PUERTO RICO BEFORE THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL COLONIALISM IN ACTION

Andrés González Berdecía*

—"Is it essential to your case that we recognize Puerto Rico as a sovereign?"
—"It is not essential that you recognize Puerto Rico as a sovereign with a capital 'S'."[1]

The United States Supreme Court's October 2015 Term will go down in history as the most significant one for Puerto Rico-United States relations in more than a century. By opting to address the issues presented in Puerto Rico v. Sánchez Valle*, a constitutional case arising from the Commonwealth courts, and* Puerto Rico v. Franklin California Tax-Free Trust*, a statutory case arising from the United States District Court for the District of Puerto Rico, the answer to which directly related to one's understanding of the nature of the political status between Puerto Rico and the United States, the United States Supreme Court set in motion a series of unprecedented actions by the Commonwealth government, the President, Congress, Commonwealth and federal judges, and*

* Associate, Sepulvado & Maldonado, PSC.; B.A., University of Puerto Rico, 2008; J.D., University of Puerto Rico, 2011; LL.M., Columbia Law School, 2014; United States Supreme Court Fellow, NAAG Center for Supreme Court Advocacy, Spring 2016. The views and opinions expressed herein do not necessarily state or reflect those of the author's employer. The author would like to extend his gratitude to the editorial staff of the Columbia Journal of Race and Law for their helpful editing contributions. The author would also like to thank attorney Alejandro Suárez Vincenty for his valuable input, professor Ernesto L. Chiesa Aponte for his mentorship over the years, and attorney Aura Colón Solá, the author's wife, for her support throughout this and many other endeavors.

[1] Transcript of Oral Argument at 6, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016) (No. 15-108).

civil society in general—both in San Juan and Washington, D.C.—that illustrate, now more clearly than ever, why Puerto Rico legally remains a 21st century colony of the United States.

Part II of this Article will discuss Puerto Rico v. Sánchez Valle*, setting forth the underlying facts of the case, the legal issues presented, what Puerto Rico courts held, and what the United States Supreme Court ultimately decided. Part III will focus on* Puerto Rico v. Franklin California Tax Free Trust*, following the same basic structure. Part IV will illustrate how both cases reveal unequivocally that the United States' legal treatment of Puerto Rico amounts to pure colonialism. Finally, Part V will conclude by analyzing whether the Supreme Court of the United States can, or should, take action to fix this reality.*

I. INTRODUCTION

"This is the most important case on the constitutional relationship between Puerto Rico and the United States since the establishment of the Commonwealth in 1952."[2] So began the petition for writ of certiorari that the Commonwealth of Puerto Rico filed before the Supreme Court of the United States in July 2015 in *Commonwealth of Puerto Rico v. Luis M. Sánchez Valle* to decide whether the Commonwealth of Puerto Rico and the federal government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution. Just one month later, Puerto Rico asked the Court to review a second case, *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, to decide whether Chapter 9 of the Federal Bankruptcy Code preempts a Puerto Rico statute creating a mechanism for the Commonwealth's public utilities to restructure their debts, this time stating that "[t]his case involves Puerto Rico's ability to respond to the most acute fiscal crisis in its history."[3] Indeed, if *Sánchez Valle* is the most important case on the *constitutional* relationship between Puerto Rico and the United States, then *Franklin California Tax-Free Trust* may very well be the most important case on the *statutory* relationship between them. Uncharacteristically, the Court granted both petitions, projecting the October 2015 Term as the most significant one for Puerto Rico in more than a century.[4]

[2] Petition for Writ of Certiorari at 1, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016) (No. 15-108).

[3] Petition for Writ of Certiorari at 1, Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938 (2016) (No. 15-233).

[4] In March 2016, the Court granted certiorari in a third case arising from Puerto Rico, this time a federal criminal prosecution. In *Bravo-Fernández v. United States*, 136 S. Ct. 1491 (2016) (No. 15-537), a unanimous Court held that the the collateral estoppel prong of the Double

Since the Commonwealth's creation in 1952, Puerto Ricans have been deeply divided as to what the nature of the relationship between Puerto Rico and the United States *actually is* and what it *should be*. For more than six decades, independence and statehood supporters have argued that the Commonwealth and its Constitution did not alter Puerto Rico's constitutional status as an unincorporated territory of the United States subject to Congress's plenary powers, which, everyone agrees, is nothing more than a colonial relationship. Commonwealth supporters have fervently opposed such criticism, instead contending that Puerto Rico "decolonized" itself in 1952 through the enactment of the Constitution, when it became the *sui generis* entity that the world knows as the Estado Libre Asociado, supposedly created with the free consent of the sovereign people of Puerto Rico as a compact of association with the United States.

