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What Is Puerto Rico?

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WHAT IS PUERTO RICO?

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Puerto Rico is suffering through multiple crises. Two are obvious: a financial crisis triggered by the island’s public debts and the humanitarian crisis brought on by Hurricane Maria. One is not: the island’s ongoing crisis of constitutional identity. Like the hurricane, this crisis came from outside the island. Congress, the U.S. Supreme Court, and the Executive Branch have each moved in the last twenty years to undermine the “inventive statesmanship” that allowed for Puerto Rico’s self-government with minimal interference from a federal government in which the people of Puerto Rico had, and have, no representation. From the point of view of federal officials, it now appears that statehood, independence, or subjugation are the only constitutionally acceptable options for Puerto Rico. Yet the federal government’s formalist absolutism is inconsistent with the text and history of the U.S. Constitution—as well as the needs and desires of the U.S. citizens who make up Puerto Rico’s population. A review of the constitutional history of the Territory Clause, including a reexamination of the difficult Insular Cases, reveals the range of sovereign relations available to Puerto Rico within its current Commonwealth status. Only a resumption of inventive statesmanship, of the kind found throughout U.S. history, including the modern treatment of Indian tribes, can provide a satisfactory answer to the question of “What Is Puerto Rico?,” and only a satisfactory answer to that question can contribute the political preconditions for a lasting recovery from the financial and natural disasters afflicting the island.

INTRODUCTION.....	2
I. THE CONSTITUTIONAL STATUS OF PUERTO RICO.....	4
II. THE EXECUTIVE BRANCH REBELS	13
III. SUPREME COURT FORMALISM	19
IV. CONGRESS WEIGHS IN	26
V. WHERE TO NOW?.....	34
A. THE <i>INSULAR CASES</i> REDUX.....	34
B. RECONSIDERING THE PARALLELS TO AMERICAN INDIAN LAW.....	39
CONCLUSION.....	44

* Reiss Professor of Constitutional Law, New York University School of Law. The authors thank our many interlocutors in Puerto Rico for insights for this Article. We benefitted from extensive discussions with former governors Alejandro García Padilla, Aníbal Acevedo Vilá, and Rafael Hernández Colón. As discussed below, the initial work on this Article was done when the authors were serving as legal advisors to Governor García Padilla and the Partido Popular Democrático. No views in this Article should be attributed to anyone other than the authors. We also learned from NYU colleagues Clayton Gillette, Daniel Hulsebosch, Troy McKenzie, and Richard Pildes. Rona Li, Daniel Loehr, and Benjamin Perotin provided great research assistance. Our thanks to Victoria Wolfe and the staff of the *Indiana Law Journal* for exemplary editing and proofing.

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INTRODUCTION

Not since the Civil War has a substantial area of the United States been so thoroughly laid to waste as was Puerto Rico following Hurricane Maria. The sustained impact of the hurricane more completely compromised access to basic amenities, such as clean water and electricity, than any prior natural disaster in the United States.¹ The physical devastation of Puerto Rico compounded the terrible financial straits in which the bankrupt Commonwealth found itself even before the storm. That history of financial collapse in turn prompted President Trump's more uncharitable accounts of the fate of Puerto Rico.² And the hesitating federal response highlighted once again uncertainty about the relation between Puerto Rico and the United States, as President Trump immediately questioned the ultimate financial responsibility for the inevitable reconstruction, something never broached in Houston or New Orleans or Florida.³ Even in the midst of a natural disaster, there was no escaping the exposed wound of the political status of Puerto Rico.

Our immediate point of departure for this Article is not the human toll exacted on Puerto Rico by nature and fiscal collapse, but the question of political responsibility. The events of the day, from hurricane relief to debt restructuring, brought to public attention uncertainty about what it means to be a "Commonwealth," a legal status unmentioned in the U.S. Constitution, a word that lacks a direct translation into Spanish, and indeed a concept without a terribly clear meaning in English.⁴

Indeed, less than half a year before Hurricane Maria, on June 11, 2017, citizens of Puerto Rico voted for the fifth time in fifty years on their preference for the political organization of what in Puerto Rico is referred to as the "island," even if technically an archipelago.⁵ There were three options presented: "Statehood," "Free

1. See, e.g., Caitlin Dickerson & Luis Ferré-Sadurní, *'Like Going Back in Time': Puerto Ricans Put Survival Skills to Use*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/hurricane-maria-puerto-rico-coping.html> [<https://perma.cc/M8BB-TUBF>] (chronicling just some of the devastation experienced on the island since Maria).

2. See, e.g., Peter Baker & Caitlin Dickerson, *Trump Warns Storm-Ravaged Puerto Rico that Aid Won't Last 'Forever'*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/politics/trump-warns-puerto-rico-weeks-after-storms-federal-help-cannot-stay-forever.html> [<https://perma.cc/7BH8-BG93>].

3. John Wagner, *Trump: 'Big Decisions' Ahead on How Much to Spend on a 'Destroyed' Puerto Rico*, WASH. POST (Sept. 29, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/09/29/trump-big-decisions-ahead-on-how-much-to-spend-on-a-destroyed-puerto-rico> [<https://perma.cc/2WH3-LWQT>].

4. The Oxford English Dictionary defines "commonwealth" as, variously, "the whole body of people comprising a nation or state," "a body politic," "a state," "an independent community," "a republic," "a democratic state," "a state of the United States of America," "a body of persons united by some common interest," and "an association of self-governing nations." *Commonwealth*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/37261?redirectedFrom=Commonwealth#eid> [<https://perma.cc/A5N4-2K5K>]. The term serves as well as the titles for a federal government (Australia, from 1901 to the present); a unitary state (Commonwealth of England, during the Civil War); a supranational federation (Commonwealth of Nations/Commonwealth of Independent States); and as one of various related concepts of political philosophy (as with John Locke).

5. Nick Brown & Tracy Rucinski, *Puerto Rico Governor Vows Statehood Push After*

Association/Independence,” and “Current Territorial Status.”⁶ In a result more typically associated with voting in the former Soviet Union, the statehood option won a jaw-dropping ninety-seven percent of the votes cast—a reflection of a boycott of the referendum by the major opponents of Governor Ricardo Rosselló’s pro-statehood New Progressive Party.⁷ In a jurisdiction where voter turnout typically reaches seventy percent and above, only twenty-three percent of eligible voters participated.⁸

The desultory referendum was an orchestrated effort to tarnish any choice but statehood, an unfortunate rendition of democratic choice for a community still straddling self-determination and dependence on the United States. The legacy of colonial subjugation was doubly imprinted onto the referendum choice—even a vote for “Statehood” was presented as *requesting* “the Federal government to immediately begin the process for the decolonization of Puerto Rico with the admission of Puerto Rico as a state.”⁹ Free Association/Independence was offered as a vote to become independent and pursue an unspecified treaty-based relationship with the United States that would be further refined in a second stage of voting.¹⁰ Finally, Puerto Rico’s present relationship with the United States—what is termed a “Free Associated State” (“Estado Libre Asociado”) in its official Spanish translation—was depicted rather pejoratively as a continuation of the “Current Territorial Status.”¹¹

Holding a referendum on political status is nothing new in Puerto Rico, and unfortunately neither are peculiar referendum results. The next most recent referendum, held in 2012, led to an apparent mandate for statehood, but some 500,000 ballots were left blank in protest over confusing procedures and wording.¹² In response, Congress ignored the 2012 plebiscite and appropriated \$2.5 million in

Referendum Win, REUTERS (June 12, 2017, 10:22 AM), <https://www.reuters.com/article/us-puertorico-debt-vote-idUSKBN1931NG> [<https://perma.cc/3VSZ-QRDE>].

6. STATE ELECTIONS COMM’N, PLEBISCITE FOR THE IMMEDIATE DECOLONIZATION OF PUERTO RICO (2017), <http://plebiscito2017.ceepur.org/docs/Papeleta%20Plebiscito.pdf> [<https://perma.cc/LJW4-H8UV>].

7. Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html> [<https://perma.cc/TCH3-2HCJ>].

8. *Id.*

9. STATE ELECTIONS COMM’N, *supra* note 6.

10. *Id.*

11. *Id.* To be fair, the legacy of colonialism weighs heavily on the history of Puerto Rico under American rule. See José A. Cabranes, *Some Common Ground*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 39, 40–41 (Christina Duffy Burnett & Burke Marshall eds., 2001) (“Speaking plainly and honestly about our history requires us to acknowledge, without rancor and without embarrassment, that *colonialism* is a simple and perfectly useful word to describe a relationship between a powerful metropolitan state and a poor overseas dependency that does not participate meaningfully in the formal lawmaking processes that shape the daily lives of its people.”).

12. Danica Coto, *Puerto Rico Says ‘Yes’ to Statehood; Now It’s Up to Congress*, CHI. TRIB. (June 11, 2017, 4:48 PM), <http://www.chicagotribune.com/news/nationworld/ct-puerto-rico-referendum-20170611-story.html> [<https://perma.cc/59X7-WUBK>].

funds to hold yet another vote on political status.¹³ This appropriation was contingent on the Department of Justice (DOJ) approving the language of any proposed plebiscite (specifically, making a finding that the options conformed to the policies and laws of the United States) at least forty-five days before the election.¹⁴ The Justice Department refused to approve the wording of the 2017 plebiscite and, rather than restate the options on the ballot to access federal funding, the desperately-indebted Puerto Rican government assumed all the costs of a sham vote.¹⁵

This strange congressional requirement that Puerto Rico's referendum options conform to U.S. law and policy served as the genesis of this Article. The authors were hired by the then-Governor of Puerto Rico, Alejandro García Padilla, and the (now out-of-power) Popular Democratic Party, to examine precisely the question that would confront the Justice Department under the statute: what does it mean to present options compatible with U.S. law and policy, as required by the referendum statute? We remain committed to the proposition that the choice among options must, in the first instance, rest with the people of Puerto Rico.¹⁶ But this is no answer to the question we were first retained to engage in 2015: what exactly are the options available?

I. THE CONSTITUTIONAL STATUS OF PUERTO RICO

Our inquiry is even more specific than the full range of possible lawful arrangements. Certain options are fairly self-explanatory. Were Puerto Rico to become independent, it would become a nation among many, free to enter into any treaty-based relations with the United States, much as has post-independence Philippines. But such a path would put in jeopardy a highly-valued birthright of Puerto Ricans, the American citizenship conferred by the Jones-Shafroth Act,¹⁷ and seems an unlikely prospect politically.¹⁸ At the other end of the spectrum, were

13. Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 61 (2014); see also H.R. REP. NO. 113-171, at 53 (2013) (describing purpose of enactment); Leslie Picker & Dawn Giel, *Statehood? Sovereignty? Bankrupt Puerto Rico Heads to Ballot Box for 'Status' Vote*, CNBC (June 9, 2017, 10:28 AM), <http://www.cnbc.com/2017/06/09/statehood-sovereignty-bankrupt-puerto-rico-heads-to-ballot-box-for-status-vote.html> [https://perma.cc/LLU7-CDK5].

14. Colin Wilhelm, *Puerto Rico Governor Pushes Statehood as Vote Looms Despite No U.S. Support*, POLITICO (May 26, 2017, 4:32 PM), <http://www.politico.com/story/2017/05/26/puerto-rico-statehood-is-it-possible-238867> [https://perma.cc/K3MV-E249].

15. After the DOJ rejected the ballot and denied the funds, Puerto Rico's sole (nonvoting) congressional representative, Jenniffer González, stated: "This is not about the money; this is more than that. So keep the money. Let us express ourselves. And that is what we are going to have [with the plebiscite]." Picker & Giel, *supra* note 13.

16. We take no position on whether there is a right to demand statehood or independence, either as a matter of American constitutional law or under international law, a question well presented in Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 264 (2018). We agree with Blocher and Gulati that the choice of status should be that of the citizens of Puerto Rico. Our aim here is to elucidate what exactly are the rights associated with the current status if there is no alteration.

17. Pub. L. No. 64-368, 39 Stat. 951 (codified at 48 U.S.C. § 733 (2012)).

18. Despite lingering questions about the various plebiscite votes, the independence

Puerto Rico to become a U.S. state, then the integration of new states from Vermont in 1791 to Hawaii in 1959 provides a well-trod path for accession. We may remain skeptical that those presently in control of the federal government would readily admit a new state with a large Democratic majority,¹⁹ immense public debt, and—to boot—a Spanish-speaking populace.²⁰ Statehood requires assent from Congress,²¹ and this particular tango partner seems especially reticent.²²

Rather, our focus is on the current default option, leaving aside the latest plebiscite’s tendentious characterizations about territory and colonialism. If nothing were to change in terms of independence or statehood, questions would still remain: What is Puerto Rico at present? What is its status under current American law and policy? And, what are the constitutional boundaries on the range of permissible forms of governance available to Puerto Rico while still territorially affiliated with the United States?

The complicated political status of Puerto Rico begins with the name for its relation to the United States. In the Puerto Rico Federal Relations Act of 1950 (often referred to simply as “Public Law 600”), which kicked off the process that eventually led to the island’s present Constitution,²³ Puerto Rico is defined as a commonwealth,

movement has proven to have very limited traction politically in Puerto Rico. *See* Dieter Nohlen, *Puerto Rico*, in 1 ELECTIONS IN THE AMERICAS: A DATA HANDBOOK 555 (Dieter Nohlen ed., 2005) (independence received 2.6% of the vote in the 1998 Referendum); Mariano Castillo, *Puerto Ricans Favor Statehood for First Time*, CNN: POLITICS (Nov. 8, 2012, 10:32 AM), <http://www.cnn.com/2012/11/07/politics/election-puerto-rico/index.html> [https://perma.cc/XV6K-G3RY] (of the 54% of voters who rejected the current commonwealth regime, only 6% voted for outright independence); *Senado de Puerto Rico 18VA. Asamblea Legislativa*, SENADO ESPERANZA Y PROGRESO, <http://senado.pr.gov/Pages/Senadores.aspx> [https://perma.cc/39TG-URGY] (Puerto Rican Independence Party has only one representative in the Puerto Rican Senate).

19. *See* Ryan Struyk, *Here’s What Would Happen to US Politics if Puerto Rico Became a State*, CNN: POLITICS (Oct. 14, 2017, 10:51 AM), <http://www.cnn.com/2017/10/14/politics/puerto-rico-state-congress-white-house/index.html> [https://perma.cc/5N6T-BNJW].

20. *Characteristics of the Group Quarters Population in Puerto Rico: 2012-2016 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> [https://perma.cc/V5TW-KHDV] (an estimated 94.5% of Puerto Ricans speak Spanish in the home).

21. U.S. CONST. art. IV, § 3, cl. 1.

22. *See, e.g.*, Katanga Johnson, *Puerto Rico Pressing on in Its Quest for Statehood*, ROLL CALL (Aug. 22, 2017, 5:03 AM), <https://www.rollcall.com/news/politics/puerto-rico-statehood-congressional-delegation> [https://perma.cc/8JUD-V9NJ] (“Congress has the power to grant statehood but that remains an unlikely proposition given the current political climate on the Hill”); Vann R. Newkirk II, *Puerto Rico’s Plebiscite to Nowhere*, ATLANTIC (June 13, 2017), <https://www.theatlantic.com/politics/archive/2017/06/puerto-rico-statehood-plebiscite-congress/530136> [https://perma.cc/Y8QP-WU5E] (“In today’s political climate, the Republican-dominated [Congress] won’t feel any pressure to add an island of millions of likely Democrats to the electorate.”); Frances Robles, *Despite Vote in Favor, Puerto Rico Faces a Daunting Road Toward Statehood*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/us/trump-puerto-rico-statehood-congress.html> [https://perma.cc/32JE-CHDK] (“The Republicans are also considered highly unlikely to do something that could result in five more Democrats in the House and two in the Senate.”).

23. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950)

a term that admits of no ready translation into Spanish or definition in English and is allowed the title of “Free Associated State” (“Estado Libre Asociado”) under the official Spanish translation. Its residents are entitled to self-government yet cannot vote in elections for federal office in the United States,²⁴ save in U.S. presidential primaries.²⁵ But Puerto Ricans are U.S. citizens,²⁶ and at the same time popularly elect their own governor and bicameral legislature to control local government.²⁷ Puerto Ricans are holders of American passports, can enter the United States freely, and may establish residency and voting eligibility upon disembarking without customs or special legal barriers.²⁸ The United States manages Puerto Rico’s foreign affairs and defense,²⁹ but Puerto Rico sends its own team to the Olympics.³⁰ Puerto Ricans fight in the U.S. military and are represented by the federal government in the United Nations.³¹ Puerto Ricans pay no federal taxes³² yet are eligible for federal benefits,³³ with twenty-four percent of the island’s population currently drawing

(codified at 48 U.S.C. §§ 731b–731e (2012)); *see* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1868–69 (2016).

24. *See generally* Igartúa-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005).

