://www.britannica.com/money/protectionism> (Dec. 24, 2024).

16. Thomas, *supra* note 7, at 620.

17. *Id.* at 620, 624.

18. *Id.* at 630.

19. Lawrence Harper, *Mercantilism and the American Revolution*, XXIII CAN. HIST. REV. 1, 8 (1942); *see also* Curtis P. Nettels, *British Mercantilism and the Economic Development of the Thirteen Colonies*, 12 J. ECON. HIST. 105, 112–13 (1952).

Proclamation of 1763 that restricted colonial expansion,²⁰ fueled further discontent of the colonists towards British rule. The introduction of direct taxes, like the Stamp Act of 1765,²¹ ignited protests under the slogan “[n]o taxation without representation,” leading to a push for independence.²² Later, a series of what the colonists thought were “intolerable” acts pushed the colonists to a revolution against the English crown.²³ These mercantile policies, characterized as “governmental regulation of a nation’s economy for the purpose of augmenting state power at the expense of rival national powers,” were the seeds that planted and grew into the American Revolution.²⁴

Once the American Revolution was won and the Declaration of Independence was signed and recognized by foreign powers, the framers set out to design the U.S. government.²⁵ For obvious reasons, they shied away from allowing any one person or section of the government to amass too much authoritarian power over the people.²⁶ Although the Articles of Confederation, our nation’s first constitution, would have some checks and balances between the presidency and Congress, it did not divide the government into three branches as seen in its replacement.²⁷ However, when

20. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 94–96 (1967).

21. *Id.* at 162.

22. *Id.* at 263.

23. The Intolerable Acts were four legislative acts passed by the British parliament that limited or completely restricted town meetings; provided that accused criminals were to be taken to Britain to be tried, rather than in the colonies by their similarly situated peers; shut down the Boston harbor; and permitted British soldiers to be housed in citizens’ private homes without the citizens’ prior consent. MILLER, *supra* note 7, at 5–25.

24. *Mercantilism*, *supra* note 15.

25. France was the first nation to officially recognize The Declaration of Independence and signed the Treaty of Alliance in 1778, the Thirteen Colonies’ first military treaty as a new nation. Treaty of Alliance with France, Fr.-U.S., Feb. 6, 1778, 18 Stat. 201.

26. THE FEDERALIST NO. 47 (James Madison).

27. The Articles of Confederation did not set up three branches of government. “[T]he President came from a ‘Committee of the States’ appointed by Congress.” *Articles of Confederation*, FINDLAW, <https://supreme.findlaw.com/documents/articles.html/> (last visited Nov. 11, 2024). However, the Articles of Confederation also included the following checks on Congress’ power:

The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors. Congress shall be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever. The judicial Power shall extend to Controversies between two or more States. Congress shall have the sole and exclusive right and power of directing the operations of the land and naval

drafting the Constitution as we know it today, drawing on inspiration from the Enlightenment philosopher Baron de Montesquieu, James Madison wrote about the need for a separation of powers in government so as to prevent the very issue that the Americans fought against in the Revolution.²⁸ In this new model of government, different bodies of government would exercise legislative power, executive power, and judicial power—with all these bodies subject to the rule of law and to each other’s oversight.²⁹ The built-in oversight included a system of “checks and balances” sprinkled throughout the Constitution so that no one branch could amass sufficient power to take over the others and lean towards aristocracy.³⁰ This, as James Madison wrote in the *Federalist Papers*, was the framers’ key to preventing authoritarian rule.³¹ Thus, the framers of the U.S. Constitution

forces. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

Id. (citing ARTICLES OF CONFEDERATION of 1781, art. II–IX).

28. THE FEDERALIST NO. 47 (James Madison).

29. The Constitution of Virginia of 1776 provided: “The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time . . .” VA. CONST. (1776). Similarly, the Massachusetts Constitution of 1780 provided:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

MA. CONST. art. XXX; *see also* U.S. CONST. art. I, § 1.