Because of this issue's obvious significance to the very political and legal structure of the island's government, Puerto Ricans have organized themselves electorally mostly around each particular group's preferred position on the status question. The same two parties always alternate power: those who favor the annexation of Puerto Rico as a full state of the Union vote mostly for the New Progressive Party (NPP), while those who favor the Commonwealth vote mostly for the Popular Democratic Party (PDP). And most people who favor independence vote—always losing—for the Puerto Rican Independence Party (PIP).[5] Though other parties have sprung up throughout the years attempting to break this

Jeopardy Clause does not bar the government from retrying defendants acquitted on some counts but inconsistently convicted on other counts that were later vacated based on instructional error.

[5] Brief History of Elections in Puerto Rico, PUERTO RICO ENCYCLOPEDIA, http://www.enciclopediapr.org/ing/article.cfm?ref=09012602 [http://perma.cc/5K2G-ZBSN]. For many historically complex reasons, it is fair to say that fewer independence supporters vote "as a bloc" for the Puerto Rican Independence Party (PIP) than do Commonwealth supporters for the PDP or statehood supporters for the NPP.

mold, none have succeeded electorally or lasted for a significant period of time.[6] For better or worse, each party's members' ideological differences with regard to economic and social policies take a backseat to their common perspective on the status question. This divide extends far beyond the political electoral arena; it permeates Puerto Rican society in general and arouses almost religious-like fervor.

Only if one is aware of this social dynamic can one understand the fervor with which the Puerto Rican judges involved in both cases expressed their particular views or why some of them referred to Puerto Rico as their nation while others referred to the United States as theirs. Only then can one understand why these are the most important Puerto Rico cases that the United States Supreme Court has decided since the creation of the Commonwealth, and probably since the island became a United States territory in 1898. The Court has finally ended the six-decade old political debate. The Commonwealth lost.

Much will be said about these cases in the upcoming years, especially about whether the Court got them right. That, however, is not the purpose of this Article. Though I will discuss them thoroughly, this Article's true intention is to illustrate how these two cases dispelled any lingering doubts as to the colonial nature of the relationship between Puerto Rico and the United States.

Part II of this Article will discuss *Puerto Rico v. Sánchez Valle*, setting forth the underlying facts of the case, the legal issues presented, what Puerto Rico courts held, and what the Supreme Court ultimately decided. Part III will focus on *Puerto Rico v. Franklin California Tax Free Trust*. Part IV will illustrate how both cases reveal unequivocally that the United States' legal treatment of Puerto Rico amounts to pure colonialism. Part V will conclude by

[6] *Id.*

analyzing whether the Supreme Court of the United States can, or should, fix this reality.

II. *PUERTO RICO V. SÁNCHEZ VALLE*: THE COMMONWEALTH'S PLEA FOR [S]OVEREIGNTY

A. Life Before *Sánchez Valle*

Almost one hundred years ago, a man named Vito Lanza was charged in federal court with possessing, manufacturing, and transporting intoxicating liquor[7] in violation of the National Prohibition Act, commonly known as the Volstead Act.[8] Because he had already been convicted in Washington State Court of possessing, manufacturing, and transporting the same liquor, Lanza argued in federal court that two punishments for the same act, one under the federal law and one under state law, violated the Double Jeopardy Clause of the Fifth Amendment.[9] The district court agreed. But the Supreme Court overruled. Speaking for a unanimous Court in *United States v. Lanza*, Chief Justice Taft concluded that "an act denounced as a crime by both *national* and *state* sovereignties is an offense against the peace and dignity of

---

[7] United States v. Lanza, 260 U.S. 377, 378 (1922).

[8] National Prohibition Act of 1919, Pub. L. No. 66-66, 41 Stat. 305 (repealed 1933).