25. *See* DEMOCRATIC NAT’L COMM., THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 7 (amended 2018), http://democrats.org/wp-content/uploads/2018/09/DNC_Charter_Bylaws_3.12.181.pdf [<https://perma.cc/QW7W-N4JX>]; REPUBLICAN NAT’L COMM., THE RULES OF THE REPUBLICAN PARTY 16–17 (amended 2018), https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018_1533138132.pdf [<https://perma.cc/C822-Y9Y3>].

26. Jones-Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 733 (2012)).

27. REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS 18 (2011) [hereinafter 2011 REPORT]. *See generally* P.R. CONST. art. III; *id.* art. IV.

28. *See* Eduardo Guzmán, Comment, Igartúa De La Rosa v. United States: *The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-Evaluate America’s Territorial Policy*, 4 U. PA. J. CONST. L. 141, 142 n.5 (2001).

29. 2011 REPORT, *supra* note 27.

30. Alexis E. Quinones, *Unique Industry, Unique Relationship = Unique Perspective: A Quick Look at Some Issues of Puerto Rican Sports*, 15 SPORTS L.J. 195, 201 (2008) (“The [International Olympic Committee] has recognized Puerto Rico’s Olympic Committee (COPUR) since January 1948, two years before Congress’s approval of a Constitution for the island and four years before its ratification in 1952.” (footnote omitted)).

31. Shannon Collins, *Puerto Ricans Represented Throughout U.S. Military History*, U.S. DEP’T DEFENSE (Oct. 14, 2016), <https://www.defense.gov/News/Article/Article/974518/puerto-ricans-represented-throughout-us-military-history> [<https://perma.cc/AU8X-47QB>] (“As citizens of the United States, Puerto Ricans have participated in every major United States military engagement from World War I onward.”); *Member States*, UNITED NATIONS, <http://www.un.org/en/member-states/index.html> [<https://perma.cc/LD9H-SG9Y>].

32. 26 U.S.C. § 933 (2012).

33. Josh Hicks, *Puerto Ricans Who Can’t Speak English Qualify as Disabled for Social Security*, WASH. POST (Apr. 10, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/04/10/puerto-ricans-who-cant-speak-english-qualify-as-disabled-for-social-security> [<https://perma.cc/FG2R-QCF4>].

Social Security benefits, a higher percentage than almost any U.S. state.³⁴ Indeed, prior to Hurricane Maria, nearly half the island's population was on Medicaid.³⁵

More incongruous still is the application of federal economic regulations to Puerto Rico. Under the Jones Act, any shipping between U.S. ports must be on U.S.-flagged ships,³⁶ which not only raises the cost of goods brought to Puerto Rico³⁷ but also prevents the island from transitioning to natural gas—the longstanding prohibitions on any exports of fossil fuels from the United States meant that, until recently, there were no U.S. vessels capable of carrying natural gas and thus no natural gas capable of being conveniently shipped to the island.³⁸ The application of U.S. minimum wage laws to Puerto Rico results in labor costs roughly double those in Puerto Rico's Caribbean counterparts and has been estimated to reduce employment on the island by eight to ten percent.³⁹ One manifestation of the damage done by the mechanical application of the federal minimum wage laws has been Puerto Rico's failure to exploit its tourism potential. The number of hotel beds throughout the island has seen only modest growth since the 1970s,⁴⁰ increasing from around 9000 to 15,000 in 2015.⁴¹ In comparison, the Dominican Republic increased from 1600 to 60,000 and Jamaica went from 6600 to 20,000.⁴² These rivals continue to aggressively expand their tourism sectors, with the Dominican Republic planning to reach 100,000 hotel

34. *Compare* SOC. SEC. ADMIN., PUERTO RICO: CONGRESSIONAL STATISTICS (2017), https://www.ssa.gov/policy/docs/factsheets/cong_stats/2017/pr.pdf [https://perma.cc/5YN7-E5PM] (providing the total number of Social Security beneficiaries in Puerto Rico), and *QuickFacts: Puerto Rico*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/pr> [https://perma.cc/8DK3-AZVU] (providing an estimate of the total population in Puerto Rico), with SOC. SEC. ADMIN., BENEFICIARIES AS A PERCENTAGE OF THE TOTAL RESIDENT POPULATION AND OF THE POPULATION AGED 65 OR OLDER, BY STATE (2017), https://www.ssa.gov/policy/docs/statcomps/oasdi_sc/2017/table01.pdf [https://perma.cc/V7XL-H6L7] (providing the percentage of Social Security beneficiaries for each U.S. state).

35. *Puerto Rico: Medicaid Overview*, MEDICAID, <https://www.medicaid.gov/medicaid/by-state/puerto-rico.html> [https://perma.cc/XW9G-SZGL].

36. 46 U.S.C. § 55102(b) (2006).

37. FED. RESERVE BANK OF N.Y., REPORT ON THE COMPETITIVENESS OF PUERTO RICO'S ECONOMY 13, 22 (2012), www.newyorkfed.org/medialibrary/media/regional/PuertoRico/report.pdf [https://perma.cc/63QL-VEWX] (estimating cost of shipping to Puerto Rico as double that to the Dominican Republic or Jamaica).

38. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 20 & n.28 (2013).

39. Alida Castillo-Freeman & Richard B. Freeman, *When the Minimum Wage Really Bites: The Effect of the U.S.-Level Minimum on Puerto Rico*, in IMMIGRATION AND THE WORKFORCE: ECONOMIC CONSEQUENCES FOR THE UNITED STATES AND SOURCE AREAS 177, 178 (George J. Borjas & Richard B. Freeman eds., 1992).

40. ANNE O. KRUEGER, RANJIT TEJA & ANDREW WOLFE, PUERTO RICO – A WAY FORWARD 8 (2015), <http://www.gdbpr.com/documents/PuertoRicoAWayForward.pdf> [https://perma.cc/X4G7-S23N].

41. Jessica DiNapoli, *Tourism to Puerto Rico Is Down in the Wake of the Debt Crisis*, BUS. INSIDER (July 27, 2015, 12:14 PM), <http://www.businessinsider.com/r-puerto-rico-tourism-industry-lags-rivals-offers-little-relief-from-debt-crisis-2015-7> [https://perma.cc/76KJ-LY4K].

42. *Id.*

rooms by the end of 2018.⁴³ Puerto Rico, held back by obligations imposed by federal law, is falling ever further behind these regional rivals. With regulatory controls imported wholesale from the mainland, Puerto Rico finds itself at a consistent disadvantage regionally, a condition exacerbated in the aftermath of Hurricane Maria.

The resulting statutory, regulatory, and constitutional hodgepodge means that, in the words of the U.S. Supreme Court, “Puerto Rico occupies a relationship to the United States that has no parallel in [American] history.”⁴⁴ But that hodgepodge had a historic logic as the era of overt colonialism drew to a close. The turn to greater autonomy in local affairs after World War II fit comfortably with the international move toward self-determination and the closing of the colonial era. As then-Judge, now-Justice, Breyer put it, “[t]he theme that consistently runs throughout the legislative history of Puerto Rico’s attainment of Commonwealth status is . . . increasing self-government over local affairs by the people of Puerto Rico.”⁴⁵ But unlike the great run of decolonization in Asia and Africa, Puerto Rico’s formal legal relationship with the United States remained intact, even as its functional autonomy increased. The list of paradoxical legal relations goes on and on, yet it all comes back time and again to the evolving, if ill-understood, concepts of “Commonwealth” and “Estado Libre Asociado.”

Our assessment of these fraught terms begins with what it means for the United States to have longstanding relations with territories defined by three critical attributes: (1) their domiciliaries are U.S. citizens; (2) these domiciliaries have some but not all of the political and civil rights of other U.S. citizens living within the incorporated states of the United States, most notably they are citizens without national-level voting rights unless they leave the territory and move to the mainland; and (3) there is no immediate prospect of statehood or other fundamental change in the territory’s political status. The status of territories prior to statehood has been a convulsive controversy in American constitutional history, ranging back to the formal question presented in *Dred Scott v. Sandford* of the federal power to regulate slavery holdings in the so-called incorporated territories (i.e., those territories that were anticipated, at the time of their creation, to eventually be admitted as states).⁴⁶ That controversy continues in the dissatisfaction over the current status of the District

43. *Dominican Republic Could Reach 100k Hotel Rooms in 2018*, DOMINICAN TODAY (Aug. 15, 2017, 7:08 PM), <https://dominantoday.com/dr/tourism/2017/08/15/dominican-republic-could-reach-100k-hotel-rooms-in-2018> [<https://perma.cc/QS3D-XZ6A>].

44. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976).

45. *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 40 (1st Cir. 1981).

46. 60 U.S. 393, 446 (1857) (“There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.”).

of Columbia and to the permanent disputes over the extent of sovereignty enjoyed by American Indian tribes and their tribal governments.

The governmental status of Puerto Rico through the twentieth century until the late 1990s can be separated into two major periods. The first period's legal structure emerged from the so-called *Insular Cases*,⁴⁷ a series of U.S. Supreme Court decisions starting in 1901 delineating the constitutional and statutory status of the United States' new territorial acquisitions. In this period, the United States acquired a number of overseas lands that were neither states nor had the ready prospect of eventual statehood. Using the legal concept of "unincorporated territory," the Supreme Court deemed these jurisdictions outside the full constitutional structure of the United States, even if subject to some fundamental protections of American law.⁴⁸ As an unincorporated territory, Puerto Rico was a territorial subject capable of being given (or not given) certain rights and authorities pursuant to the prerogative power of its territorial master. There is no escaping the reality that the *Insular Cases* were part and parcel of the early period of American empire, heavily imbued with notions of racial destiny and imperial domination. Indeed, in one of the first *Insular Cases*, *Downes v. Bidwell*, the Court spoke of the newly acquired territories as being "inhabited by alien races," such that governance "according to Anglo-Saxon principles, may for a time be impossible."⁴⁹

In this first period, the Court applied the relevant constitutional provisions flexibly, recognizing that the Constitution of the imperial era could not sustain the assumption of the early Republic that territories would move steadily toward statehood. Thus, the Court accepted that a mechanical application of the constitutional conventions respecting newly-acquired territory threatened the needed "power to acquire and hold territory as property or as appurtenant to the United States."⁵⁰ Extending full rights to people the Court described as "utterly unfit for American citizenship,"⁵¹ especially as a matter of constitutional law, was unthinkable. The result was a pragmatic accommodation, recognizing, in somewhat oxymoronic fashion, that such territories would be part of the United States, but would remain "foreign . . . in a domestic sense."⁵² The new imperial doctrine

47. The cases falling under the heading of "the *Insular Cases*" is a contested issue. Some commentators include only the cases decided in 1901; others reach as far forward as *Balzac v. Porto Rico*, 258 U.S. 298 (1922). See Christina Duffy Burnett, *A Note on the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 389, 389–92 (Christina Duffy Burnett & Burke Marshall eds., 2001). We use the term to describe the *constitutional* cases beginning in 1901 and ending with *Balzac* in 1922. Primarily, we refer to *Balzac*; *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); and *Downes v. Bidwell*, 182 U.S. 244 (1901).

48. See, e.g., *Balzac*, 258 U.S. at 312–13 ("The guaranties of certain fundamental personal rights declared in the Constitution, as for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and [Puerto] Rico . . .").

49. 182 U.S. at 287.

50. *Id.* at 300 (White, J., concurring).

51. *Id.* at 311.

52. *Id.* at 341. For elaborate discussion of the paradoxes in the early treatment of the newly acquired territories, see *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* (Christina Duffy Burnett & Burke Marshall eds., 2001).

reflected in the *Insular Cases* showed a distinctive constitutional tolerance for particularized territorial arrangements, one that allowed for fundamental ambiguity in legal status. But however tolerant (or intolerant) the constitutional doctrine may have been after the United States took control of Puerto Rico in 1898, there was no escaping the practical reality that Puerto Rico was wholly subordinate to the U.S. government. Indeed, from the ratification of the Treaty of Paris in 1898 until the Elective Governor Act of 1947,⁵³ the Governor and Executive Council (the equivalent of a state senate) of Puerto Rico were entirely appointed by the U.S. federal government.⁵⁴

The second period emerged with the global anticolonial movements that mushroomed during and after World War II. The changed international landscape, the Cold War, and the emergence of a nonaligned bloc of independent states acting as members of the United Nations all made continued colonial prerogatives an international liability for the United States. Here, the defining legal act was Public Law 600,⁵⁵ approved by Congress in 1952, which “was intended to end [Puerto Rico’s] subordinate status.”⁵⁶ Public Law 600 set out the terms of a collaboration between Puerto Rico and the United States: Congress set out a process for Puerto Ricans to write their own constitution, elect representatives to govern local affairs, and create a bill of rights, but Puerto Ricans drafted the constitution proper. As its legislative history makes clear, Public Law 600 was a “reaffirmation by the Congress of the self-government principle.”⁵⁷ The preamble to the bill describes Public Law 600 as the culmination of a “series of enactments [that] progressively recognized the right of self-government of the People of Puerto Rico.”⁵⁸

Indeed, after Congress passed Public Law 600, Puerto Ricans voted on whether to accept it in an island-wide referendum before proceeding to do any constitution writing at all.⁵⁹ After Public Law 600 gained popular approval from Puerto Ricans, a constitutional convention was convened whose proposed constitutional text was approved by a second referendum. Congress may have initiated the constitution-writing process, but the voters of Puerto Rico made it a reality. Since that time, apart from some initial and inevitable tweaks as the constitution “settled in,” the people of

53. Elective Governor Act of 1947, Pub. L. No. 80-362, 61 Stat. 770 (1947).

54. See The Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900).

55. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950).

56. *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 40 (1st Cir. 1981).

57. H.R. REP. NO. 81-2275, at 6 (1950). *But see* 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, 77–84 (2018) (arguing the history of Public Law 600 suggests it was not intended to alter the political relationship between Puerto Rico and the United States).

58. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, pmb., 64 Stat. 319, 319 (1950).

59. Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO [REV. JUR. U.P.R.] 945, 949 (2011) (“Public Law 600 did not come fully into force until its acceptance by the Puerto Rican people in an island-wide referendum.”).

Puerto Rico have exercised complete control over the constitutional form of governance.⁶⁰

Public Law 600 and the Puerto Rican Constitution reframed the relationship between the United States and Puerto Rico using terms of consent.⁶¹ Indeed, the law's first enacting clause declares that "fully recognizing the principle of government by consent, this Act is now adopted *in the nature of a compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."⁶² In the first federal court opinion to interpret Puerto Rico's status after Congress approved the Puerto Rico Constitution, the U.S. District Court for the District of Puerto Rico held that "Puerto Rico is, under the terms of the compact, sovereign over matters not ruled by the Constitution of the United States."⁶³ In reaching this conclusion, the court looked not only to Public Law 600's legislative history but also to the international law obligations of the United States to the colonial deaccession mandates of the United Nations.⁶⁴ After the passage of Public Law 600, the United States ceased reporting on Puerto Rico to the United Nations under Article 73(e) of the U.N. Charter (which pertained to "non-self-governing territories"),⁶⁵ a change in status accepted in turn by the U.N. General Assembly.⁶⁶ The result, as recognized by the U.S. Supreme Court in *Rodriguez v. Popular*

60. The Senate chronicles the interaction between Public Law 600 and the Puerto Rican Constitution in S. REP. NO. 82-1720, at 3 (1952).

61. José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Conditions of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 28 (1999) ("[T]here was indeed a change in the relationship [between Puerto Rico and the United States]. The principle of consent, fully recognized in the first section of Public Law 600, provides the key to understanding the nature of the change. The change did not alone consist in the obtention [sic] of a fuller measure of self-government, but particularly in the fact that such consent became the new basis of the relationship."). *But see* Torruella, *supra* note 57, at 81–84. According to Judge Torruella, the themes of Puerto Rican autonomy in Public Law 600, and in subsequent representations to the United Nations, were a "monumental hoax" concocted for the immediate political advantage of the American government. *Id.* at 85–88. Whether the representations of Puerto Rican autonomy were genuine or not, we argue below that those representations themselves had real consequences that constrain American abuse of power in relations with Puerto Rico moving forward.

62. Puerto Rico Federal Relations Act § 1, 64 Stat. at 319 (emphasis added).

63. *Mora v. Mejias*, 115 F. Supp. 610, 612 (D.P.R. 1953).

64. *Id.*

65. The impetus behind Puerto Rico's removal began in a letter from Governor Muñoz Marín to President Truman requesting it. This and a fuller history behind Public Law 600, the transition to local self-rule, and the removal of Puerto Rico from the list of non-self-governing territories are laid out in substantial detail in JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 119–140 (1997) and Chimène I. Keitner, *From Conquest to Consent: Puerto Rico and the Prospect of Genuine Free Association, in CONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 77 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

66. G.A. Res. 748 (VIII) (Nov. 27, 1953). The General Assembly found that the people of Puerto Rico "ha[d] achieved a new constitutional status." *Id.* at 26; *see also* U.N. Charter art. 73, ¶ e. (regulating "non-self-governing territories").