30. The principle of separating legislative, executive, and judicial powers is fundamental to this commonwealth’s government, as expressed in the following excerpt:

For example, the Constitution allows the President to veto legislation, but requires the President to gain the Senate’s consent to appoint executive officers and judges or enter into treaties, . . . [and] bicameralism reduces legislative predominance, while the presidential veto gives the President a means of defending his priorities and preventing congressional overreach. The Senate’s role in appointments and treaties provides a check on the President. The courts are assured independence from the political branches through good-behavior tenure and security of compensations, and, through judicial review, the courts check the other two branches. The impeachment power gives Congress authority to root out corruption and abuse of power in the other two branches.

ArtI.S1.3.1 Separation of Powers and Checks and Balances, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/article-1/section-1/separation-of-powers-and-checks-and-balances> (last visited Nov. 11, 2024).

31. “If men were angels, no government would be necessary,” James Madison wrote in the *Federalist Papers*, in reference to the necessity for checks and balances. THE FEDERALIST NO. 47 (James Madison). “In framing a government which is to be administered by men over men, the great difficulty is this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.” *The Three Branches of*

recognized the intrinsic dangers of concentrated power and instituted a carefully designed system of checks and balances intended to ensure no single branch of government could dominate the others—a structure that was foundational in their vision for a balanced and fair governance.

III. THE TERRITORIAL CLAUSE OF THE CONSTITUTION: A CONTRADICTION TO THE CHECKS AND BALANCES SYSTEM

Despite their commitment to a checks and balances system that distributed power evenly across government branches, the framers of the Constitution paradoxically crafted and included the Territorial Clause, which centralizes substantial authority under congressional federal control over any acquired territories.³² Article IV, Section 3 of the Constitution states that, “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”³³ In order to have complete and exclusive control over its territories, the U.S. Supreme Court upheld this federal power.³⁴ This skewed the power over the governance of any territories acquired by the United States to the legislative branch—congressional power divided between the House of Representatives and the Senate.³⁵ Although this power can still be “checked” by the judicial branch, Congress has the sole authority to legislate in the territories.³⁶

This provision of the U.S. Constitution grants Congress complete legislative control over U.S. territories, a power that the U.S. Supreme Court has consistently upheld.³⁷ This power is

Government, HISTORY.COM, <https://www.history.com/topics/us-government-and-politics/three-branches-of-government> (Sept. 4, 2019).

32. U.S. CONST. art. IV, § 3, cl. 2.

33. *Id.*

34. *Downes v. Bidwell*, 182 U.S. 244, 286–87 (1901).

35. *Id.*

36. *Id.* at 289.

37. Many of the traditional *Insular Cases* ruled that territories could be incorporated or unincorporated for purposes of constitutional limitations. Territories that were incorporated were seen as on a path to statehood, while Territories that were unincorporated were seen as foreign in a domestic sense. *See, e.g., Balzac v. Porto Rico*, 268 U.S. 298 (1922); *Dooley v. United States*, 182 U.S. 222, 236 (1901); *JDS Realty Corp. v. Gov’t of the V.I.*, 824 F.2d 256, 259–60 (3d Cir. 1987).

specifically divided between the House of Representatives and the Senate when enacting laws with regard to the territories acquired by the United States.³⁸ To begin the lawmaking process, any member of Congress can introduce a bill.³⁹ Once introduced, the bill is assigned to a relevant committee, where members of Congress debate, offer amendments, and eventually vote to pass or reject the bill.⁴⁰ The compromise bill is sent back to both the House and the Senate for final approval and both chambers must then approve the revised bill.⁴¹ This system sounds productive and fair, until you consider the U.S. territories. The problem is that no U.S. territory has a voting member or representation in any chamber of Congress.⁴² This means that the inhabitants of U.S. territories are not directly involved in the legislative process that governs the federal laws they are subject to.⁴³