[9] *Lanza*, 260 U.S. at 379. The Fifth Amendment provides that

> [n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

both and may be punished by each."[10] Therefore, the Court held, Lanza "committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States, and so is not double jeopardy."[11] Thus, the "dual sovereignty" doctrine was born.[12]

Though the Court settled the double jeopardy issue with regard to federal-state relations, the question as to its application in Puerto Rico after the adoption of the Constitution of the Commonwealth in 1952 remained unaddressed. That changed in 1987 when two former police officers were convicted in the United States District Court for the District of Puerto Rico of civil rights violations for assaulting and beating three men, after having been previously convicted in Commonwealth courts for the same acts. In *United States v. López Andino*,[13] the Court of Appeals for the First Circuit rejected appellants' claim that Puerto Rico and the United States were "the same sovereign" for double jeopardy purposes. The First Circuit straightforwardly applied *Lanza* to Puerto Rico, concluding that "[a]lthough the legal relationship between Puerto Rico and the United States is far from clear and fraught with controversy, it is established that Puerto Rico is to be treated as a state for purposes of the [D]ouble [J]eopardy [C]lause."[14]

[10] *Lanza*, 260 U.S. at 382 (emphasis added).

[11] *Id*.

[12] Even though *Lanza* predated the world of selective incorporation of the Bill of Rights through the due process clause of the Fourteenth Amendment ("The Fifth Amendment, like all other guaranties in the first eight amendments, applies only to proceedings by the Federal government," *id.*), its holding, that the Double Jeopardy Clause applied to the states, remained intact after the Supreme Court decided Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)). *See also* Heath v. Alabama, 474 U.S. 82 (1985).

[13] United States v. López Andino, 831 F.2d 1164, 1168 (1st Cir. 1987).

[14] *Id*.

Puerto Rican Circuit Judge Juan R. Torruella concurred. He agreed with the rest of the panel that the federal prosecution there was not barred by the Double Jeopardy Clause. However, Judge Torruella believed that the majority's discussion regarding Puerto Rico's sovereignty for purposes of double jeopardy was both unnecessary to decide the case and erroneous as a matter of law because "Puerto Rico is *constitutionally* a territory, thus lacking that separate sovereignty which would allow consecutive Puerto Rico/federal prosecutions for what would otherwise be the same offenses."[15]

The Supreme Court of Puerto Rico took on this question just one year later in *Puerto Rico v. Castro García*.[16] Unsurprisingly, the Court sided with the First Circuit majority in *López Andino*, concluding that since 1952 the island's political power derived from the consent and will of the People of Puerto Rico. The majority rejected the claim that the court was bound by *Puerto Rico v. Shell Co.*,[17] where the United States Supreme Court stated that, given the territorial condition of Puerto Rico, its statutes stemmed from one sovereign power, i.e., the federal power. Instead, the majority concluded that "the pronouncements contained in dictum at that time, 1937, are currently devoid of any legal basis and should be left to rest in peace."[18] The Supreme Court of Puerto Rico also relied on *United States v. Wheeler*,[19] where the United States Supreme Court held that the Navajo Tribe, although under the control of Congress, is a sovereign independent of the federal government for purposes of the dual sovereignty doctrine because its power to prosecute the members of the tribe emanates from its "primeval sovereignty."[20]

---

[15] *Id*. at 1172.

[16] Puerto Rico v. Castro García, 20 P.R. Offic. Trans. 775, 823 (1988).

[17] Puerto Rico v. Shell Co., 302 U.S. 253 (1937).

[18] *Castro García*, 20 P.R. Offic. Trans. at 799.

[19] *Id*. at 800.

[20] United States v. Wheeler, 435 U.S. 313, 325 (1978).

Justice Negrón García issued a short concurring opinion,[21] stating that:

> It is an historical fact that after the approval of the Commonwealth Constitution on July 25, 1952, Puerto Rico's juridico-political relations with the United States may be characterized as peculiar, distinct and unique within the constitutional framework of the North American federal system. The issue has sparked, and still generates, intense debates in the different sectors of public opinion. There are in the legal sphere areas of honest differences of opinion not as yet defined by the federal Supreme Court in its function as ultimate interpreter of the United States Constitution.[22]

The concurring Justice approvingly claimed that the majority abstained from drawing the court into "the politico-partisan debate that these differences generate," stating that their decision was based on "a strictly legal standpoint" and that

> Constitutionally speaking, the pertinent historical and political precedents constitute solid grounds on which to recognize that the People of Puerto Rico enjoy sufficient sovereign attributes, although not of a classic mold, to conclude and adjudicate—by way of analogy to the legal approach prevailing in relation to the states of the Union—that successive criminal prosecutions in our courts and in the federal courts for the same offense do not impinge on

[21] In Puerto Rico, lower court judges and Supreme Court judges are referred to equally as "juez" or "jueza"—the Spanish word for "judge." However, for purposes of this Article, judges of the Supreme Court of Puerto Rico are referred to as "Justices," the term most commonly used in the United States to designate judges from a state's highest court.