Democratic Party, is that “Puerto Rico . . . is an autonomous political entity, ‘sovereign over matters not ruled by the Constitution.’”⁶⁷

This second constitutional period of mixed sovereignty proved serviceable, if underspecified. As we shall address subsequently, the redefinition of Puerto Rican governance ushered in a period of economic expansion under beneficial U.S. tax regulations. On the political front, the broad popular mandate for the new system of self-rule engendered by the Puerto Rican referenda on both Public Law 600 and the Puerto Rico Constitution allowed the arrangement to satisfy the anticolonialist tenor of the times and allowed the federal government to put a stop to persistent United Nations efforts to embarrass the United States for its territorial holdings. After Public Law 600 was enacted and a Puerto Rican Constitution approved by Congress and the Puerto Rican constitutional convention, the United States requested that Puerto Rico be removed from the United Nation’s list of Non-Self-Governing Territories and that the United States be relieved of its U.N. obligation to continue transmitting information on it.⁶⁸ In response, the General Assembly voted in 1953 to remove Puerto Rico from the list of Non-Self-Governing Territories and relieve the United States of its reporting obligations.⁶⁹

Public Law 600’s development of Puerto Rican “sovereignty” of a contingent and limited sort proved to be not so much a coherent conceptual structure than an example of what Felix Frankfurter long ago referred to as “inventive statesmanship.”⁷⁰ The accommodation allowed both continued U.S. command of Puerto Rico’s international affairs and a strong measure of democratic legitimacy for the island’s political self-governance. But without the overlay of popular sovereignty among Puerto Ricans, the commonwealth enterprise would be revealed as “a monumental hoax,” as the U.S. Court of Appeals for the First Circuit memorably declaimed in its first substantive examination of Puerto Rico’s status after the enactment of Public Law 600.⁷¹

Yet “inventive statesmanship” has started to appear a “monumental hoax” under the pressure of the apparently uncoordinated but no less real efforts by the three branches of the U.S. government to erode the foundations of the second twentieth century constitutional accommodation, through recent repudiations by the Executive Branch, destabilizing decisions of the Supreme Court, and, as we shall see, a congressional enactment, Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), that placed the island under an unprecedented form of fiscal receivership.⁷² All have done so under what we maintain is a limited

67. 457 U.S. 1, 8 (1982) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)).

68. *See supra* note 65.

69. *See supra* note 66.

70. *See* Memorandum from Felix Frankfurter, Law Officer, Dep’t of War, to Henry Stimson, Sec’y of War (Mar. 11, 1914) [hereinafter Frankfurter Memorandum] (quoted in *Mora v. Torres*, 113 F. Supp. 309, 319 (D.P.R. 1953), *aff’d sub nom. Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953)). At the time, Frankfurter was the law officer of the Department of War, which exercised jurisdiction over Puerto Rico.

71. *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

72. *See infra* Part IV.

understanding of the Territory Clause of the Constitution and what it permits or compels in terms of local governance.

Taken as a package, federal action has forced a reexamination of the constitutional relation between the United States and Puerto Rico. We reiterate that were the people of Puerto Rico to claim independence or were the United States to offer statehood, these constitutional issues could be avoided. Absent such fundamental change, however, some of the premises of the two constitutional periods need to be revisited. We undertake to do so and find ourselves oddly drawn to the structural logic of some of the *Insular Cases*, hard as it may be to distance ourselves from the imperial and racist rhetoric of the day.

II. THE EXECUTIVE BRANCH REBELS

Over the last three decades, the Department of Justice and three presidential administrations have taken the position that the commonwealth arrangement with Puerto Rico confers *no* special rights of self-governance. Allowing for some variations in presentation, the basic theme has been that Puerto Rico's designation as a commonwealth is simply a delegation of governing authority under the Territory Clause, pursuant to which Congress has plenary authority over Puerto Rico—meaning that it could unilaterally abrogate such an arrangement at any time.⁷³ Despite Public Law 600 being made “in the nature of a compact,”⁷⁴ and accompanying representations to the United Nations that the Puerto Rico Commonwealth arrangement could only be modified by mutual consent,⁷⁵ the Executive Branch has come to argue that such an option is constitutionally impossible.⁷⁶ The argument turns on two maxims. First, the sole constitutional authority for the United States to have any relation with Puerto Rico is the Territory Clause of the Constitution, which confers on Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁷⁷ Second, there may be no conferral of any binding

73. Or, as a federal judge memorably put it, albeit in a different context, “to paraphrase the scripture: the Congress giveth, and the Congress taketh away.” Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973).

74. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, § 1, 64 Stat. 319, 319 (1950).

75. See, e.g., Frances P. Bolton, U.S. Representative to the Gen. Assembly, Statement to U.N. Committee IV (Trusteeship) (Nov. 3, 1953), *reprinted in* 29 DEP'T ST. BULL. 802, 804 (1953) (describing the accord as “a compact of a bilateral nature whose terms may be changed only by common consent”); Press Release No. 1741, U.S. Mission to the United Nations, Statement by Mr. Mason Sears, U.S. Representative in the Comm. on Info. from Non-Self Governing Territories 2 (Aug. 28, 1953) (“[A] compact cannot be denounced by either party unless it has the permission of the other.”); JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 123–24 (1997) (collecting statements by U.S. officials to similar effect).

76. See, e.g., REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 5–8 (2007) [hereinafter 2007 REPORT]; see also Brief for the United States as Amicus Curiae Supporting Respondents at 15, *Puerto Rico v. Sanchez Valle*, 579 U.S. ____ (2016) (No. 15-108) (opinion reported at 136 S. Ct. 1863 (2016)).

77. U.S. CONST. art. IV, § 3, cl. 2.

special status on Puerto Rico because of the old truism that one Congress cannot bind another.

The two propositions are in tension with each other. The ability of Congress pursuant to the Territory Clause to “dispose of” territory or property of the United States grants textual authority to any Congress to make a final and irrevocable decision to remove a tract of land (or any other property, for that matter) from the sovereignty and jurisdiction of the federal government. Once a Congress has disposed of a territory, of necessity it binds future Congresses to the consequences of that decision. Thus, for example, the United States in 1946 entered into a treaty with the newly formed government of the Philippines that recognized the independence of the new territory and limited American interests to the use of military bases there.⁷⁸ Once duly authorized by Congress and incorporated into a treaty, there could be no question that future Congresses would be “bound” by the fact that the Philippines was no longer an American possession.

Nonetheless, an atextual hands-tying view of the Territory Clause took hold in the Executive Branch in the 1990s, with its first articulation in a 1994 Office of Legal Counsel (OLC) opinion on the constitutionality of a “mutual consent provision” in proposed legislation for a commonwealth agreement between the United States and Guam, another unincorporated territory of the United States. Much as with Puerto Rico after Public Law 600, the question was whether the agreement with Guam could give legal force to the requirement of consent from each of Guam and the federal government before alterations in the commonwealth agreement could come into effect. The OLC opinion noted the inconsistent views of the Department of Justice on such provisions, including an opinion approved by then-Assistant Attorney General William Rehnquist that sanctioned the inclusion of such a provision in the Covenant with the Commonwealth of the Northern Mariana Islands.⁷⁹ OLC nonetheless rejected these views, laying out a series of propositions that the Executive Branch has followed ever since. First, OLC declared all sovereign territory in the United States is either a part of a State, or it is not. If it is not, then Congress exercises “plenary” authority over that area until it “becomes a State or ceases to be under United States sovereignty.”⁸⁰ This plenary authority could not be alienated or delegated in such a way as to deprive later Congresses of the very same authority over the territories.⁸¹

While the original 1994 memo dealt with Guam, its uncompromising logic carried over to Puerto Rico, the territory whose legal and political status had been most often and most contentiously engaged.⁸² The Department of Justice reiterated an absolutist,

78. Treaty of General Relations Between the United States of America and the Republic of the Philippines, Phil.-U.S., July 4, 1946, 61 Stat. 1174.

79. Mut. Consent Provisions in the Guam Commonwealth Legislation, Op. O.L.C. 1, 1 & n.2 (1994) [hereinafter OLC Guam Memo], <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1994-07-28-mutual-consent-guam.pdf> [<https://perma.cc/MN9F-C2PN>]; see also Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 105, 90 Stat. 263, 264 (codified at 48 U.S.C. § 1801 (2012)) (mutual consent provision).

80. OLC Guam Memo, *supra* note 79, at 2–5.

81. See *id.* at 4–5.

82. Indeed, it seems that the reconsideration of the Department’s views on the subject

no-sovereignty view on Puerto Rico in 2001 in a letter to the Senate Committee on Energy and Natural Resources concerning potential political status options for Puerto Rico. The letter underscores that the “terms of the Constitution do not contemplate an option other than sovereign independence, statehood, or territorial status.”⁸³ Again, the assumption was territorial status could not allow anything but unilateral congressional command, without any legal weight given to any required consent on the part of Puerto Rico.

These arguments were taken up by the Task Forces on Puerto Rico’s Status under both Presidents George W. Bush and Barack Obama. The reports issued by the task forces have challenged the available options for the creation of a bilateral agreement from the U.S. side. The 2005 report found that “Puerto Rico is, for purposes under the U.S. Constitution, ‘a territory,’”⁸⁴ and the 2011 Task Force affirmed that Puerto Rico is “subject to the Territory Clause of the U.S. Constitution.”⁸⁵ Both task forces relied on the maxim that one Congress cannot bind a subsequent Congress and thus “cannot restrict a future Congress from revising a delegation to a territory of powers of self-government.”⁸⁶ The OLC has also insisted on the “rule” that one Congress may not bind another, using it to conclude that mutual consent provisions are “legally unenforceable.”⁸⁷ Consequently, both the Obama and Bush administrations contended Congress has the power unilaterally to alter the United States’ relationship with Puerto Rico, and that any restriction of that authority would be unconstitutional.

The Department of Justice laid out its most forceful and aggressive articulation of Puerto Rico’s straitened political status—and impliedly, the instability of the commonwealth arrangement—in its amicus briefing and argument before the U.S. Supreme Court in *Puerto Rico v. Sanchez Valle*.⁸⁸ Here the Solicitor General argued that “[t]he Constitution affords no independent political status to territories but instead confirms that they are under the sovereignty of the United States and subject to the plenary authority of Congress.”⁸⁹ The brief further characterized the Puerto Rico Constitution as being adopted only because Congress “permitted the people of Puerto Rico to adopt” it, arguing that neither this nor subsequent history altered “Puerto Rico’s constitutional status as a U.S. territory.”⁹⁰ “That arrangement can be revised by Congress . . . [t]he ultimate source of sovereign power in Puerto Rico thus

were prompted by legislation dealing with Puerto Rico. *See id.* at 1 n.2 (“The Department revisited this issue in the early 1990’s in connection with the Puerto Rico Status Referendum Bill . . .”).

83. Letter from Robert Raben, Assistant Attorney Gen., U.S. Dep’t of Justice, to Senator Frank H. Murkowski, Chairman, Comm. on Energy and Nat. Res. 5 (Jan. 18, 2001), in Appendix E of REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS (2005) [hereinafter 2005 REPORT].

84. 2005 REPORT, *supra* note 83, at 5. The Task Force adds that “[f]or entities under the sovereignty of the United States, the only constitutional options are to be a State or [T]erritory.” *Id.* at 6.

85. 2011 REPORT, *supra* note 27, at 26 (“[Mutual consent] provisions would not be enforceable because a future Congress could choose to alter that relationship unilaterally.”).

86. 2005 REPORT, *supra* note 83, at 6; *see also* 2011 REPORT, *supra* note 27, at 26.

87. OLC Guam Memo, *supra* note 79, at 2, 5.

88. Brief for the United States, *supra* note 76.

89. *Id.* at 7.

90. *Id.* at 7–8.

remains the United States.”⁹¹ This is the first court filing by the Department of Justice in recent history to take so emphatic a position on Puerto Rico’s political status.

In rejecting any legal significance to the ratification of the commonwealth compact by a referendum of Puerto Ricans, much as the Supreme Court’s opinion in *Sanchez Valle* would go on to do,⁹² the government’s filing returned reflexively to Congress’s ability unilaterally to abrogate the island’s self-government at its pleasure:

[The Commonwealth negotiations and adoption] were of profound significance for the relationship between the United States and Puerto Rico, but they did not alter Puerto Rico’s constitutional status as a U.S. territory. The United States did not cede its sovereignty over Puerto Rico by admitting it as a State or granting it independence. Rather, Congress authorized Puerto Rico to exercise governance over local affairs. That arrangement can be revised by Congress, and federal and Puerto Rico officials understood that *Puerto Rico’s adoption of a constitution did not change its constitutional status*.⁹³

Setting aside the irony that “adoption of a constitution” did not, in the eyes of the federal government, change a community’s “constitutional status,” the brief argues that the “compact” (the government’s quotation marks) was “an agreement that Congress would permit self-government if the people of Puerto Rico drafted a constitution and Congress approved it Congress retained the authority to approve or disapprove the constitution and reaffirmed that it could legislate for Puerto Rico in the future.”⁹⁴ The brief repeatedly hammered home the supposedly absolute nature of congressional power to govern Puerto Rico and, consequently, how ineffectual the commonwealth compact was to protect Puerto Rico from plenary congressional control.⁹⁵

The Executive Branch’s arguments on the status of Puerto Rico rest on two arguments: first, that the Territory Clause of the Constitution is the sole textual foundation for the exercise of any form of American sovereignty over an acquired area that is not a state; and, second, that any congressional enactment cannot purport to bind a future Congress. The constitutional question is whether either proposition, alone or in combination, compels a conclusion that Puerto Rico lacks any attribute of sovereign authority under the commonwealth compact memorialized in Public Law 600.

Certainly, the Territory Clause may serve as the source of congressional authority to act under a Constitution of limited and enumerated powers. But we return to the persistent issue in constitutionalizing the acquisitions of the Spanish-American War: whether the source of Congress’s authority in the Territory Clause does or does not

91. *Id.* at 8.

92. 136 S. Ct. 1863, 1874 (2016) (holding that Puerto Rico was not a separate sovereign for double jeopardy purposes, notwithstanding the “constitutional developments . . . of great significance”).

93. Brief for the United States, *supra* note 76, at 7–8 (emphasis added).

94. *Id.* at 24–25 (citations omitted).

95. *See id.* at 24–27.

predetermine the options Congress has before it as it pursues “inventive statesmanship.”⁹⁶ The original understanding of the Territory Clause anticipated western expansion of the new republic and the status of territory as an interim measure along the path to statehood.⁹⁷ But, as recognized in the *Insular Cases* and on forward, the textual source of constitutional authority for territorial expansion does not in itself prescribe any particular political arrangement in the acquired territory.

Indeed, the doctrinal innovation of incorporated versus unincorporated territories was a response to the imperial acquisitions of the late nineteenth century.⁹⁸ Painful to recall is the question presented to the Court in *Dred Scott v. Sandford*, which turned on whether Congress had authority under the Territory Clause to legislate conditions for territories acquired after the adoption of the Federal Constitution.⁹⁹ In finding that Congress lacked the capacity to hold territories as a federal protectorate, *Dred Scott* relied on the conventional understanding that any territories “should be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which should become members of the Federal Union, and have the same rights of sovereignty, and freedom, and independence, as other States.”¹⁰⁰ For the antebellum Court, the congressional authority to define the conditions of governance in the territories was inextricably intertwined with the power to dispose of the territories for the common good of the States—as opposed to holding them in some form of federal usufruct.¹⁰¹ Indeed, the power to dispose comes before the power to “make needful Rules and Regulations” for the territories in the text of the Territory Clause.

This part of the *Dred Scott* holding also did not survive the Civil War. One of the central doctrinal innovations of the *Insular Cases* was precisely the recognition of an expanded ambit of federal authority on terms beyond the original text. Thus, in the specific case of Puerto Rico, the Territory Clause historically has permitted both governance by a military commander and by an elected governor, with no alteration of the formal foundation for the arrangement within American constitutional law. The text of the Clause may in fact be read to anticipate such flexibility as the power of Congress to “dispose of” a “Territory,” a concept that *Dred Scott* struggled to define. Further, as noted, “dispose of” also implies that power of Congress to act definitively by taking an action it cannot undo—it would be an odd definition of the word “dispose” that did not impliedly accept that one Congress was undoing a prior act.¹⁰² As Felix Frankfurter recognized a century ago, the Territory Clause permits

96. Frankfurter Memorandum, *supra* note 70, at 3.

97. See BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 14–29 (2006) (describing the United States’ pattern of territorial expansion in the nineteenth century).

98. See Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1688–93 (2017).

99. 60 U.S. 393, 432 (1857).

100. *Id.* at 433.

101. *Id.* at 440–41.