Even when a law is passed in Congress, the system of checks and balances ensures that the Executive branch has the authority to review and potentially veto the enacted bill.⁴⁴ The President can sign the bill into law, veto it, or, if Congress adjourns during the ten days the President has to consider the bill, it does not become law.⁴⁵ However, even if the President vetoes the bill, Congress can attempt to override the veto, and if both the House and Senate pass the vetoed bill with a two-thirds majority, the congressional act becomes law.⁴⁶ An in-depth review of presidential veto history concluded that no President has ever vetoed legislation relating specifically and exclusively to one of the current U.S. unincorporated territories.⁴⁷ The evidence is clear—the executive branch allows Congress full unchecked authority over the U.S. territories, as designed by the Territorial Clause of the U.S. Constitution.⁴⁸

38. *How Laws are Made*, USA.GOV, <https://www.usa.gov/how-laws-are-made> (Nov. 5, 2024).

39. *Id.*

40. *Id.*

41. *Id.*

42. *D.C., Puerto Rico, and the U.S. Territories: An Explainer*, ROCK VOTE (Nov. 24, 2021), <https://www.rockthevote.org/explainers/washington-d-c-puerto-rico-and-the-u-s-territories/>.

43. *How Laws are Made*, *supra* note 38.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See Vetoes, 1789 to Present*, U.S. SENATE, <https://www.senate.gov/legislative/vetoes/vetoCounts.htm> (last visited Nov. 11, 2024).

48. *See* U.S. CONST. art. IV, § 3, cl. 2.

While this authority is still subject to oversight by the judicial branch, thus preserving a measure of checks and balances, it is clear that Congress holds predominant legislative power in territorial matters.⁴⁹ This display of centralized power does not align with the framers' original vision and the question remains as to whether the Constitution can reconcile the two disparate ideas.

IV. UNCHECKED AND IMBALANCED GOVERNANCE IN THE U.S. TERRITORIES

Currently, the five unincorporated territories owned by the United States include Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.⁵⁰ Because they are deemed “unincorporated,”⁵¹

49. The Supreme Court has upheld numerous congressional acts in the governance of the territories and continues to rely on precedent from 1901. *See, e.g.*, *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1186 (2023) (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)) (holding that although Puerto Rico has a local constitutional right to access public government records, that the Financial Oversight and Management Board for Puerto Rico—put in place by the Congressional Act PROMESA—enjoys sovereign immunity that Puerto Rico itself does not enjoy, because the congressional act did not specifically abrogate it); *Downes v. Bidwell*, 182 U.S. 244, 347 (1901) (citing *Fleming v. Page*, 50 U.S. (1 How.) 603, 617 (1850) (holding that, although territories were not foreign nations, they were not actually part of the United States within the meaning of the Revenue Clause of the U.S. Constitution); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022) (upholding the precedential interpretation that the Constitution allows “Congress [to] sometimes legislate[] differently with respect to the Territories, including Puerto Rico, than it does with respect to the States”).

50. Sigrid Vendrell-Polanco, *No Remedy for Colonization*, CUNY L. REV. (forthcoming 2025); *see also Introduction*, 130 HARV. L. REV. 1617, 1617 (2017) (recalling the expansiveness of the territorial reach and discussing the history of citizenship rights for territory citizens).

51. *Vendrell-Polanco*, *supra* note 50; *see also De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes*, 182 U.S. 244; *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Fourteen Diamond Rings v. United States (The Diamond Rings)*, 183 U.S. 176 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States* 195 U.S. 188 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Over the course of more than a century, the United States gained control of five unincorporated territories through diverse historical events and agreements: Puerto Rico and Guam were acquired in 1898 following the Spanish-American War. *Introduction*, *supra* note 50, at 1617; *The Spanish-American War, 1898*, OFF. HISTORIAN, <https://history.state.gov/milestones/1866-1898/spanish-american-war> (last visited Jan. 19, 2025). Puerto Ricans were granted U.S. citizenship in 1917, while the people of Guam received citizenship in 1950. “*Foreign in a Domestic Sense*: U.S. Territories and “*Insular Areas*”, NAT’L IMMIGR. F. (April 12, 2021), <https://immigrationforum.org/article/foreign-in-a-domestic-sense-u-s-territories-and-insular-areas/>. American Samoa was brought under U.S. sovereignty through treaties with Great Britain and Germany formalized before 1904. *See American Samoa’s Role In World War II*, NAT’L PARK SERV., <https://www.nps.gov/articles/samoawwii.htm> (last visited Jan. 19, 2025). The U.S. Virgin Islands were purchased from Denmark in 1917, and residents

