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

130 *Yale L.J. Forum* ____ (Forthcoming 2020).

30 Pages

Posted: 27 Jul 2020

Last revised: 3 Aug 2020

Christina D. Ponsa-Kraus (https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=4152514)

Columbia Law School

Date Written: July 27, 2020

Abstract

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*, a case involving an Appointments Clause challenge to the mechanism for selecting the members of the Financial Oversight and Management Board for Puerto Rico (“FOMB”). Although the Court unanimously upheld the appointments, Justice Sotomayor wrote separately to address an issue not raised by the parties, but directly relevant to a bitter, longstanding, and high-stakes political debate: the debate over Puerto Rican decolonization. According to Justice Sotomayor, the FOMB itself is likely unconstitutional, because it violates a “compact” between the United States and Puerto Rico, which Congress may not unilaterally amend or repeal. What Justice Sotomayor didn’t mention is that whether such a “compact” even exists is easily the most hotly contested issue in Puerto Rico’s status debate—the debate over whether Puerto Rico should become a state of the Union or an independent nation, or remain something in between. Justice Sotomayor’s *Aurelius* concurrence surprised everyone by aggressively taking sides in favor of the compact. Yet she did so without even acknowledging, let alone engaging, the other side of the debate. As a result, she exacerbated the already considerable legal ambiguity that has defined and prolonged Puerto Rico’s colonial condition for well over a century. This Essay criticizes Justice Sotomayor for offering her unsolicited opinion on a profoundly divisive and consequential issue for Puerto Ricans, and attempts to mitigate the damage she has done by giving voice to the opposing point of view.

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