[22] *Castro García*, 20 P.R. Offic. Trans. at 820.

> the [D]ouble [J]eopardy [C]lause contained in Art. II, Section 11 of our Bill of Rights or in the Fifth Amendment to the Federal Constitution.[23]

The lone dissenter was Justice Francisco Rebollo López.[24] Contrary to the concurrence, the dissent started by accusing the majority of playing politics, stating that:

> Although in our personal capacity we have the absolute constitutional right to believe and think in accordance with our particular view of life and the world we live in, we, as members of this Court, cannot afford the luxury of acting and deciding the issues brought to our consideration in accordance with those personal beliefs or wishes, in total abstraction from the legal reality in which we are immersed.[25]

Rebollo López concluded that, although:

> Public Law No. 600 of the eighty-first United States Congress passed on July 3, 1950, authorizing the People of Puerto Rico to organize a local government under its own Constitution, it is very important that we always keep in mind that being said Public Law 600 'an act' of said Congress, it is not binding upon future Congresses and it can be unilaterally amended by any future Congress.[26]

---

[23] *Id*. at 820–21 (internal citations omitted).

[24] For an analysis on Justice Rebollo López's judicial philosophy, *see* Andrés González Berdecía & Alejandro Suárez Vincenty, *Análisis y Perfil Adjudicativo de los Jueces y de las Juezas del Tribunal Supremo de Puerto Rico: Francisco Rebollo López*, 80 REV. JUR. U.P.R. 107 (2011).

[25] *Castro García*, 20 P.R. Offic. Trans. at 822 (Rebollo López, J., dissenting).

[26] *Id*. at 828 (internal citations omitted).

The dissent quoted several statements made by American and Puerto Rican sponsors of the bill at the time of its enactment, including then-Governor Luis Muñoz Marín[27] and then-Resident Commissioner Antonio Fernós Isern, who respectively stated that Congress could unilaterally change the statute in the future, and that the Act would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris. The dissenting Justice also relied on the fact that Congress has continued to treat Puerto Rico differently from states of the Union for statutory purposes, a practice the United States Supreme Court has upheld,[28] pursuant to Congress's powers under the Territorial Clause of the United States Constitution.[29] The dissent found unpersuasive the majority's reliance on *Wheeler* since "*Puerto Rico has never enjoyed a*

[27] Luis Muñoz Marín (1898-1980) was the first democratically-elected Governor of Puerto Rico (1948-1964). In 1938, he founded the PDP as a center-to-left, pro-independence institution, which later abandoned both its leftist leanings and its independence stance in favor of the Commonwealth option. He is unquestionably one of the most important political figures in Puerto Rican history and will forever be associated with the creation of the Commonwealth. To get an idea of what he represents to pro-Commonwealth Puerto Ricans, an American would probably have to merge George Washington and Franklin Delano Roosevelt into one person. To most pro-independence Puerto Ricans, however, he may fairly be characterized as Puerto Rico's Benedict Arnold, with the title of most important political figure of the 20th century falling instead on pro-independence Nationalist Party leader Dr. Pedro Albizu Campos (1891-1965). Although statehood supporters did not have a similar "mythical" figure at that time, if they did, it would have to be Luis A. Ferré Aguayo (1904-2003), founder of the New Progressive Party (NPP) and the first pro-statehood Governor of Puerto Rico (1968-1972). Thus, as shall be seen throughout this Article, the reliance on Muñoz Marín's statements by pro-statehood judges in order to demonstrate the Commonwealth's lack of sovereignty is by no means a coincidence.

[28] *See, e.g.*, Harris v. Rosario, 446 U.S. 651 (1980); Torres v. Puerto Rico, 442 U.S. 465 (1979); Califano v. Torres, 435 U.S. 1 (1978).