they are held indefinitely, with no clear path to statehood, but also without an option for independence.⁵² Upon their early acquisition, the U.S. federal government began passing laws and making judicial decisions to establish rules for governing the Territories. Under the Constitution's Territorial Clause, the Supreme Court found that "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."⁵³ This provision grants Congress full authority over U.S. territories and the District of Columbia, allowing it not only to pass legislation regulating local affairs but also to delegate governing power to local legislatures if it chooses.⁵⁴ However, the federal government in its rule over the territories is unchecked and imbalanced.

In short, the checks and balances system that we revere as a nation has failed in the ruling of the U.S. territories. This failure has allowed the United States to reverse roles with the British Empire which it fought for its independence, and to put in place its own mercantilist policies with respect to the territories.

A. Modern Mercantilism: U.S. Governance of and Economic Benefit from the Territories

Mercantilism, as explained in Part I of this Article, is defined as a historical economic policy aimed at building a nation's wealth by maximizing exports and minimizing imports, and now manifests in modern forms through the United States' continued influence over its territories.⁵⁵ In the case of Puerto Rico, the United States acquired the territory in 1889, following the Spanish-American War, as a means to export surplus manufactured products (in addition to a strategic naval base

became U.S. citizens in 1927. *U.S. Virgin Islands: History & Political Status*, U.S. DEPT INTERIOR, <https://www.doi.gov/oia/islands/virgin-islands> (last visited Jan. 19, 2025). Finally, the Commonwealth of the Northern Mariana Islands ("CNMI") became a commonwealth in political union with the United States in 1976, and residents received U.S. citizenship. Dirk Anthony Ballendorf & Sophie Foster, *Northern Mariana Islands*, BRITANNICA, <https://www.britannica.com/place/Northern-Mariana-Islands> (Jan. 17, 2025).

52. Kristina Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 31 YALE L.J. 2449, 2454–55 (2022).

53. U.S. CONST. art. IV, § 3, cl. 2.

54. *E.g.*, Vendrell-Polanco, *supra* note 50.

55. Harry Magdoff & Richard A. Webster, *Mercantilism*, BRITANNICA, <https://www.britannica.com/topic/Western-colonialism/Mercantilism> (Dec. 14, 2024).

within the Caribbean region)⁵⁶ and has held it indefinitely for the last 135 years without giving its people full rights under the U.S. Constitution.⁵⁷

However, scholars do not need to comb through 135 years of American history to find evidence of U.S. mercantilism towards its own colonies. Modern examples of these types of policies are alive and well today; consider the now-controversial Jones Act, otherwise known as:

The Merchant Marine Act of 1920[,] . . . [a] law [that] was presented as a plan to ensure adequate domestic shipbuilding capacity and a ready supply of merchant mariners to be available in times of war or other national emergencies. The law aim[ed] to achieve those objectives by restricting domestic shipping services to vessels that are U.S.-built, U.S.-owned, U.S.-flagged, and U.S.-staffed.⁵⁸

The result of this Congressional Act in 2017, though, during the devastation in Puerto Rico from Hurricane Maria, was that:

[b]asic shipments of goods from the island to the US mainland, and vice versa, must be conducted via expensive protected ships rather than exposing them to global competition. That makes everything Puerto Ricans buy unnecessarily expensive relative to goods purchased on either the US mainland or other Caribbean islands, and drives up the cost of living on the island overall.⁵⁹

This economic control, to the detriment of the Puerto Ricans, but to the benefit of the U.S. federal government and economy, is reminiscent of colonial practices where a mother country exploits a colony for its resources. In U.S. territories like Puerto Rico,

56. Sigr  Vendrell-Polanco, *Puerto Rican Presidential Voting Rights: Why Precedent Should Be Overturned, and Other Options for Suffrage*, 89 BROOK. L. REV. 563, 568–69 (2024).