102. The phrase “to dispose of” appears nowhere else in the Constitution, but at the time the Constitution was drafted, the phrase had already taken on its modern definition of “to get rid of, to get done with, settle, finish.” See *Dispose*, OXFORD ENG. DICTIONARY,

“working out, step by step, forms of government for our Insular possessions responsive to the largest needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress.”¹⁰³

Similarly, the hollow truism that one Congress may not bind another does nothing to distinguish the Territory Clause from the Treaty Clause, which is the source of authority for the President to make agreements with foreign sovereigns subject to approval by two-thirds of the Senate. Treaties, like the commonwealth compact, are in principle subject to subsequent revocation. So too is any domestic legislation subject to subsequent repeal, even if the decision to expand the military or provide additional prescription drug benefits to older Americans might saddle subsequent Congresses with costly budgetary constraints.¹⁰⁴ Indeed, any congressional action can in theory always be undone. But that one Congress can undo the work of another does not address the binding external consequences of entering into a compact, ratifying a treaty, or simply repealing a law. Nor can it stand for the proposition that the domestic constitutional arrangements of the United States somehow forbid any senate from ratifying a mutually beneficial, forward-looking treaty, simply because subsequent events might require it to be undone.¹⁰⁵ The executive’s retreat from the opportunities and nuances of Public Law 600—evidenced in the OLC opinions of the last two decades, and DOJ’s recent litigating positions embodying those OLC opinions—rejects Frankfurter’s inventive statesmanship in favor of a reductive formalism that, as we explain below, would soon be matched by the other branches.

<http://www.oed.com/view/Entry/55113?rskey=rlqXT2&result=2&isAdvanced=false#eid> [<https://perma.cc/E4JV-945K>] (meaning eight, “to dispose of”). Certainly, if the Constitution’s drafters and ratifiers had wanted to underline congressional power over territories *in perpetuity*, thus subject to the one-Congress-cannot-bind-another rule, they had a variety of words from which to choose. For example, when providing for Congress’s powers over the District of Columbia, the Constitution endows Congress with the power “[t]o exercise exclusive Legislation in all Cases whatsoever, over [the District] . . . and to exercise like Authority over all Places purchased . . . for the Erection of Forts . . . and other needful buildings.” U.S. CONST. art. I, § 8, cl. 17.

103. Frankfurter Memorandum, *supra* note 70, at 3.

104. Any legislation such as this imposes *de facto* future constraints in the form of not only budgetary commitments but political capital. See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1696–97 (2002) (“[A]ny statute changes the legal status quo and thereby shifts the burden of inertia from the enacting legislature to future legislatures . . .”); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1815–16 (2003) (describing a host of *de facto*, accepted ways legislation may be “entrenched”).

105. *Whitney v. Robertson*, 124 U.S. 190, 195 (1887) (“[S]o far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of [the United States], it [will be] subject to such acts as Congress may pass for its enforcement, modification, or repeal.”).

III. SUPREME COURT FORMALISM

For decades, the United States Supreme Court has recognized that Puerto Rico, “like a state, is an autonomous political entity.”¹⁰⁶ As the Court has chronicled many times, Puerto Rico’s “demand[] for greater autonomy” led Congress to pass Public Law 600 and Puerto Rico to enact its own Constitution;¹⁰⁷ with that constitution, Puerto Rico gained “the degree of autonomy and independence normally associated with States of the Union.”¹⁰⁸ Yet the Court’s recent decisions in *Puerto Rico v. Sanchez Valle*¹⁰⁹ and *Puerto Rico v. Franklin California Tax-Free Trust*¹¹⁰ retreated to a different, more formalist understanding of Puerto Rico’s sovereignty status, much in keeping with the position advocated by the Executive Branch.

In *Sanchez Valle*, the Court held that Puerto Rico—unlike a state—is not a separate sovereign for purposes of the double jeopardy clause, consequently diminishing its power to enforce criminal law. In *Franklin Trust*, the Court held that Puerto Rico *was* a state for purposes of the preemption provision in Chapter 9 of the Bankruptcy Code, thereby eliminating Puerto Rico’s ability to restructure its insolvent public utilities. Taken together, the two decisions sharply constrict the autonomous governance domain of the Commonwealth.

At least on the surface, the Court did not suddenly forget its decades of jurisprudence recognizing Puerto Rico’s sovereignty; the Court dutifully marched through the requisite rhetoric of Puerto Rican autonomy.¹¹¹ Yet both decisions treated Puerto Rico’s fundamental constitutional transformation after 1950 as nothing more than a data point—and sometimes an irrelevant one—in the interpretive task at hand. In especially *Sanchez Valle* but also in *Franklin Trust*, the Court’s decision was based on a refusal to recognize the genesis of Puerto Rico’s sovereignty in the constitutional transformation of the mid-twentieth century. As the Court described its inherited test in *Sanchez Valle*, “the inquiry (despite its label) does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity.”¹¹²

Instead, the Court’s historic test for double jeopardy focused on the moment of incorporation to American law, regardless of any intervening change in status.¹¹³ Under this approach, a jurisdiction’s status at the time of legal affiliation with the United States would forever define its status, unless there were a formal cessation of affiliation (as with the Philippines) or formal integration as a state of the Union. That test, as the Court described, has been modestly serviceable in criminal law.¹¹⁴ But it

106. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)).

107. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 592–94 (1976) (upholding the jurisdiction of the Federal District Court of Puerto Rico to enforce federal legislation); *see also, e.g., Calero-Toledo*, 416 U.S. at 671–72.

108. *Examining Bd. of Eng’rs*, 426 U.S. at 594.

109. 136 S. Ct. 1863 (2016).

110. 136 S. Ct. 1938 (2016).

111. *Sanchez Valle*, 136 S. Ct. at 1874–75.

112. *Id.* at 1870.

113. *See id.* at 1871–75.

114. *See id.* at 1876–77.

does nothing to recognize the capacity of a relationship between sovereign entities to be constitutionally transformed.

Sanchez Valle dramatizes the problems with the Court's jurisprudence most clearly. The case began when Luis Sanchez Valle sold weapons to undercover officers; while criminal charges under Puerto Rico law were pending, a federal grand jury based in Puerto Rico indicted him for violating federal law.¹¹⁵ Sanchez Valle invoked the dual sovereignty doctrine to halt prosecution in the courts of Puerto Rico on double jeopardy grounds. Under the dual sovereignty doctrine, a defendant may only be subject to successive prosecutions for "a single act" if that offense "violates the laws of *separate* sovereigns."¹¹⁶

The critical issue before the Court turned on whether Puerto Rico—like a state—is a separate sovereign or is simply a subordinate entity of the United States. As a technical matter under the inherited criminal law doctrine of dual sovereignty, the term "sovereignty" loses all of its conventional meaning in favor of a stylized inquiry as to how that entity came to be within the United States.¹¹⁷ Sovereignty is defined for these purposes as the state in which the subnational entity entered into relations with the United States, rather than as any kind of functional assessment of the powers exercised by the respective political jurisdictions. Whether a political entity is sovereign depends on whether their political powers derive from the same "ultimate source."¹¹⁸ The Court is clear the inquiry is "historical, not functional"—to determine whether Puerto Rico is a separate sovereign from the United States requires "looking at the deepest wellsprings, not the current exercise, of prosecutorial authority."¹¹⁹ The Court stressed the importance of going back to the historical origin of sovereign power, looking for "primeval" sources of authority,¹²⁰ discerning sovereignty as "an original matter,"¹²¹ and seeking the "furthest-back source of prosecutorial power."¹²²

Using this "historical" test, the Court found the "ultimate" source of Puerto Rico's sovereignty (or, as the Court narrowed the phrase, Puerto Rico's "prosecutorial power") was the United States:

Congress, in Public Law 600, authorized Puerto Rico's constitution-making process in the first instance; the people of a territory could not legally have initiated that process on their own. And Congress, in later legislation, both amended the draft charter and gave it the indispensable stamp of approval; popular ratification, however meaningful, could not have turned the convention's handiwork into law. Put simply, Congress

115. *Id.* at 1869–70. A second petitioner, Jaime Gomez Vazquez, had his case joined with Sanchez Valle; for all relevant purposes, the facts of their cases are the same.

116. *Id.* at 1867 (emphasis added).

117. *Id.* at 1870 ("For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty.").

118. *Id.* at 1871 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

119. *Id.*

120. *Id.* at 1872.

121. *Id.* at 1874.

122. *Id.* at 1875.

conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges.¹²³

Locating the source of Puerto Rico’s “sovereignty” in the U.S. Congress gives ample support to the old adage that “history is written by the victors.” Without much explanation, the Court located the “origin” of Puerto Rico at the moment the United States colonized Puerto Rico. By the Court’s logic, Puerto Rico derives its prosecutorial power from the Puerto Rico Constitution, which is in turned authorized by Congress; Congress has authority over Puerto Rico as a result of the 1898 Treaty of Paris (which ended the Spanish-American War).¹²⁴ The only further defense the Supreme Court gives of its choice to begin the story of Puerto Rican autonomy at the Spanish-American War is that, going back one step further, Puerto Rico was just a Spanish colony: “[N]o one argues that when the United States gained possession of Puerto Rico, its people possessed independent prosecutorial power, in the way that the States or tribes did upon becoming part of this country. Puerto Rico was until then a colony ‘under Spanish sovereignty.’”¹²⁵ The Court seems to suggest that, since Puerto Rico was already colonized when it came into U.S. possession, it was ultimately, originally a colony.

All of this reasoning is question-begging. If the moment of origin is set at the moment of colonization, then of course Puerto Rico would not be a separate sovereign under any definition, for the reason that it was subject to a brutal military occupation. But why set the origin moment at the arrival of the gunboats in the first place? When Columbus voyaged West in the late fifteenth century, for example, the Borinquen Taínos had already established a thriving society on the islands that make up what is now modern-day Puerto Rico, and that society already had a sophisticated legal system.¹²⁶ This system included “prosecutorial power”: under Taíno law, village chiefs could condemn their subjects to death (after following particular procedures), an exercise of “prosecutorial power” that not only predates Congress’s first grant of power to Puerto Rico but predates Congress (even the Continental Congress) itself, and does so by at least 700 years.¹²⁷

Like Native Americans—whose sovereignty the Court recognizes predates their encounter with the United States—Puerto Rican sovereignty predates conquest, whether by Spaniards or Americans; Justice Thomas’s separate concurrence in *Sanchez Valle* expressing discomfort with extending sovereignty to Native Americans underlined that the Court was well aware that using a slightly wider historical lens would reveal an alternative source of sovereignty even under the Court’s crabbed definition of the term.¹²⁸

123. *Id.* (citation and footnote omitted).

124. *Id.* at 1880 (Breyer, J., dissenting) (citing Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., art. IX, Dec. 10, 1898, 30 Stat. 1754, 1759).

125. *Id.* at 1875 (citation omitted).

126. See IRVING ROUSE, *THE TAINOS: RISE & DECLINE OF THE PEOPLE WHO GREETED COLUMBUS* 5, 9–17 (1992).

127. *Id.* at 16.

128. *Sanchez Valle*, 136 S. Ct. at 1877 (Thomas, J., concurring).

This historical “furthest-back” inquiry is its own *reductio ad absurdum*. The Taínos had sovereignty over the landmass of Puerto Rico before the Spanish, but humans have inhabited the island as early as 2000 BCE.¹²⁹ Would the Court’s “historical” inquiry be satisfied by this “furthest-back,” or is there further yet to go?¹³⁰ In dissent, Justice Breyer highlights this “conceptual” problem by explaining the Court could also trace Puerto Rico’s sovereignty back to Spain then Rome then Justinian, or trace the United States’ sovereignty to Parliament or William the Conqueror or King Arthur.¹³¹ Given the gaping leaps in logic, one would have expected a deeper conceptual defense of the Court’s cramped original position doctrine. Instead, the Court acknowledged that it has:

[N]ever explained its reasons for adopting this historical approach to the dual-sovereignty doctrine. It may appear counter-intuitive, even legalistic, as compared to an inquiry focused on a governmental entity’s functional autonomy. But that alternative would raise serious problems of application. It would require deciding exactly how much autonomy is sufficient for separate sovereignty¹³²

The Court’s turn to formalism does not detract from the stark reality that the historical test the court settles for raises precisely the same “serious problems of application” of its own—what suffices for original “prosecutorial authority,” and how much is sufficient for separate sovereignty? And how far back must that “prosecutorial authority” go to establish its separateness? One can contrast the formalism of *Sanchez Valle* to the Court’s functional approach to the status of Guantánamo, another kind of “territory” subject to the rule of Congress, in the series of post-September 11th cases culminating in *Boumediene v. United States*.¹³³

As Justice Breyer points out in his dissent to *Sanchez Valle*, the “furthest-back” historical inquiry is symptomatic of a larger theoretical problem with the Court’s reasoning: the “ultimate” source of Puerto Rico’s “prosecutorial authority” or sovereignty writ large cannot be found by going further and further back.¹³⁴ In the developments between 1950 and 1952, Puerto Rico’s adoption of a Constitution by and for the people marked a qualitative shift in Puerto Rico’s political status including its “prosecutorial authority” and, indeed, its “sovereignty” as that term is commonly understood. After all, the U.S. Constitution does not, in the final analysis, draw its moral or political authority from the legal recognition of American independence in the 1783 Treaty of Paris, or even from the Articles of Confederation,

129. ROUSE, *supra* note 126, at 69, 106–07 (noting the Ortoiroid Indians began migrating to present-day Puerto Rico around 2000 BCE).

130. The Court’s inquiry also has the further disadvantage of leaving open what counts as “prosecutorial power”—does the sovereign’s power over its subjects suffice, or does the court require “prosecutorial power” to look like Anglo-American justice systems, further repeating its revisionist history?

131. *Sanchez Valle*, 136 S. Ct. at 1878 (Breyer, J., dissenting).

132. *Id.* at 1871 n.3.

133. 553 U.S. 723, 764 (2008) (finding that the common thread in their jurisprudence is “the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism”).

134. *Sanchez Valle*, 136 S. Ct. at 1878 (Breyer, J., dissenting).

but rather from “We the People.” As there, so here: the provenance of Puerto Rico’s prosecutorial authority and its sovereignty is *its* Constitution, which, just like the U.S. Constitution, declares that it ultimately draws authority from its people.¹³⁵

At root, the question unanswered by the Supreme Court remains why the creation of the Puerto Rico Constitution, by the popular consent of the residents of Puerto Rico, did not create “the ‘ultimate source’”¹³⁶ of sovereignty for modern Puerto Rico—especially when that popular consent was accompanied by consent from the original colonizing entity (the U.S. federal government). Does the Court really want to hold that sovereignty can be vested at the moment of conquest and not subsequently assumed by the democratic undertaking of “We the People,” of the United States in general and those U.S. citizens residing in Puerto Rico in particular?

Puerto Rico’s Constitution culminated a process of both a reorganization of the terms by which the United States organized legal authority over its territory and the role of the Puerto Rican people in self-government. It was both a new compact with the United States and what Bruce Ackerman has called a transformative “constitutional moment.”¹³⁷ For Ackerman, such moments alter the fundamental understanding of constitutional power in which “[d]ecisions by the People . . . under special constitutional conditions” take on a new legal dimension above and beyond the formal textual commands. Certainly, Ackerman’s conditions for such moments appear satisfied in Puerto Rico—a supermajority of people must support the fundamental change to the nature of government, and they must convince or defeat opponents through deliberation on the merits.¹³⁸ This is precisely what happened in Puerto Rico between 1950 and 1952, as decisive majorities of Puerto Rico residents (76.5% of voters and 81.9% of voters, respectively) approved Public Law 600 and the Puerto Rico Constitution,¹³⁹ while Congress (representing the rest of the American people) overwhelmingly endorsed both acts as well.¹⁴⁰

135. P.R. CONST. art. I, § 1 (“Su poder político emana del pueblo y se ejercerá con arreglo a su voluntad . . . [Its political power emanates from the people and shall be exercised in accordance with their will . . .]”).

136. *Sanchez Valle*, 136 S. Ct. at 1871.

137. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

138. *Id.* at 6.

139. Dieter Nohlen, *Puerto Rico*, in 1 *ELECTIONS IN THE AMERICAS: A DATA HANDBOOK* 556 (Dieter Nohlen ed., 2005). The turnout for these referenda were significant, as 506,185 Puerto Ricans voted in the referendum on Public Law 600, and 457,572 voted in the 1952 Constitutional Referendum. *Id.* These amounted to roughly 55–70% of the voting aged population at the time. See U.S. CENSUS BUREAU, *DETAILED CHARACTERISTICS: PUERTO RICO*, in 2 *CENSUS OF POPULATION: 1950*, at 53–107 (1950) (the 1950 Census did not create divisions based on citizens under 18 versus over 18, only 5-year categories (i.e., 15–19 years, 20–24 years), making an exact calculation of the number of voting-aged Puerto Ricans impossible).

140. S. REP. NO. 82-1720 (1952), <http://www.puertoricoreport.com/wp-content/uploads/2011/04/Senate-Rpt-1720.pdf> [<https://perma.cc/43WW-2VVT>]; H.R. REP. NO. 82-1832 (1952), <http://www.puertoricoreport.com/wp-content/uploads/2011/04/House-Rpt-1832.pdf> [<https://perma.cc/6UB9-FLFE>]; H.R. REP. NO. 81-2275 (1950), http://www.puertoricoreport.com/wp-content/uploads/2011/04/104063731_1.pdf [<https://perma.cc/W865-V9SA>]; S. REP. NO. 81-1779 (1950), <http://www.puertoricoreport.com/wp-content/uploads/2011/04/Senate-Rpt-1779.pdf> [<https://perma.cc/385X-JZFB>].

One need not accept Ackerman's account of constitutional transformations to recognize that a fundamental change occurred through the decisions of Congress and Puerto Rico that the popular will of the people of Puerto Rico would be honored in relations going forward. This process of popular consent was the most significant modern turning point in U.S.-Puerto Rico relations. Put simply, Public Law 600¹⁴¹ "was intended to end" Puerto Rico's "subordinate status"¹⁴² and, as a matter of constitutional fact, ought to have done so.

The Court's decision in *Sanchez Valle* missed the critical significance of Public Law 600. Puerto Rico was endowed by an act of Congress with the power to determine its own political fate. The holding of a referendum on political status was an act of what classic constitutional theory would term "constituent power."¹⁴³ As expounded in the classic account of modern state formation by the Abbé Emmanuel Joseph Sieyès, there is a distinction drawn between the authority to decide on a constitutional order and the manner in which that power is constituted ultimately.¹⁴⁴ The authority to make that choice is an attribute of sovereignty reserved to the constituent power, in this case the critical decisions by the citizens of Puerto Rico to enter into this new relationship by overwhelmingly endorsing their new constitutional arrangements in 1952. The constituent power for the new commonwealth arrangement was exercised in the decision of the people of Puerto Rico to take the first affirmative steps of adopting the formal relationship with the United States. The Court in *Sanchez Valle* offered no account of why sovereign status could not emerge during the reformulation of political relations as part of the process of decolonization.

Further, the Court did not explain why it rejected congressional intent in altering the relation between the United States and Puerto Rico. As its legislative history makes clear, Public Law 600 was a "reaffirmation by the Congress of the self-government principle."¹⁴⁵ Even if one were to reject legislative history as a legitimate ground for judicial decision-making, Public Law 600's enacted preamble (which is broadly agreed to be acceptable grounds for judicial interpretation of a statute)¹⁴⁶

141. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950).

142. *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 40 (1st Cir. 1981).

143. See MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW 100* (2003) (defining constituent power as the power of the people to establish the constitutional order of their nation).

144. EMMANUEL JOSEPH SIEYÈS, *WHAT IS THE THIRD ESTATE?* (1789), reprinted in *POLITICAL WRITINGS* 134 (Michael Sonenscher ed., 2003) (distinguishing between constituent power, which resides in the nation itself and exists free of constitutional limits, and constituted power, which emanates from the will of the nation and is therefore limited by the Constitution); see also Frank I. Michelman, *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 64 (Larry Alexander ed., 1998); Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, 14 *CARDOZO L. REV.* 639 (1993).

145. H.R. REP. NO. 81-2275, at 6.

146. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 217–20 (2012) ("[T]he prologue [sets] forth the assumed facts and the purposes that the majority of the enacting legislature . . . had in mind, and these can shed light on the meaning of the operative provisions that follow."); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 459, at 350 (5th ed. 1891)

describes Public Law 600 as the culmination of a “series of enactments [that] progressively recognized the right of self-government of the people of Puerto Rico.”¹⁴⁷ Even in the absence of these statements, however, is the political reality that after Congress passed the law, Puerto Ricans voted on whether to accept it in an island-wide referendum before proceeding to any constitution writing at all.¹⁴⁸ After Public Law 600 gained popular approval, Puerto Rico convened a constitutional convention whose proposed constitutional plan was approved by a second referendum. Congress may have initiated the constitution-writing process, but the voters of Puerto Rico made it a reality.¹⁴⁹

The path from Public Law 600 to the Puerto Rican Constitution similarly renders all “sources of authority” predating that organic shift open to reexamination, if not outright obsolete. Seemingly, the Court had adopted this reasoning in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*,¹⁵⁰ which recognized that Puerto Rico has “a relationship to the United States that has no parallel in our history”—a point the Court acknowledged in *Sanchez Valle*.¹⁵¹ Yet, the majority of the Court rejected petitioner’s claim that “Puerto Rico’s transformative constitutional moment” was controlling on the grounds that it only revealed “immediate,” not “ultimate,” historical authority.¹⁵² But why Spain’s act of conquest trumps congressional agreement to Puerto Rican self-government over local affairs is not at all clear. Not only was it evident to both the federal government and Puerto Rico that the events of 1950 to 1952 marked a constitutional transformation, that understanding was the basis of binding representations made to the world at large. Courts once looked to these representations in their interpretation of Public Law 600 and what followed.¹⁵³ As far as Puerto Rico, the rest of the United States, and even the United Nations were concerned, Puerto Rico became “sovereign” in terms of obtaining political agency. Yet all of these considerations did not sway the Supreme Court in *Sanchez Valle*; indeed, the U.S. federal government’s representations to the United Nations did not merit even a mention in the majority opinion.

Failure to recognize Puerto Rico’s transformative constitutional moment may be less obvious in the U.S. Supreme Court’s decision in *Franklin Trust*, but a similar logic was at play. The decision resolved as a practical matter a question of immense importance to Puerto Rico’s economic survival: the power of the Puerto Rican government to pass a bankruptcy scheme to restructure its insolvent public utilities in the middle of a massive economic crisis. But the Court resolved this question by

(“[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute.”).

147. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, pmbll., 64 Stat. 319, 319 (1950).

148. See *supra* note 59. Prior to final approval, Congress insisted on some secondary changes to the text, but this did not alter the core act of sovereign approval by the people of Puerto Rico.

149. See *supra* note 60.

150. 426 U.S. 572 (1976).

151. *Id.* at 596.

152. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875 (2016).

153. See, e.g., *Mora v. Mejias*, 115 F. Supp. 610, 612 (D.P.R. 1953).

engaging in a highly technical statutory interpretation of the Bankruptcy Code.¹⁵⁴ The Bankruptcy Code originally expressly included Puerto Rico in the definition of “state,”¹⁵⁵ which meant that Puerto Rico could legislate reorganization procedures for its agencies or political subdivisions. Subsequent amendment, however, removed Puerto Rico from the category of states, meaning that it could neither be a debtor under the Code nor authorize any insolvency scheme of its own. While Puerto Rico is thus not a state for purposes of the “gateway provision”—that is, it cannot authorize municipalities to seek relief under Chapter 9 of the Bankruptcy Code—the Court held Puerto Rico should still be considered a state for purposes of preemption, thereby preventing it from restructuring on its own terms.¹⁵⁶ The decision paid no attention at all to the nature of Puerto Rico’s sovereignty under Public Law 600 and the Puerto Rico Constitution; the Court treated it as if it were simply a nonstate, subordinate, political jurisdiction, no different from Detroit or any other municipality, rather than a territory able to claim congressional recognition of its political institutions and with its own constitution.

Both of these Supreme Court decisions undermined the effective relationship between Puerto Rico and the rest of the United States. After decades of internal and international representations that Puerto Rico was not a U.S. colony, the Court traced its power to the moment of colonization and treated it as a subsidiary governmental unit; the Supreme Court embraced the Department of Justice’s position that Puerto Rico’s putative sovereignty was only a matter of legislative grace without legal substance. As summarized by the Court, “the dual-sovereignty test we have adopted focuses on a different question: not on the fact of self-rule, but on where it came from.”¹⁵⁷ The birthmark of imperial conquest proves indelible.

IV. CONGRESS WEIGHS IN

As hard as it may be to recall, Puerto Rico was a great economic success story until the end of the twentieth century. Beneficial treatment of the island under federal law provided a significant spur to local economic development, most notably through generous corporate tax exemptions that spurred the growth of a dynamic industrial sector.¹⁵⁸ The period following the 1950–52 “constitutional moment” featured dramatic economic growth, with the Commonwealth outperforming the Asian “tigers” whose economic takeoff would dazzle observers in the late twentieth

154. See *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946–49 (2016).

155. *Id.* at 1945. Along, it might be noted, with literally hundreds of similar laws. See, e.g., 15 U.S.C. § 15g (2012) (monopolies and combinations in restraint of trade); 18 U.S.C. § 3528 (2012) (witness protection); 22 U.S.C. § 7102 (2012) (trafficking victims protection); 23 U.S.C. § 101 (2012) (federal-aid highways); 32 U.S.C. § 901 (2012) (homeland defense activities); 42 U.S.C. § 1301 (2006) (social security); 42 U.S.C. § 5122 (2012) (disaster relief); 42 U.S.C. § 12302 (2012) (coordinated youth services); 46 U.S.C. § 112 (2012) (shipping).

156. *Franklin Trust*, 136 S. Ct. at 1947–48.

157. *Sanchez Valle*, 136 S. Ct. at 1874.

158. J. Tomas Hexner & Glenn P. Jenkins, *Puerto Rico and Section 936: A Costly Dependence*, 10 TAX NOTES INT’L 235, 237 (1995), [https://www.finance.senate.gov/imo/media/doc/Glenn%20P.%20Jenkins%20\(Attachment%203\).pdf](https://www.finance.senate.gov/imo/media/doc/Glenn%20P.%20Jenkins%20(Attachment%203).pdf) [<https://perma.cc/9WHJ-54YP>].

century.¹⁵⁹ The Federal Tax Reform Act of 1976 established a more robust version of an economic opportunity zone under Section 936 of the Internal Revenue Code, which entrenched the preferential tax treatment of production on the island.¹⁶⁰ The combination of reduced corporate taxes, free entry into the American product market, and other economic incentives created a thriving manufacturing sector, particularly in the pharmaceutical industry. Under Section 936, Puerto Rico became a center for not only pharmaceutical but also light manufacturing industries for whom the combination of a low tax structure, proximity to the United States, and tariff-free entry into the American market was a winning combination.

As a result, the gross national product of the island increased more than four-fold from 1947 to 1993, with the biggest acceleration after 1976.¹⁶¹ By 1985, forty-two percent of the deposits in commercial Puerto Rican banks were from corporations structured to take advantage of Section 936,¹⁶² and these tax credits became one of the central drivers of growth in the Puerto Rican economy.¹⁶³ Unfortunately, this regime did not last.

After the passage of the Omnibus Budget Reconciliation Act of 1993, which limited the tax benefits corporations could claim,¹⁶⁴ Congress, responding to a complex set of political incentives, eliminated the Section 936 credit entirely in the Small Business Job Protection Act of 1996, with a ten-year phase out.¹⁶⁵ According to World Bank figures for the period 1996 to 2014, the end of Section 936 precipitated Puerto Rico's descent into a prolonged recession: growth rates averaged 2.17% in the eight years prior to the repeal of Section 936; in the eight years after Section 936 was repealed, the economy actually contracted 0.49% on average; the economy grew only two years of those eight.¹⁶⁶

159. *Trouble on Welfare Island*, *ECONOMIST* (May 25, 2006), <http://www.economist.com/node/6980051> [<https://perma.cc/YS6U-GS64>].

160. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-541, *FISCAL RELATIONS WITH THE FEDERAL GOVERNMENT AND ECONOMIC TRENDS DURING THE PHASEOUT OF THE POSSESSIONS TAX CREDIT 29-30* (2006), <http://www.gao.gov/assets/160/157687.pdf> [<https://perma.cc/VF8C-886D>].

161. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-93-109, *PUERTO RICO AND THE SECTION 936 TAX CREDIT 4* (1993), <https://www.gao.gov/assets/220/218131.pdf> [<https://perma.cc/W38P-328G>].

162. Arthur MacEwan, *The Effect of 936*, in Appendix 1 of CONGRESSIONAL TASK FORCE ON ECONOMIC GROWTH IN PUERTO RICO REPORT TO THE HOUSE AND SENATE 1, 3 (2016), [https://www.finance.senate.gov/imo/media/doc/Arthur%20MacEwan%20and%20J.%20Thomas%20Hexner%20\(Submission%206\).pdf](https://www.finance.senate.gov/imo/media/doc/Arthur%20MacEwan%20and%20J.%20Thomas%20Hexner%20(Submission%206).pdf) [<https://perma.cc/V2Z6-PFVB>].

163. Rashid Marcano-Rivera, *Puerto Rico Can't Pay Its Debt, and the United States Is Partly to Blame*, *WASH. POST* (July 15, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/15/puerto-rico-cant-pay-its-debt-and-the-united-states-is-partly-to-blame> [<https://perma.cc/VR24-98LP>].

164. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

165. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755, (1996).

166. See Jack Duval, *Puerto Rico: Did Section 936 Cause the Secular Decline? Yes*, *ACCELERANT* (Mar. 5, 2015, 10:05 AM), <http://blog.accelerant.biz/blog/puerto-rico-did-section-936-cause-the-secular-decline-yes> [<https://perma.cc/E5QA-D9US>]. As Duval makes

As manufacturing began to wane, Puerto Rico turned to debt financing to underwrite its budgetary obligations. The Jones-Shafroth Act of 1917 exempted Puerto Rican bonds from federal, state, and municipal taxation.¹⁶⁷ Puerto Rico's bonds were backed by the Commonwealth regardless of the issuing authority.¹⁶⁸ The Commonwealth constitution even emphasized borrowing as a potential source of funding, including a provision to reassure investors by requiring that the Secretary of the Treasury of Puerto Rico "apply the available revenues including surplus to the payment of interest on the public debt."¹⁶⁹ Puerto Rican law further limited local taxation of revenues from bonds. Finally, Puerto Rico was excluded from Chapter 9 of the Bankruptcy Code, which allowed states to authorize bankruptcy procedures for their political subdivisions.¹⁷⁰ This meant that bondholders could lend to Puerto Rico's agencies and municipalities with little prospect of being subjected to cramdown reorganizations in case of financial crises. The effect was to make Puerto Rican debt an attractive investment, even as the economy tottered.¹⁷¹

The combination of the end of Section 936 and increasing local and federal protection for bond creditors served to simultaneously depress manufacturing and facilitate the expansion of public debt, paving the road for Puerto Rico to become America's Greece. As is common in economies funded by debt, mismanagement and corruption became endemic problems. The island is currently \$123 billion in debt, with \$49 billion in unfunded pension obligations.¹⁷² The poverty rate stood at forty-five percent and unemployment at eleven percent,¹⁷³ all before Hurricane Maria reduced much of the Puerto Rican archipelago to rubble. Indeed, former Governor

strikingly clear, in the heyday of Section 936 Puerto Rico's economy was almost recession-proof, suffering only one year of net negative growth (1982) and exhibiting strong positive growth through the various economic privations of the remainder of the 80s, 90s, and early 2000s. This is at least suggestive of the global recession being less decisive in Puerto Rico's current economic troubles than the repeal of Section 936.

167. 48 U.S.C. § 745 (2012).

168. P.R. CONST. art. VI, § 8 (guaranteeing public debt will be paid prior to any other claims in the event of a shortfall); *see also* P.R. GOV'T DEV. BANK, COMMONWEALTH OF PUERTO RICO FINANCIAL INFORMATION AND OPERATING DATA REPORT 58 (2013), http://www.gdbpr.com/investors_resources/publications-reports/commonwealthfiodr/commonwealth-report.pdf [<https://perma.cc/NH6K-9YTF>] ("'[P]ublic debt' includes only general obligation bonds and notes of the Commonwealth . . . [and] also any payments required to be made by the Commonwealth under its guarantees of bonds and notes issued by its public instrumentalities.").

169. P.R. CONST. art. VI, § 2.

170. 11 U.S.C. § 101(52) (2012).

171. Mary Williams Walsh, *How Puerto Rico is Grappling with a Debt Crisis*, N.Y. TIMES: DEALBOOK (May 16, 2017), <https://www.nytimes.com/interactive/2017/business/dealbook/puerto-rico-debt-bankruptcy.html> [<https://perma.cc/WL7C-EKWN>].

172. *Id.*; *see also* Mary Williams Walsh, *Puerto Rico Declares a Form of Bankruptcy*, N.Y. TIMES: DEALBOOK (May 3, 2017), <https://www.nytimes.com/2017/05/03/business/dealbook/puerto-rico-debt.html> [<https://perma.cc/9SJU-86PA?type=image>].