57. See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022) (upholding the precedential interpretation that the Constitution allows “Congress [to] sometimes legislate[] differently with respect to the Territories, including Puerto Rico, than it does with respect to the States”).

58. Colin Grabow et al., *The Jones Act: A Burden America Can No Longer Bear*, CATO INST. (June 28, 2018), <https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear>.

59. Matthew Yglesias, *The Jones Act, the Obscure 1920 Shipping Regulation Strangling Puerto Rico, Explained*, VOX, <https://www.vox.com/policy-and-politics/2017/9/27/16373484/jones-act-puerto-rico> (Oct. 9, 2017, 4:41 PM).

Guam, and the U.S. Virgin Islands, this relationship can be seen in a wide variety of economic and fiscal policies imposed by the United States that prioritize national benefits over local ones.⁶⁰

The most egregious control over any territory, however, is the enactment of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) and the creation of a federally appointed Fiscal Oversight and Management Board (“the Board”) enacted to remedy Puerto Rico’s debt crisis. In order to demonstrate how the three branches of government are unchecked and imbalanced, this Part expands on PROMESA in the case of the Commonwealth of Puerto Rico.

B. PROMESA: Puerto Rico Oversight, Management, and Economic Stability Act

PROMESA was enacted by Congress in 2016 to help Puerto Rico come out of the extreme debt crisis created by, among other factors,⁶¹ the United States’ own actions and disparate treatment of the various territories.⁶² The congressional Act gave the

60. See Javier Balmaceda, *Federal Data Inequities in US Territories Hinder Inclusive and Precise Policymaking*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 7, 2024, 4:40PM), <https://www.cbpp.org/blog/federal-data-inequities-in-us-territories-hinder-inclusive-and-precise-policymaking>.

61. The financial crisis and substantial debt in Puerto Rico can be attributed to several factors including colonial policies not allowing Puerto Rico to oversee its own economy, but also Puerto Rican government deficiencies. *Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them*, GAO (May 9, 2018), <https://www.gao.gov/products/gao-18-387> [hereinafter *Puerto Rico and the Debt Crisis*]. Firstly, the Puerto Rican government consistently faced annual deficits, where government expenditures surpassed revenues. *Id.* To manage these deficits, the government frequently resorted to borrowing. *Id.* Additionally, the government of Puerto Rico often overestimated its revenue projections and its agencies habitually spent beyond the budget allocations approved by its legislature. *Id.* Furthermore, Puerto Rico has experienced a sustained economic downturn, worsened by factors like the emigration of workers leading to a reduced labor force, and the high costs associated with importing goods and energy. *Id.*

62. Congress deprived Puerto Rico of any federal remedy for securing debt relief when it stripped municipalities’ authority to participate in Chapter 9 bankruptcy protection. Vendrell-Polanco, *supra* note 50. Thus, in an attempt to address the crisis, Puerto Rico created a local law in 2014, hoping to provide some type of debt relief for its public utilities’ programs. *Id.* However, their local law was deemed to be invalidated by the federal action, thereby denying the territory a legal debt relief remedy. *Id.* Thus, Congress acted and passed the Puerto Rico Oversight and Management and Economic Stability Act in order to provide a bankruptcy process that sometimes resulted in forcing creditors to accept a settlement and created large scale in territory governance. *Id.* (citing Juan Gonzalez, *Puerto Rico’s \$123 Billion Bankruptcy is the Cost of U.S. Colonialism*, INTERCEPT (May 9, 2017, 9:23AM), <https://theintercept.com/2017/05/09/puerto-ricos-123-billion-bankruptcy-is-the-cost-of-u-s-colonialism/>). Additionally, the attractiveness of Puerto Rican debt to investors has been bolstered by federal laws that offer favorable tax treatment for income derived

executive branch the power to create the Board that has the power to control the entirety of the Puerto Rican budget.⁶³ These budgetary decisions include raising taxes for services and goods and cutting funding to public systems such as education, public parks, public pensions, among many other public programs⁶⁴ over the dissent of the Puerto Rican people, and without their approval.⁶⁵ The extreme encroachment on self-determination for the Puerto Rican people aside, this Article shifts its attention to the methods by which the Board is created under the congressional Act.⁶⁶