173. Daniel Bases, *Puerto Rico's Bankruptcy Hearing Marks Reset of Asset Scramble*, REUTERS (May 16, 2017, 4:29 PM), www.reuters.com/article/us-puertorico-debt-prices-analysis-idUSKCN18C2KI [<https://perma.cc/E6R2-WFFR>].

García Padilla already described the economy as being in a “death spiral” in 2016,¹⁷⁴ and this was well before Hurricane Maria.

Even without the impact of Maria, the sheer size of Puerto Rico’s debt relative to its total population and the high level of poverty and dependency made a financial crisis unavoidable. By the time Governor García Padilla rightly sounded the alarm about the Commonwealth’s insuperable debt load and initiated efforts to bring spending under control, even the best efforts at fiscal restraint by the Commonwealth’s political actors had the feel of fighting off a forest fire with a garden hose. The question became what to do with the limited time and resources available. Much of the debt was accumulated by local government entities in Puerto Rico, or through bond offerings by public agencies such as utilities,¹⁷⁵ all of which were ultimately backstopped by the Commonwealth government. At the same time, as confirmed in *Franklin Trust*, Puerto Rico could neither declare its own bankruptcy nor create a bankruptcy work-out procedure for its subordinate jurisdictions without congressional intervention.

If debt relief were to come from without, it would likely resemble one of three basic models for external debt restructuring. The first responds to a demand from international banking authorities and creditors by creating a new fiscal order, in exchange for which the debtor is permitted continued access to international credit markets (we will term this the “Argentine model”).¹⁷⁶ The second uses the debtor’s membership in preexisting political organizations to impose similar forms of fiscal restructuring and austerity but oblige the debtor’s own leadership to implement the austerity measures and allow it some discretion as to how austerity will be achieved (the “Greek model”).¹⁷⁷ The final one is to suspend the authority of the debtor political unit and subordinate its governmental functions to operate under the aegis

174. Mary Williams Walsh, *Puerto Rico’s Governor Warns of Fiscal ‘Death Spiral’*, N.Y. TIMES: DEALBOOK (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/business/dealbook/puerto-rico-financial-oversight-board.html> [https://perma.cc/5YL9-NSN5].

175. See Michael Corkery & Mary Williams Walsh, *Puerto Rico’s Governor Says Island’s Debts Are ‘Not Payable’*, N.Y. TIMES: DEALBOOK (June 28, 2015), <https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html> [https://perma.cc/UX9V-ZPCZ].

176. See Miguel Kiguel, *Argentina’s Debt: The Good, the Bad and the Ugly*, in THINK TANK 20: THE G-20 AND CENTRAL BANKS IN THE NEW WORLD OF UNCONVENTIONAL MONETARY POLICY 6 (BROOKINGS INST., 2013), <https://www.brookings.edu/wp-content/uploads/2016/06/TT20-central-banks-monetary-policy-2.pdf> [https://perma.cc/8U7U-NEET]; Heather Stewart, *Defaulting Rescued Argentina. It Could Work for Athens Too*, GUARDIAN (July 9, 2011, 7:06 PM), <https://www.theguardian.com/business/2011/jul/10/european-debt-crisis-argentina-imf> [https://perma.cc/2W6K-7DAQ]; Robert Flood & Nancy Marion, *Getting Shut Out of the International Capital Markets: It Doesn’t Take Much 3* (Int’l Monetary Fund, Working Paper No. WP/06/144, 2006), <https://www.imf.org/external/pubs/ft/wp/2006/wp06144.pdf> [https://perma.cc/LC76-ZKL5].

177. See Jeromin Zettelmeyer, Christoph Trebesch & Mitu Gulati, *The Greek Debt Restructuring: An Autopsy*, 28 ECON. POL’Y 513 (2013), <https://academic.oup.com/economicpolicy/article/28/75/513/2918414> [https://perma.cc/26H5-87FQ]; The New York Times, *Explaining Greece’s Debt Crisis*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/interactive/2016/business/international/greece-debt-crisis-euro.html> [https://perma.cc/ZV6H-QFVS].

of a higher-level political authority to whom the insolvent polity already belongs, who will once again impose fiscal restrictions and austerity but under its own legal authority (the “Detroit model”).¹⁷⁸

Each of these three involves a suspension of some of the attributes of a government’s sovereign authority under the strains of insolvency. Greece could protest the harshness of the austerity terms, but the final decision on the future structure of the Greek state and economy was going to be made in Berlin, Frankfurt, or Brussels—not Athens. Similarly, protest as they might, Detroit voters were going to have to make their appeals to the broad electorate of Michigan, many of whom were well distant to the interests of Detroit as a matter of geography, partisanship, race, or a combination thereof. And even in the case of Argentina, the ability to “just say no” to international demands was a temporary expedient that ultimately yielded to the need to pay off bondholders as a condition of renewed access to international credit and trade.

But coercive as all forms of restructuring may be at bottom, the Argentine, Greek, and Detroit models all respect, at least to a degree, the rights of democratic engagement by the affected populations. In Argentina, the need to obtain political buy-in from the population of the debtor gave at least some leverage to the Argentine government in the negotiations with the more powerful creditors. In the case of Detroit, municipal restructuring took place under the supervision of the political authorities of Michigan, who were in turn (at least in theory) democratically accountable to the citizen-voters of Detroit. Greece too retained its positions in all of the European Union governing institutions for the duration of the crisis, and the need for ultimate electoral approval by Greek voters was a central point in negotiations. The voters of Greece, Argentina, and Detroit all had an electoral stake in how their governors implemented fiscal reform, and election results in all three had an impact on the deals that were eventually cut. This is what ultimately differentiates being part of a democratic polity from being a subordinated colonial supplicant.

Compare, by way of contrast, Congress’s effort to restructure Puerto Rico’s debts in the 2016 Puerto Rico Oversight, Management and Economic Stability Act (PROMESA).¹⁷⁹ Under PROMESA, any fiscal plan or budget developed by the Commonwealth’s central government needs to be approved by an Oversight Board before implementation.¹⁸⁰ That Board has the authority to generate revenue forecasts¹⁸¹ and to authorize the Governor to lower the minimum wage.¹⁸² Most centrally, under Chapter III of PROMESA, the Oversight Board has the authority to

178. See Michael A. Fletcher, *Detroit Files Largest Municipal Bankruptcy in U.S. History*, WASH. POST (July 18, 2013), https://www.washingtonpost.com/business/economy/2013/07/18/a8db3f0e-efe6-11e2-bed3-b9b6fe264871_story.html?utm_term=.630d9d0753c2 [<https://perma.cc/93PT-BZHU>]; Matthew Kredell, *Meet the Man Who Orchestrated Detroit’s Astonishing Comeback*, USC NEWS (Nov. 3, 2015), <https://news.usc.edu/88256/meet-the-man-who-orchestrated-detroits-astonishing-revival> [<https://perma.cc/N5J6-BR7U>].

179. 48 U.S.C. § 2101 (Supp. IV 2017).

180. 48 U.S.C. §§ 2141-2142 (Supp. IV 2017).

181. 48 U.S.C. § 2142(b) (Supp. IV 2017).

182. 29 U.S.C. § 206(g)(2) (Supp. V 2018).

represent Puerto Rico in a reorganization of the island's obligations by a court to be designated by the Chief Justice of the United States.¹⁸³

PROMESA now oversees the largest reorganization of a public entity in American history.¹⁸⁴ Unlike Detroit (or, by extension, Greece or Argentina) the authority of the PROMESA Board (or the “junta”¹⁸⁵ to use the more evocative term in Spanish) has no democratic accountability to the polity facing its decisions on austerity and debt cancellation. The PROMESA Board is selected by the President from lists submitted from the Speaker of the House, Majority Leader of the Senate, Minority Leader of the House, and the Minority Leader of the Senate, and a single member selected solely at the discretion of the President.¹⁸⁶ Only “off-list” nominations, selections of an individual not provided on one of the aforementioned lists, are subject to Senate confirmation¹⁸⁷ (an expedient designed, as the House Report on PROMESA makes plain, to ensure that the Oversight Board had a Republican majority—this to oversee a population that is largely made up of would-be Democratic voters).¹⁸⁸

When viewed in terms of democratic accountability to the affected citizens, PROMESA has no formal antecedents in the Argentine, Greek, or Detroit models. The Board has only an obligation to consult with Puerto Rican authorities, not to obtain their approval. Puerto Ricans do not vote for any members of Congress or the Electoral College. Despite an aspiration “to coordinate with an eye to consensus in the enactment of the fiscal plan, the [Board] has final authority to establish the fiscal plan and local budgets.”¹⁸⁹

As a result, Puerto Ricans are the only U.S. citizens who do not have the right to vote for those officials with ultimate budgetary authority over them.¹⁹⁰ If anything hearkens back to the imagery of colonialism, it is the utter lack of a claim to self-rule in the most fundamental attributes of government that PROMESA exemplifies.

183. 48 U.S.C. § 2168(a) (Supp. IV 2017).

184. Bases, *supra* note 173.

185. Mary Williams Walsh, *Puerto Rico's Fiscal Affairs Will Be Overseen by 7 Experts in Finance and Law*, N.Y. TIMES: DEALBOOK (Aug. 31, 2016), <https://www.nytimes.com/2016/09/01/business/dealbook/team-from-finance-and-law-to-direct-puerto-ricos-fiscal-affairs.html> [<https://perma.cc/BU3D-8A94>].

186. 48 U.S.C. § 2121(e) (Supp. IV 2017).

187. *Id.* § 2121(e)(2)(E).

188. H.R. REP. NO. 114-602, at 42 (2016).

189. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U. L. REV. 587, 614 (2017) (citing Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 201, 130 Stat. 549, 563–565 (2016)).

190. Like Puerto Rico, citizens in the District of Columbia are only represented in Congress by a non-voting delegate. 2 U.S.C. § 25a(a). But in 1923, the Twenty-third Amendment provided citizens in the District of Columbia electors in presidential elections as if it were a state, at least providing D.C. citizens with representation at the executive level. U.S. CONST. amend. XXIII. Puerto Ricans do not have this right. *See* *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 147–48 (1st Cir. 2005) (finding that Puerto Ricans do not have a constitutional right to representation in presidential elections); *see also* *Igartúa v. United States*, 626 F.3d 592, 600–01 (1st Cir. 2010) (finding that Puerto Ricans do not have a constitutional right to representation in congressional elections).

What distinguishes the PROMESA model is the lurking colonial imagery that comes from the lack of political accountability of the PROMESA Board to anyone in Puerto Rico. This distinguishes Puerto Rico from the domestic applications of the “dictatorship for democracy” model of financial control boards promoted by David Skeel (now a member of the PROMESA Board) and Clayton Gillette¹⁹¹ whose proposals¹⁹² were largely followed in the PROMESA legislation.¹⁹³ Unlike the collapse of “normal politics” in a municipal bankruptcy in the United States, the fiscal woes in Puerto Rico are not merely a local contrivance but are also in part a function of the web of federal laws that simultaneously make unviable many routes to durable economic growth on the island.

Identifying the troubling antidemocratic character of PROMESA is not to claim that it was either not necessary or designed to be malevolent. Although the debt restructuring provisions of PROMESA were modeled after Chapter 9 of the Federal Bankruptcy Code,¹⁹⁴ PROMESA critically differs in having several pro-debtor provisions that are of great benefit to Puerto Rico. These include allowing a debtor to use collateral to pay expenses, allowing a debtor to obtain credit while in proceedings in order to continue functioning without any protection for the lien holder, and having no “safe harbor” that would allow a creditor to terminate derivative contracts with Puerto Rico during the reorganization proceedings.¹⁹⁵ Overall, PROMESA has more protections for Puerto Rico during a bankruptcy than Puerto Rico would have obtained if its subordinate jurisdictions were allowed to file for bankruptcy protection under Chapter 9 of the Bankruptcy Code.¹⁹⁶

Even as the callous appointments process to the PROMESA Board has provoked great anger in Puerto Rico,¹⁹⁷ there is little desire to overturn the needed protections of the statute. Without bankruptcy protection, Puerto Rico could become a failed government without even internal protection. And, although not formally a part of

191. See, e.g., Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373 (2014); Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150 (2016).

192. Clayton P. Gillette & David A. Skeel, Jr., *How Congress Can Help Puerto Rico*, N.Y. TIMES (Sept. 14, 2015), <https://www.nytimes.com/2015/09/14/opinion/how-congress-can-help-puerto-rico.html> [<https://perma.cc/LP3E-3CNT>]; Clayton P. Gillette & David A. Skeel, Jr., *A Two-Step Plan for Puerto Rico* (Univ. of Pa. Inst. for Law & Econ., Research Paper No. 16-3, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728466 [<https://perma.cc/3BFT-XZWS>].

193. Simon Davis-Cohen, *Meet the Legal Theorists Behind the Financial Takeover of Puerto Rico*, NATION (Oct. 30, 2017), <https://www.thenation.com/article/meet-the-legal-theorists-behind-the-financial-takeover-of-puerto-rico> [<https://perma.cc/4CUZ-GA9B>] (“‘I probably would have tinkered with a few things,’ Skeel told me, referring to the design of the [PROMESA] fiscal-control board, ‘but what they did looks quite a bit like what we were proposing.’”).

194. Perry T. Graham, *Municipal Bankruptcy in “The Oldest Colony in the World” After Puerto Rico v. Franklin California Tax-Free Trust and PROMESA*, 63 LOY. L. REV. 179, 182 (2017).

195. *Id.*

196. See *id.*

197. Walsh, *supra* note 185.

the political process that yielded PROMESA, Puerto Ricans in the United States are politically active and a forceful constituency in Florida, Illinois, and New York, and concern for Puerto Rican welfare has drawn considerable support from various forces on the political left;¹⁹⁸ the island is not altogether without political leverage.

As it has proceeded about its business, the PROMESA Board has, thus far, been careful about its demands for any further compromise of the Commonwealth's governmental functions. While pensioners and civil servants will bear the brunt of any reduction in government expenditures, the story thus far is one of basically respectful engagement in a horribly difficult environment. For example, the PROMESA Board has reached agreements to liquidate Puerto Rico's central bank, the Government Development Bank, after it defaulted on \$422 million of debt in April of 2016.¹⁹⁹ Puerto Rico's utility companies also reached a deal with the help of the Oversight Board to restructure its debt and lower customer rates over the next six years.²⁰⁰

Indeed, it has been Puerto Rico's hedge fund creditors who have filed for relief from the automatic stay under 11 U.S.C. §§ 362 and 922, so they can pursue an action against the PROMESA Oversight Board on a constitutional basis,²⁰¹ either as a violation of the Appointments Clause,²⁰² or the requirement under the Bankruptcy Clause that Congress's authority must be exercised "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."²⁰³ By and large, Puerto Rico's political elites appear to have made the calculation that they are better off with PROMESA, notwithstanding its neo-colonialist sheen, than without it.

However beneficial PROMESA may turn out to be, it is still a paternalistic intervention imposed from without. Congress's intervention in PROMESA, then, was the realization of the rebellion of the Executive Branch and the formalism of the Supreme Court. In microcosm, it represents the culmination of the process by which any constitutional arrangement, and indeed any *modus vivendi*, unravels. The "compact" and "consent" that empowered the people of Puerto Rico after 1952 was gently worn away.

198. See, e.g., Elise Viebeck & Joel Achenbach, *Puerto Ricans Are a Surging, Outraged Political Force in Florida in the Aftermath of Maria*, WASH. POST (Oct. 6, 2017), https://www.washingtonpost.com/powerpost/in-florida-puerto-ricans-are-a-surging-political-force--and-outraged-by-trumps-response-to-maria/2017/10/06/e7389e7a-aa29-11e7-b3aa-c0e2e1d41e38_story.html?noredirect=on&utm_term=.7369ad4e01f9 [https://perma.cc/3BH9-CLU7]; *Puerto Ricans on the Mainland United States*, ECONOMIST (Oct. 5, 2017), <https://www.economist.com/united-states/2017/10/05/puerto-ricans-on-the-mainland-united-states> [https://perma.cc/EU85-PTML].

199. Nick Brown, *Puerto Rico Oversight Board Approves GDB Liquidation Plan*, REUTERS (Apr. 28, 2017, 9:28 AM), <http://www.reuters.com/article/us-puertorico-debt-oversightboard-idUSKBN17U1ZG> [https://perma.cc/7DWV-SXUP].

200. *Id.*

201. Motion of Aurelius for Relief from the Automatic Stay, *In re Commonwealth of Puerto Rico*, No. 17-BK-3283-LTS (D.P.R. Aug. 7, 2017).

202. *Id.* at 12; see also U.S. CONST. art. II, § 2, cl. 2.

203. Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 53 (2017) (emphasis omitted) (quoting U.S. CONST. art. I, § 8, cl. 4).