The Act dictates that the Board is comprised of seven *unelected* board members which shall be solely appointed by the President—the executive branch.⁶⁷ Congress can suggest a list of eligible board members to the President, but the President, alone, appoints the officers to the Board.⁶⁸ However, contradictory to other “officers of the government” appointed by the executive, the Supreme Court held that Board members, although appointed by the President, were not intended by Congress to be officers of the United States.⁶⁹

This, by congressional Act, and upheld by judicial review, eliminates one of the checks and balance systems created by the

from Puerto Rican bonds compared to those issued by U.S. states and localities, enabling the continued reliance on debt to finance deficits. *Puerto Rico and the Debt Crisis*, *supra* note 61.

63. Though the Financial Oversight and Management Board for Puerto Rico claims that, “PROMESA also requires the Government of Puerto Rico and the Oversight Board to develop a fiscal plan that provides a method to achieve fiscal responsibility and access to the capital markets,” in reality, the Board is hierarchically superior to the Puerto Rican government, and no Puerto Rican government official can sit on the Board. *Frequently Asked Questions About PROMESA and the Fiscal Oversight and Management Board for Puerto Rico*, FIN. OVERSIGHT & MGMT. BD. FOR P. R., <https://oversightboard.pr.gov/faq/> (last visited Dec. 29, 2024).

64. *See id.*

65. *See generally* Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R., 37 F.4th 746, 746 (1st Cir. 2022) (serving as evidence of litigation that stems from the Puerto Rican people attempting to pass laws that they deem should override PROMESA changes, which the Board challenges in court to nullify its validity).

66. Puerto Rico Oversight, Management, and Economic Stability Act of 2016, 48 U.S.C. §§ 2101–2232.

67. *Id.* § 2121(e)(1)(A).

68. *Id.* § 2121(e)(2)(A)(i)–(vi).

69. This decision ruled that the members of the Financial Oversight and Management Board could be appointed without Senate confirmation, the way traditional officers of the United States are confirmed by the Senate. Vendrell-Polanco, *supra* note 56, at 583 (citing Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661 (2020)). This eliminated an important checks and balances system in place for other such positions. *Id.*

Constitution.⁷⁰ Under said judicial review, *Aurelius* determined that this lack of Senate confirmation was constitutional because the officers of the government, as appointed by the executive under PROMESA, are not “*federal* Officers of the government,” but are instead officers carrying out local duties.⁷¹ This, under the judicial branch, confirms the elimination of one of the checks and balance systems created by the Constitution.

However, the Board cannot be said to be local in nature, even if it deals with some of Puerto Rico’s local budget because it was not liable to the Puerto Rican government or citizens, and only required one board member to live or have their principal place of business in Puerto Rico; past or present members of the local government were prohibited from serving on the board.⁷²

Due to the broad powers granted to the Board, Puerto Ricans are justified in mistrusting an unchecked and federally appointed Board of officers of the government taking complete control over economic decisions made in Puerto Rico’s governance.⁷³ The current makeup of the Board includes David A. Skeel, Jr., a law professor at the University of Pennsylvania Law School; Andrew G. Biggs, a resident scholar at the American Enterprise Institute; (former) Judge Arthur J. González, a senior fellow and former adjunct professor at New York University School of Law; John Nixon, senior vice president and senior account executive at CNSI, an innovative healthcare technology company; Dr. Betty A. Rosa, the commissioner of education and president of the University of the State of New York; and Juan A. Sabater, a partner and co-president of Valor Equity Partners, a private investment firm.⁷⁴ No local authority is involved, no local representation is allowed, and the Puerto Rican people, neither by vote, by electorate, nor by general public opinion, are allowed to have input in the decisions of the Board.⁷⁵

70. See § 2121(e); see also *Aurelius Inv., LLC*, 140 S. Ct. at 1661.

71. *Aurelius Inv., LLC*, 140 S. Ct. at 1661.

72. Vendrell-Polanco, *supra* note 50.

73. See *Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R.*, 37 F.4th 746, 750 (1st Cir. 2022); *Aurelius Inv., LLC*, 140 S. Ct. at 1661; *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1182 (2023).

74. *About Us*, FIN. OVERSIGHT & MGMT. BD. FOR P. R., <https://oversightboard.pr.gov/about-us/> (last visited Dec. 29, 2024).

75. *Id.*; see also Puerto Rico Oversight, Management, and Economic Stability Act of 2016, 48 U.S.C. § 2121(e).

*C. Financial Oversight & Management Board v. Aurelius and
Centro de Periodismo Investigativo*

In *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, decided in 2020, the Court solidified and upheld, once again, that Congress and Congress alone rules in the territories.⁷⁶ The case arose from creditors who challenged the validity of PROMESA’s authority to establish the Board, which was tasked with overseeing the restructuring of Puerto Rico’s debt and instituting fiscal reforms; reduced repayment from Puerto Rico would occur if PROMESA restructured and reduced Puerto Rico’s debt to creditors.⁷⁷ The controversy at the center of the case was the constitutionality of the appointment of the Board’s members—specifically the procedures, or lack thereof, in the appointment of the Board members.⁷⁸ According to Aurelius Investment and the other creditors, they asserted that the members of the Board were appointed without the advice and consent of the Senate, which, they argued violated the Appointments Clause of the U.S. Constitution, as dictated by the systems of separation of powers and checks and balances.⁷⁹ The Appointments Clause stipulates that principal officers must be appointed with Senate confirmation, but allows Congress to vest the appointment of “inferior [o]fficers” in the President, courts, or department heads without such confirmation.⁸⁰

The Supreme Court, in a unanimous decision, held that the members of the Board did not require Senate confirmation despite their significant powers.⁸¹ The Court reasoned that the Board members were *territorial* officers, rather than *federal* officers of the government, given that their powers and duties were primarily local, concerning Puerto Rico, and not federal.⁸² The decision emphasizes that the Appointments Clause does not extend fully to unincorporated territories like Puerto Rico unless explicitly stated by Congress, continuing to uphold the idea that the territories are

76. *See Aurelius Inv., LLC*, 140 S. Ct. at 1659.

77. *Id.* at 1655–56.

78. *Id.* at 1656.

79. *Id.* at 1654.

80. *Id.* at 1666.

81. *Id.* at 1665.

82. *Id.* at 1661–63.

foreign to the United States and thus can be treated disparately.⁸³ This interpretation was pivotal in affirming the structure of oversight established under PROMESA. The ruling also delved into the historical and functional aspects of territorial governance, citing instances and precedents where local governance structures in U.S. territories were treated differently from federal governance mechanisms.⁸⁴ The Court's decision thus upheld the unique status of the territories as unincorporated lands, where governance can forego traditional checks and balances as a means of achieving separation of powers.

Justifiably, the Puerto Rican people demanded accountability from the Board members after years of questions regarding board member activities.⁸⁵ Acting in accordance with Puerto Rico's constitutional right of information, a Puerto Rican investigative journal, seeking information regarding allegedly misused funds, sued the Board in federal court, in what became *Centro Periodismo Investigative v. Financial Management Oversight Board*.⁸⁶ However, in line with much of the authoritarian control and grasp of the Board and the federal government that created it, the local officers did not want to disclose information to the Puerto Ricans and claimed they were immune from suit in federal court.⁸⁷ The Supreme Court, confirming that Congress has unchecked authority in the territories, decided that the Board enjoys a type of sovereign immunity that Puerto Rico itself doesn't enjoy, since Congress did not expressly abrogate such perceived or assumed immunity.⁸⁸ This was the *Centro Periodismo* Court's final blow to the principle of checks and balances. In sum, the Constitution, even while building a system of checks and balances to ensure separation of powers and protect the governance of its citizens from any one overpowering branch, gives exclusive power to Congress to legislate in the territories.⁸⁹ In the case of Puerto Rico, because the Supreme Court rules that Puerto Rico is not allowed to create