V. WHERE TO NOW?

A. *The Insular Cases Redux*

It is odd to see in the current issues over Puerto Rico a replaying of the same considerations that bedeviled the first imperial acquisition of territory by the United States following the Spanish-American War.²⁰⁴ These questions of empire, hotly debated at the turn of the century, played out in the election of 1900 and, ultimately, in the Supreme Court's decisions in the *Insular Cases*.²⁰⁵ Each of these cases was a variation on a basic fact pattern: goods were shipped between the United States and one of the new territories, duties were levied on the shipment, and a constitutional challenge ensued as to whether constitutional and statutory guarantees of free shipment of goods could be invoked to resist any attempted tariff. In each case, the presumption of uniform treatment would have condemned any tariff on trade within the United States while leaving similar exactions on external trade to the authority of Congress and the President over foreign relations.

The Court's early engagement with the issue yielded the conclusion that, since Puerto Rico had been handed to the United States by Spain, it was wholly integrated in the United States' territory and hence, as a purely domestic entity, could no longer be considered foreign in *any* sense of the word. Accordingly, no tariff could be levied on the transport of goods from one part of the country to another.²⁰⁶ After a series of sharply divided 5–4 decisions, the Court finally reversed course and found that not only tariffs were the prerogative of Congress, but that the Territory Clause was a broad mandate to congressional experimentation with divergent models of governance. As set forth by Justice Brown, “the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct.”²⁰⁷

Justice Brown created a bifurcated constitutional order that would permit both American control and a theory of territorial status that was neither state nor colony with different rights guarantees in each domain.²⁰⁸ In this sense, the *Insular Cases* anticipated debates from the last part of the twentieth century on the incorporation of the protections of the Bill of Rights onto the states through the Fourteenth Amendment.²⁰⁹ On one hand, Brown saw the Constitution as a restraining document,

204. See Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 288–90 (2007).

205. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 809–10 (2005) (spelling out the various cases thought to be part of the ongoing debate on insularity).

206. *De Lima v. Bidwell*, 182 U.S. 1, 194–97 (1901).

207. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901).

208. *Id.* at 282.

209. Though Justice Black argued that the Fourteenth Amendment incorporated all elements of the Bill of Rights, *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting), the Court has continued to incorporate elements of the Bill of Rights selectively. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment); *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Fourth Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the Fifth Amendment); *In re Oliver*, 333 U.S. 257

providing negative liberty for American citizens by preventing the government from interfering with certain essential natural rights.²¹⁰ On the other, the Constitution also provided for certain “artificial or remedial rights” that did not exist naturally, but rather as a grant by the government.²¹¹ Citizenship, suffrage, and judicial procedure are examples of this category.²¹² Given that Congress had not extended the Constitution in its entirety to Puerto Rico, artificial rights like the Uniformity Clause had not been extended either,²¹³ and a tariff based on nonuniform treatment of the territories was constitutional.²¹⁴

The resolution was pragmatic rather than resting on any formalist reading of any particular clause of the Constitution. Like all pragmatic accommodations, the *Insular Cases* left much to the specific applications of divergent governance models across the various territorial acquisitions. Paradoxically, the Uniformity Clause emerges at the heart of the current challenge to the PROMESA bankruptcy process, this time led by hedge fund challengers to any haircut in the value of the debt they hold that they might be subjected to during the restructuring process.²¹⁵

And yet the pragmatic resolution of core constitutional protections being differentiated from specific applications survived the increasing distancing of American constitutional law from the *Insular Cases*. Partial incorporation of constitutional guarantees is the norm in the application of federal law to the states as the Fourteenth Amendment filled out its current constitutional form after World War II.²¹⁶ Even matters as central as the right to trial by jury are left to state-by-state determination rather than extension of the Seventh Amendment. American Indian law goes further in not extending a presumption of constitutional incorporation to Indian tribes and instead affording critical constitutional rights as a matter of congressional mandate under the Indian Civil Rights Act.²¹⁷

(1948) (incorporating the Sixth Amendment); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the Eighth Amendment).

210. *Downes*, 182 U.S. at 282. Brown provided what appears to be a nonexhaustive list of examples, including rights to freedom of religion, property, due process, and equal protection.

211. *Id.*

212. *Id.* at 283.

213. *Id.* at 286–87.

214. *Id.* at 287.

215. See Mary Williams Walsh, *Hedge Fund Sues to Have Puerto Rico’s Bankruptcy Case Thrown Out*, N.Y. TIMES: DEALBOOK (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/business/dealbook/puerto-rico-debt-oversight-board.html> [<https://perma.cc/XBH7-W76F>].

216. See *Downes*, 182 U.S. at 292, 341–42 (White, J., concurring) (The question is “not whether the Constitution is operative, *for that is self-evident*, but whether the provision relied on is applicable.” (emphasis added)); see also ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 16 n.45 (1989) (setting out doctrines of partial incorporation of U.S. law as applied to Puerto Rico).

217. The Constitution is not self-executing on Indian tribal land and is only partially incorporated pursuant to the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304 (2012 & Supp. IV 2017). See *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring) (“[I]t has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978) (finding that due process protections accorded under the Indian Civil Rights Act are analogous, but “not identical,” to those guaranteed under the Constitution); see

The key to the reasoning across the *Insular Cases* is the centrality of congressional action. The governance of the newly acquired territories was left to political resolution rather than being compelled by any formal inherent obligation from the Constitution as such. For Justice Edward D. White's influential concurrence in *Downes*, the reasoning of which the Court adopted by 1922,²¹⁸ congressional authority over how to govern territories²¹⁹ yielded the odd (but in our view appealing) conclusion that Puerto Rico was not foreign *per se*, but rather "foreign to the United States in a domestic sense."²²⁰ As we shall develop in the next Section, the focus on the scope of congressional authority grounds the discussion of Puerto Rico in comparable concepts developed in the context of Indian law, where the Court recognizes the presumption of tribal sovereignty "unless and until" there is contrary action by Congress.²²¹ The fact that Congress may act in contrary fashion does not diminish the core sovereignty principle of American Indian law. Nor does the superior sovereignty of the United States diminish the obligation of Congress to be clear in its override of tribal authority.²²²

Despite the divided opinions and lack of controlling rationale, the leading opinions of the *Insular Cases* provide a constitutional flexibility missing in both the executive pronouncements of late and the recent U.S. Supreme Court decisions. Some notion of what we will term "compact sovereignty" should reemerge that would capture the notion of subordination of Puerto Rico, but subordination entered into by virtue of an exercise of popular sovereignty. The idea of compacted sovereignty captures both the sense that the sovereignty is the basis of the fundamental compact establishing the relation between the two polities, and also that the resulting sovereignty has been "compact" to be less fulsome than plenary sovereignty. As expressed by former Governor Rafael Hernández Colón, recognition of the transformative role of the exercise of popular sovereignty "sets the groundwork for the democratic experimentation required to fulfill the asymmetric legitimacy of those areas not incorporated as a state in the Union."²²³ Relying on

also FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 667 (1982 ed.) ("Many significant constitutional limitations on federal and state governments are not included in the Indian Civil Rights Act . . .").

218. *See* *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

219. *Downes*, 182 U.S. at 339–41.

220. *Id.* at 341–42.

221. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016).

222. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014).

223. Colón, *supra* note 189, at 592. Governor Hernández Colón relies on a long series of cases following the 1952 Constitution that recognize the core independent legal status of Puerto Rico over its internal affairs. *See, e.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673–74 (1974) (reaffirming Puerto Rico's power to determine scope of own legislation); *United States v. Rivera Torres*, 826 F.2d 151, 154 (1st Cir. 1987) (affirming Congress's power to legislate Puerto Rico in manner different from U.S. states); *United States v. Quiñones*, 758 F.2d 40, 42 (1st Cir. 1985) (determining Congress no longer has plenary power over Puerto Rico); *Cordova v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38 (1st Cir. 1981) (holding Puerto Rico considered "state" when applying Sherman Act to activities on island); *Moreno Rios v. United States*, 256 F.2d 68, 69–72 (1st Cir. 1958) (determining U.S. criminal law applied to Puerto Rico after achieving commonwealth status); *Guerrido v. Alcoa Steamship Co.*, 234 F.2d 349, 351–52 (1st Cir. 1956) (accepting argument for continued

David Rezvani's study of "Partially Independent Territories" (PITs) around the world,²²⁴ Hernández Colón argues that such arrangements allow "the partially independent political entities to reach a higher level of wellbeing than if they were independent" based upon unions that "are tailor-made to the specific political, nationalistic, and economic interests of a region rather than a framework that demands transformation of the core state."²²⁵

As Hernández Colón and Rezvani observe, the decolonization movement of the twentieth century saw—particularly in the Pacific—a slew of political arrangements take hold in which a sovereign-yet-subordinate political entity was recognized with a "superior" sovereign entity assuming some, but not all, of the functions that a sovereign state would customarily perform.²²⁶ Examples include the United States' "trusteeship" over the Trust Territory of the Pacific Islands after World War II;²²⁷ the United States' "free association" with the newly-sovereign nations of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, which emerged from the trust territory;²²⁸ and New Zealand's relationship, not replicated anywhere else in the world, with the "sovereign and independent state[s]" of the Cook Islands and Niue.²²⁹ Such arrangements exemplify the "inventive

application of U.S. maritime law); *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956) (affirming Puerto Rico Constitution not act of Congress); *United States v. Figueroa Rios*, 140 F. Supp. 376, 377 (D.P.R. 1956) (considering competing arguments based on Congress's plenary power and Puerto Rico's new status); *Carrión v. González*, 125 F. Supp. 819, 820 (D.P.R. 1954) (discussing changed relationship between United States and Puerto Rico after Public Law 600); *Cosentino v. Int'l Longshoremen's Ass'n Dist. Council of Ports of P.R.*, 126 F. Supp. 420, 422 (D.P.R. 1954) (suggesting Puerto Rico no longer territory of United States).

224. DAVID A. REZVANI, *SURPASSING THE SOVEREIGN STATE: THE WEALTH, SELF-RULE, AND SECURITY ADVANTAGES OF PARTIALLY INDEPENDENT TERRITORIES* (2014).

225. Colón, *supra* note 189, at 608.

226. *See id.* at 588–593, 606–610; REZVANI, *supra* note 224, at 93.

227. Chapter XII of the United Nations Charter created the International Trusteeship System whereby former, and current colonies, of the time were placed under the "trusteeship" of an established state. The aim of the Charter was to facilitate a means by which colonies could become self-governing, autonomous bodies. Article 77 of the Charter, "The Trust Territory of the Pacific Islands," established the same form of trusteeship for territories. Timothy H. Bellas, *The Trust Territory of the Pacific Islands*, in *THE NORTHERN MARIANA ISLANDS JUDICIARY: A HISTORICAL OVERVIEW* 35, 35–36 (2011), http://www.justice.gov.mp/uploads/History_Book_-_ch5-7.pdf [<https://perma.cc/5LNZ-VG64>].

228. The three free associated states are full members of the United Nations that issue their own passports and compete under their own flags at the Olympics. Nevertheless, they "outsource" to the United States certain key sovereign functions, like national defense and provision of certain vital social services. *See U.S. Relations with the Federated States of Micronesia*, U.S. DEP'T STATE (July 5, 2018), <https://www.state.gov/r/pa/ei/bgn/1839.htm> [<https://perma.cc/V97C-8DFG>]; *U.S. Relations with Marshall Islands*, U.S. DEP'T STATE (July 5, 2018), <https://www.state.gov/r/pa/ei/bgn/26551.htm> [<https://perma.cc/7AJE-JLGC>]; *U.S. Relations with Palau*, U.S. DEP'T STATE (Aug. 14, 2018), <https://www.state.gov/r/pa/ei/bgn/1840.htm> [<https://perma.cc/F74U-CKF2>]. So, while fully "sovereign" in one sense, they are illustrative of the innate pliability of the concept of "sovereignty."

229. Joint Centenary Declaration of the Principles of the Relationship Between the Cook Islands and New Zealand, Cook Islands-N.Z., June 11, 2001. The Cook Islands and Niue make their own laws and may enter into treaties with other sovereign nations in their own right. *See*

statesmanship” that necessarily arose to meet the challenges of decolonization and gesture to the international pedigree of pragmatic accommodations akin to our notion of “compact sovereignty.” As we discuss *infra*, however, we need not cross an ocean to find examples of this accommodation.

Sovereignty is a contested concept, but there are at least four elements that appear key in this context, even when they exist in conjunction with an agreed upon subordination to another, higher sovereign. The first is the existence of a defined territory, something found in both American and international law.²³⁰ The second, as discussed earlier in the events leading to popular approbation of the 1952 Puerto Rico Constitution, is the exercise of a constituent power among the affected population that expresses a will to sovereignty. The third is the domestic exercise of the customary police powers over health and safety of the population by internal political authorities.²³¹ And, finally, there is the self-identification as a nation, reflected in custom, shared political engagements, and even such matters as a national sports team.²³²

Perhaps not surprisingly, American Indian law recognizes just this concept of subordinated sovereignty, rooted in the preexisting historic claims to sovereignty of the tribes and the subsequent integration through treaty. Both Indian law and the *Insular Cases* introduce a heavy racist dose into the constitutional prescription. But both rest on the idea that limited sovereignty is necessary to preserve ways of

id. Nevertheless, they are not considered independent, sovereign nations by the international community. See MASAHIRO IGARASHI, ASSOCIATED STATEHOOD IN INTERNATIONAL LAW 263–64 (2002) (describing statement of New Zealand to the Lomé Council of Secretariat in 1979 explaining the “international position of the Cook Islands”); REZVANI, *supra* note 224, at 93.

230. See *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (citing *Texas v. White*, 74 U.S. 700, 700 (1868)) (defining a state as “a political community of free citizens, occupying a territory of defined boundaries”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (AM. LAW INST. 1987) (“Under international law, a state is an entity that has a defined territory”); Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19, 25 (setting forth that, among other qualifications for statehood, “[t]he State as a person of international law should possess . . . a defined territory”).

231. See, e.g., *Montana v. United States*, 450 U.S. 544, 566 (1981) (holding that Indian tribes have the authority to regulate conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (“It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.”); RESTATEMENT OF THE LAW: THE LAW OF AMERICAN INDIANS § 30 cmt. b (AM. LAW INST., Council Draft No. 4, 2017) [hereinafter *Restatement of American Indian Law*] (“Indian tribes may . . . exercise the [classic police] power of eminent domain to condemn property interests under tribal jurisdiction for public use . . .”).

232. See WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 11 (1995) (defining a nation within a multicultural context as “a historical community . . . sharing a distinct language and culture” and further positing that a nation “is closely related to the idea of a ‘people’ or a ‘culture’—indeed, these concepts are often defined in terms of each other”); Kai Nielsen, *Cultural Nationalism, Neither Ethnic nor Civic*, in THEORIZING NATIONALISM 119, 122–23 (Ronald Beiner ed., 1999) (discussing that to qualify as a nation, there must be a “mutual recognition of membership” by its members, an aspiration to be a political community, and a pervasive “public culture”).

life that should not be fully integrated into American society because the people who practice those ways of life do not *want* them to be so integrated. In the context of American Indian law, given the brutality of the conquest of the Indian lands and the extermination of the bulk of the population, the reliance on the fiction of a treaty-based agreement among sovereigns is at best a comforting legal construction. But the strained concept of a compact or contractual agreement serves to organize a relationship in which there are strong measures of self-governance and some burden of express justification for overriding tribal authority in favor of national uniformity.²³³

B. Reconsidering the Parallels to American Indian Law

The question is then whether such concepts of compacted sovereignty could be invoked for territorial Puerto Rico after the changes of the 1950–52 period. Certainly the textual commands of the Constitution do not support any distinction between the scope of federal authority over both territories and tribal lands, nor does the historical record.²³⁴ Both are treated as a subset of congressional authority, with Congress having the “[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory” of the United States and having the power to “regulate Commerce . . . with the Indian Tribes.”²³⁵ Even if the textual differences were significant, it remains the case that, as one of us has previously written, “the *sui generis* constitutional flexibility for Indian tribes even from the Founding,²³⁶ much of which was drawn from extratextual international law understandings,²³⁷ legitimates heterogeneous arrangements within the American system outside [a] strict . . . understanding of the Constitution.”²³⁸ The result is that “group-

233. We also note that a model of compacted sovereignty is consistent with solutions that call for enforcing existing treaty obligations, for example, by expanding the Puerto Rican franchise to empower voting in federal elections. See Torruella, *supra* note 57, at 99–104.

234. See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567–70 (2013) (Thomas, J., concurring) (questioning whether the Indian Commerce Clause grants any powers beyond that of commerce when narrowly construed). Justice Thomas draws on recent scholarship questioning the sources of federal plenary power over Indian tribes. See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 241–44, 250 (2007); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1089 (2004). For a novel recasting of the debate about the extent of federal power in terms of federalism demarcations between state and federal authorities, see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

235. U.S. CONST. art. IV, § 3, cl. 2; *id.* art. I, § 8, cl. 3.

236. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 53–58 (1996) (tracing the foundation of Indian law jurisprudence to early opinions by John Marshall).