83. *Id.* at 1664–65 (upholding the *Insular Cases* in that some territories which are unincorporated due to their savage peoples and foreign cultures can be legislated solely by Congress, rather than by the Constitution, as all other mainland Americans are).

84. *Id.* at 1663–65 (continuing to uphold the *Insular Cases*).

85. Vendrell-Polanco, *supra* note 50.

86. *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1182 (2023).

87. *Id.*

88. *Id.* at 1186.

89. U.S. CONST. art. IV, § 3, cl. 2.

a bankruptcy mechanism to help itself out of crisis, Congress has passed an act allowing the executive branch to appoint members to an Oversight Board which will control the commonwealth, without the typical checks and balances of congressional confirmations that protects other U.S. citizens living on the mainland.⁹⁰ Even when the judicial branch, the Supreme Court, steps in as a check on the imbalanced power dynamic, it is insufficient. It allows Congress and the federal government's actions to remain unchecked, ruling that this Board, made of officers of the United States carrying out duties that are "local [in] nature," is nonetheless protected by sovereign immunity, which Congress has not expressly granted to the government of Puerto Rico.⁹¹ The last stronghold, a judicial check on the legislature's actions in the territories, continues to fail time and time again.

Thus, the case of *Centro Periodismo Investigativo* proves that the checks and balances system is not in play in the territories as the founders imagined it. Why? Because the judicial branch has failed to overturn precedent that these territories are "savage" tribes, "foreign to the United States," and has allowed an unchecked Congress to legislate in the territories in a way that would be admonished, and even further, unconstitutional, if replicated and applied to mainland citizens.⁹² Policies and approaches that would be considered appalling as to mainland citizens persist, unchecked and rampant, in the territories.

IV. CONCLUSION

As with the Thirteen Colonies and their lack of representation, local autonomy, and taxation without representation, similar, significant gaps in representation, governance, and rights of the local populations exist in the U.S. territories today. This is especially clear in the recent Supreme Court cases out of Puerto Rico, where the federal government has taken complete economic

90. Puerto Rico Oversight, Management, and Economic Stability Act of 2016, 48 U.S.C. § 2121(e)(2)(E).

91. See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius, Inv., LLC*, 140 S. Ct. 1649, 1662–63 (2020); see also *Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. at 1186.

92. The *Insular Cases*, beginning with *Downes v. Bidwell*, have been upheld in modern day applications to the territories. 182 U.S. 244 (1901); see also *United States v. Vaello Madero*, 142 S. Ct. 1553 (2022) (Gorsuch, J., concurring) (describing the people of Puerto Rico as "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought" and holding that the Constitution did not apply because Puerto Rico was not "inhabited only by people of the same race" (quoting *Downes*, 182 U.S. 282, 287)).

and authoritarian control.⁹³ The limited applicability of constitutional rights underscore a profound democratic deficit, challenging the ideals of what the framers intended for the American democracy.⁹⁴ The federal government's powers over its territories, as exemplified in the application of PROMESA in Puerto Rico, very clearly illustrate a governance that is not fully accountable to the will of the people it is governing. This failure perpetuates a colonial legacy that is increasingly at odds with not only the founding ideals of this nation, but also with contemporary principles of self-determination and equality. Thus, it is imperative that this nation reevaluate the checks and balances system in relation to the U.S. territories and integrate the territories more fully into the American political fabric.

93. See *Aurelius Inv., LLC*, 140 S. Ct. at 1665; see also *Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. at 1184–86.

94. THE FEDERALIST NO. 47 (James Madison).