237. See *id.* at 37 (arguing that “plenary power in federal Indian law, like that in immigration law, arose from conceptions of the inherent sovereignty of nations under international law”). The justification for the *Insular Cases* was also premised in international law. See *Downes v. Bidwell*, 182 U.S. 244, 300–02 (1901) (White, J., concurring) (drawing on international law and the law of nations’ treatment of sovereignty and acquisition to justify Congress’s treatment of the territories).

238. Rennie, *supra* note 98, at 1715 (emphasis added) (footnotes omitted).

differentiated rights resting on the *Insular Cases* are not so strange after all, as the American constitutional order has—from its very creation—contemplated extra-constitutional arrangements in the example of Indian law.”²³⁹

Comparison to Indian law is not intended to say that Puerto Rico should be treated as are Indian tribes, or that such treatment would be more respectful of the political rights of the island. Even under *Sanchez Valle*, Puerto Rico retains full police powers over the island, and anyone committing a crime in Puerto Rico is subject to criminal prosecution—a right not given tribal authorities over non-Indians.²⁴⁰

Nonetheless, the comparison to Indian law reveals the absurdity of the “original position” doctrines assumed by the Court in *Sanchez Valle*. Consider the present position of the Cherokee Nation, now headquartered in Tahlequah, Oklahoma. The Cherokee are a southeastern tribe who, in the fashion recounted by the Court in *Sanchez Valle* as being characteristic of all Indian land agreements, entered into a treaty ceding land in exchange for benefits to the members of tribal land in Georgia. Following a minor gold rush in Georgia, however, Congress passed the Indian Removal Act of 1830,²⁴¹ which then prompted an effort to remove the Cherokee and other eastern Indian tribes. In *Worcester v. Georgia*, the Supreme Court struck down the efforts to expel the Cherokee from their treaty-recognized dwelling and ordered the protection of tribal land claims, to no avail.²⁴² President Andrew Jackson openly disregarded the Court’s order, and the ensuing forcible removal of the Cherokee and other tribes has come to be known historically as the “Trail of Tears.” In all, about one quarter of the Cherokee population died in the ensuing relocation to land in Oklahoma.²⁴³ Nonetheless, the Court in *Sanchez Valle* holds out the Indian tribal experience, including presumably that of the Cherokee, as a bastion of uninterrupted sovereignty because the original land grant took the form of a treaty—even if the treaty had been signed while staring down the wrong end of a rifle.

The experience of the Cherokee might be an extreme example of conquest, but virtually all the treaty accommodations of tribal sovereignty begin not with the fact

239. *Id.* at 1717; *see also* Frickey, *supra* note 236, at 31 (“[A]lthough sovereignty created by the United States Constitution is indeed dual, sovereignty within the United States is triadic: American Indian tribes have sovereignty as well.”). Frickey also notes that Federal Indian law has stood “well outside the constitutional law mainstream,” and that this group-differentiated regulation based on Indian status is analogous to classification based on “discrete and insular minority status.” *Id.* at 41 (internal quotation marks omitted).

240. *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding that Indian tribal courts do not have criminal jurisdiction over non-Indians). Indian tribes do, however, possess authority to exercise criminal jurisdiction over both Indians and non-Indians who commit acts of domestic or dating violence or violate certain protection orders in Indian country. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

241. Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

242. 31 U.S. 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

243. *See generally* *Indian Removal*, PBS, <https://www.pbs.org/wgbh/aia/part4/4p2959.html> [<https://perma.cc/FK7F-EVSW>].

of a compact among coequal sovereigns but with subjugation, typically by military force. If one were to abandon the formalism of status stemming from the moment of conquest, Indian law actually provides a number of instructive analogies to Puerto Rico. The tribes possess what Felix Cohen terms a “limited sovereignty.”²⁴⁴ Indian tribes simultaneously exist as domestic, dependent nations and retain their inherent sovereign authority.²⁴⁵

Using American Indian law as a template, we can establish three governing principles for Puerto Rico. First, Puerto Rico exercises ordinary police powers over local matters of health, safety, and welfare absent express congressional determination to the contrary. Second, Puerto Rico exercises control over economic regulation of its internal markets absent an express congressional determination to the contrary. Finally, the exercise of local sovereignty cannot be inconsistent with the overriding interests of the United States; therefore, constitutional principles that are central to the national identity of the United States will apply in Puerto Rico. Each of these finds a parallel in Indian law.

With regard to the police powers, Indian tribes “possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life.”²⁴⁶ This tribal power to regulate internal and social matters has been affirmed across various contexts, including matters of health, safety, and welfare, and extends to conduct of non-tribal members that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁴⁷ Such power extends into the economic domain, which the Court in *Merrion v. Jicarilla Apache Tribe* termed “an essential attribute of Indian sovereignty” that “derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction.”²⁴⁸ Indeed, this sovereign power to control economic activity is so extensive as to permit tribes to tax nonmembers on Indian lands.²⁴⁹ Finally, tribal sovereign power “is constrained so as not to conflict with the interests of this overriding sovereignty.”²⁵⁰ Therefore, deference must be afforded to the “overriding interests of the National Government,” that is, to the government of the United States.²⁵¹ In practice, the concept of partial incorporation of federal constitutional and statutory guarantees is well set out in dealings between the federal government and states, tribes, and territories.

244. COHEN, *supra* note 217, at 231.

245. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (“Indian tribes are domestic dependent nations that exercise inherent sovereign authority.” (citation omitted) (internal quotation marks omitted)).

246. *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *see also* *Williams v. Lee*, 358 U.S. 217 (1959) (noting that, generally, Indian tribes retain the right to make their own rules and be governed by them).

247. *Montana v. United States*, 450 U.S. 544, 566 (1981).

248. 455 U.S. 130, 137 (1982).

249. *See, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Merrion*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

250. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

251. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153.

Tribal sovereignty creates an equivalent to the “presumption against preemption” with regard to state law: “courts will not lightly assume that Congress in fact intends to undermine Indian self-government.”²⁵² The Supreme Court has cautioned that courts must “tread lightly in the absence of clear indications of legislative intent.”²⁵³ This principle of judicial caution informs how courts have interpreted ambiguous provisions of tribal law. “Courts will not lightly infer abrogation of tribal authority from ambiguous treaty terms.”²⁵⁴ Ambiguities in treaties are construed in favor of Indian tribes,²⁵⁵ and ambiguities in federal law are similarly resolved in favor of upholding tribal sovereignty:²⁵⁶ “[t]he legislative intent to abrogate tribal authority must be clear.”²⁵⁷ In fact, in *Santa Clara Pueblo v. Martinez*, the Court went so far as to instruct that such congressional intent must be “unequivocally expressed.”²⁵⁸ A year later, the Court bolstered this sentiment, stating that “[a]bsent *explicit statutory language*, [it has] been extremely reluctant to find congressional abrogation of treaty rights.”²⁵⁹

American Indian law has well adapted to a regime of tribal sovereignty and congressional supremacy. The fact that one Congress cannot bind another and that tribes are not states does not mean that there is no capacity to recognize the compacted sovereignty. Indeed, there are parallels in the law governing foreign relations with regard to the “stickiness” of treaty obligations. Although, again, one Senate cannot foreclose a subsequent Congress or President from unwinding treaty obligations, there is nonetheless a legal presumption in favor of the enforceability of treaties and a heightened procedural test for treaty revocation.²⁶⁰

252. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014) (citations omitted).

253. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

254. Restatement of American Indian Law § 22 cmt. b.

255. *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“[T]reaties should be construed liberally in favor of the Indians . . . with ambiguous provisions interpreted to their benefit.” (citations omitted)).

256. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989) (“[A]mbiguities in federal law are, as a rule, resolved in favor of tribal independence.”).

257. Restatement of American Indian Law § 22 cmt. a; *see Ex parte Crow Dog*, 109 U.S. 556 (1883); *see also United States v. Dion*, 476 U.S. 734, 738–39 (1986) (“We have required that Congress’ intention to abrogate Indian treaty rights be clear and plain . . . [w]e do not construe statutes as abrogating treaty rights in ‘a backhanded way’ . . .” (citations omitted)); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346 (1941) (finding that congressional intent to extinguish Indian title must be “plain and unambiguous”); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1971 ed.) (“What is not *expressly limited* remains within the domain of tribal sovereignty.” (emphasis added)).

258. 436 U.S. at 58.

259. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n.*, 443 U.S. 658, 690 (1979) (emphasis added); *see also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (finding that, in the absence of an explicit statement, the intention to abrogate a treaty is not to be lightly imputed to Congress).

260. *See Vienna Convention on the Law of Treaties* arts. 18, 65, May 23, 1969, 1155 U.N.T.S. 331, 336, 347–38 (1969) (establishing international law procedures for treaty adherence and revocation); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 312 (AM. LAW INST. 1987). While the Constitution is unclear on the exact procedure for treaty withdrawal, a long history of practice involves the President sending a message to the Senate,

Relations with Indian tribes also introduce longstanding principles from international law on the consequences of treaty abandonment or treaty revocation.²⁶¹ Customary international law provides two sources of authority that challenge the Court's crabbed sovereignty analysis from *Sanchez Valle*. First, Federal Indian law rests heavily on the presumed respect for aboriginal rights in the modern law of nations²⁶²—again lending support for Justice Breyer's argument on the historical significance of longstanding, self-governing tribes in Puerto Rico. Second, by the nineteenth century, international law norms came to define sovereignty around issues of territory and self-organization and were recognized as controlling by federal officials charged with Indian relations.²⁶³

and the Senate responds with a resolution to return the treaty. See David C. Scott, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447, 1476–77 (2002).

261. See Vienna Convention on the Law of Treaties arts. 18, 70, May 23, 1969, 1155 U.N.T.S. 331, 336, 349; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) (“A treaty is in the nature of a contract between nations.”); *Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. at 675 (“A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.”); *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (“If [treaties] fail, its infraction becomes the subject of international negotiations and reclamations It is obvious with all this the judicial courts . . . can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens . . . which are capable of enforcement as between private parties in the courts of the country.”); see also Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1581 (2005) (“International law takes a dim view of challenges to this meta norm of treaty adherence. Claims of invalidity, changed circumstances, and other exculpatory doctrines are narrowly construed, with the result that most unilateral deviations are viewed as breaches of a treaty.”).

262. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 22 (2d ed. 2004) (explaining the Marshall Court's reliance on Emmerich de Vattel's theory that “at least some non-European aboriginal peoples qualified as states or nations with rights as such”); Frickey, *supra* note 236, at 51 (arguing that the Marshall Court's Federal Indian law decisions “ratified international law notions that . . . indigenous peoples possessed sovereignty and at least a limited set of legal rights”); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 992 n.251 (2010) (noting that the grant of commerce power over Indian tribes to Congress reflected a decision to “treat the tribes as separate polities within the boundaries of the Union that the federal government would deal with through the law of nations and treaties”). Following the Marshall Court's decisions, international law shifted in the early twentieth century to adopt the view that indigenous people had no status or rights before shifting once again to endorse the rights of indigenous people under international law. See ANAYA, *supra*, at 15–34, 49–72; G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

263. See ANAYA, *supra* note 262, at 21 (“Statehood developed as a reference to the post-Westphalian political community and attendant bureaucracy, whose dominant organizing characteristic was territory.”); JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 447 (8th ed. 2012) (identifying sovereignty as a basic doctrine underlying international law); FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 33 (1984) (noting that in the early 19th century, “[t]he United States . . . recognized [Indian tribes'] independent nationhood, and in many ways acted as though the Indian chiefs were in fact the rulers of sovereign political entities”).

The closest parallel for treaty obligations with nonstate entities is again the relation with Indian tribal authority. While Congress can undo established agreements, there is nonetheless a process-based duty imposed on Congress such that Indian tribes retain their sovereign authority “unless and until Congress acts.”²⁶⁴ Independent of the bankruptcy setting of *Franklin Trust* or the bizarre original position doctrine of double jeopardy law in *Sanchez Valle*, the core principles of Indian law offer a workable template for dealing with Puerto Rico. And, most critically, Indian law offers a historically appealing way of understanding the significance of Puerto Rico’s constitutional awakening in the 1950s.

CONCLUSION

We return to the question in our title. In the absence of independence and statehood, the commonwealth status of Puerto Rico stands in serious disrepair. The situation was already dire before Hurricane Maria, and an exodus of Puerto Ricans has eroded the island’s tax base, as young, educated, working-age citizens leave for greater opportunities on the mainland.²⁶⁵ The population fell 1.7% in a single year—before the hurricane.²⁶⁶ The school system lost roughly 200,000 students from 2005 to 2014, a massive drop considering the small population of Puerto Rico.²⁶⁷ In the past decade, one million Puerto Ricans moved to the Orlando area alone. Migrants to the mainland cite greater job opportunities, higher pay, lower crime, and more accountable, less corrupt government, as reasons to flee.²⁶⁸ But this migration has further eroded basic services on the island, as many people with essential skills like

264. Restatement of American Indian Law § 21 cmt. c; *see also* *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016) (Indian tribes retain their sovereign powers “unless and until Congress withdraws a tribal power.”); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (same); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (Indian tribes retain sovereignty “to the extent that sovereignty has not been withdrawn by federal statute or treaty.”).

265. *See* D’Vera Cohn, Eileen Patten & Mark Hugo Lopez, *Puerto Rican Population Declines on Island, Grows on U.S. Mainland*, PEW RES. CTR. (Aug. 11, 2014), <http://www.pewhispanic.org/2014/08/11/puerto-rican-population-declines-on-island-grows-on-u-s-mainland> [<https://perma.cc/Y3CS-XBGU>]; Frances Robles, *Puerto Ricans Face ‘Sacrifice Everywhere’ on an Insolvent Island*, N.Y. TIMES (May 6, 2017), <https://www.nytimes.com/2017/05/06/us/puerto-rico-insolvency-business-owners-anxiety.html> [<https://perma.cc/KWX3-3HDY>].

266. Tim Worstall, *Creditors of Puerto Rico Have a Problem – The Population Can Go and Leave the Debts Behind*, FORBES (May 4, 2017, 8:52 AM), <https://www.forbes.com/sites/timworstall/2017/05/04/creditors-of-puerto-rico-have-a-problem-the-population-can-go-and-leave-the-debts-behind/#6b106b9f5e5e> [<https://perma.cc/ZDG3-EGBN>].

267. Patrick Gillespie, *Puerto Rico’s Brain Drain: Fewer Children in Schools*, CNN BUS. (Dec. 23, 2015, 11:23 AM), <http://money.cnn.com/2015/12/23/news/economy/puerto-rico-brain-drain/index.html> [<https://perma.cc/Z2EJ-RFXJ>].

268. Samuel Oakford, *Why Are So Many Young Puerto Ricans Leaving Home?*, VICE NEWS (Apr. 6, 2015), <https://news.vice.com/article/why-are-so-many-young-puerto-ricans-leaving-home> [<https://perma.cc/YKR4-GE62>].

doctors,²⁶⁹ teachers,²⁷⁰ or even technicians to repair damaged power lines in the wake of Hurricane Maria,²⁷¹ have already fled the island.

There is no popular desire for independence, statehood seems like a political nonstarter, and simply abandoning this island—and its millions of American citizens—to utter destitution simply cannot be the ultimate resolution for any society, let alone the richest on Earth. Much as sometimes happens in an ill-occasioned, youthful cohabitation under compulsion, sometimes history shows ways to work things out. If Puerto Rico and the rest of the United States are to continue to work together under the imprecise demands of a commonwealth marriage, current circumstances demand a renewal of vows under more exacting legal certainty. Compacted sovereignty for Puerto Rico under the congressional authority of the Territory Clause worked well enough for the second half of the twentieth century that it seems a relatively promising basis on which to refine relations. The example of American Indian law shows there is no constitutional barrier to its implementation. In light of the ill-considered responses of the Supreme Court, Congress, and the Executive, the question of “what is Puerto Rico” demands a clearer and better legal answer.

269. Eric Platt, *Puerto Rico: An Island's Exodus*, FIN. TIMES (Aug. 25, 2016), <https://www.ft.com/content/f9251a80-652b-11e6-a08a-c7ac04ef00aa> [https://perma.cc/WXP3-9JG5].

270. Jeffrey Acevedo, *Puerto Ricans Leaving Island for U.S. in Record Numbers*, CNN (May 2, 2016, 3:16 AM), <http://www.cnn.com/2016/05/02/americas/puerto-rico-exodus/index.html> [https://perma.cc/9UWR-5A59].

271. Steven Mufson, *Puerto Rico's Power Company Was Already Bankrupt. Then Maria Hit*, CHI. TRIB. (Sept. 21, 2017, 8:44 AM), <http://www.chicagotribune.com/news/nationworld/ct-puerto-rico-power-company-20170921-story.html> [https://perma.cc/HG59-P9AM].