[29] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

primeval sovereignty because . . . it was ceded by Spain to the United States and it is on that original condition that its relationship with the United States is based."[30]

In order to understand why a question settled almost three decades ago by both the Supreme Court of Puerto Rico and the First Circuit reached the United States Supreme Court during the October 2015 Term, historical background is necessary.[31] In November 2004, Anibal Acevedo Vilá won the governorship of Puerto Rico for the pro-Commonwealth PDP while the pro-statehood NPP obtained control of both houses of the legislature. During this four-year term, the Supreme Court of Puerto Rico went from having seven Justices to only four.[32] Almost a decade before Senate Republicans contemplated the idea of not having public hearings on a presidential nominee for the United States Supreme Court, their Puerto Rican NPP counterparts had already "successfully" employed the strategy in the Commonwealth with regard to not one, but three Supreme Court vacancies, with opposition Senator Jorge de Castro Font expressly stating, repeatedly and unapologetically, that no one who did not support statehood would be confirmed.[33] Unlike President

[30] Castro García, 20 P.R. Offic. Trans. at 832 (emphasis added).

[31] For further discussion regarding the changes to the composition of the court during this period and their impact on its case law, *see* Luis J. Torres Asencio, *Las elecciones y el Tribunal Supremo*, 80 GRADOS (November 9, 2012, 1:10 AM), http://www.80grados.net/las-elecciones-y-el-tribunal-supremo/ [https://perma.cc/3CVR-LEW2] (in Spanish).

[32] The Commonwealth Constitution states, "The Legislative Assembly shall establish a retirement system for judges. Retirement shall be compulsory at the age of seventy." P.R. CONST. art. V, § 10. Justice Baltasar Corrada del Río retired in 2005 after turning seventy years old, pursuant to the Commonwealth's constitutional requirement; so did Justice Francisco Rebollo López in 2008. Justice Jaime B. Fuster Berlingeri died from cardiac arrest in 2007.

[33] In a phrase now well-known in Puerto Rican popular culture, De Castro Font stated that the NPP would have a "banquete total" (literally translated as "total banquet," but more appropriately as "the whole meal"), meaning that the NPP would win the next elections and obtain control of the Executive, Legislature, and the Supreme Court. They did. De Castro Font, however, would not reap the benefits. In October 2008, he was

Obama, however, Governor Acevedo Vilá did not nominate a candidate. He lost the November 2008 election by a landslide[34] and Luis G. Fortuño Burset became Governor. As promised, the pro-statehood NPP quickly filled all three vacancies.[35] In addition, the only NPP-appointed Justice left on the "original" Court retired in 2010,[36] giving Fortuño the chance to appoint his fourth Justice in less than two years.[37] Thus, for the first time ever, the Supreme Court of Puerto Rico was not "controlled" by Justices appointed by the pro-Commonwealth PDP. But simple majority was not enough. In compliance with the Commonwealth's constitutional requirement that any increase in the number of seats to the Supreme Court be officially requested by the Court itself, the "new majority" did just that, and in 2011 Governor Fortuño nominated, and the Senate happily confirmed, his fifth and sixth Justices.[38]

Thus, in just four years, the Supreme Court of Puerto Rico shifted from a moderate-to-conservative pro-Commonwealth institution to a very-conservative pro-statehood one.[39] The effects were felt immediately, with the

arrested and indicted on thirty-two federal charges including fraud, extortion, bribery and money laundering, for which he was later convicted and sentenced to five years in prison and three years on probation.

[34] In March 2008, Acevedo Vilá was indicted on nineteen counts of campaign finance violations. Five more counts were added later. One month after the general elections, Judge Paul Barbadoro dismissed fifteen of the charges and in March 2009 a jury acquitted Acevedo Vilá of all remaining charges.

[35] Rafael L. Martínez Torres, Mildred G. Pabón Charneco, and Erick V. Kolthoff Caraballo took office in March 2009.

[36] Justice Efraín Rivera Pérez resigned effective July 31, 2010. He died in a motorcycle accident in September 2013.

[37] Edgardo Rivera García took office in August 2010.

[38] Roberto Feliberti Cintrón and Luis F. Estrella Martínez took office in May 2011.

[39] In November 2012, Alejandro García Padilla won the governorship for the PDP, which also regained control of both branches of the Legislature. Since that time, Chief Justice Federico Hernández Denton retired due to age in 2014 and was succeeded as Chief Justice by Associate Justice Liana Fiol Matta, who herself retired after turning seventy in early

"new Court" upholding the validity of every economic and social conservative policy adopted by the NPP administration, almost always over the dissent of the three suddenly-more-liberal pro-Commonwealth Justices.[40] It should have come as no surprise that issues relating to the nature of the political status between Puerto Rico and the United States would be looked upon differently by the Court, and that dissenting opinions like those espoused by pro-statehood judges Torruella and Rebollo López could become the law in Puerto Rico. Luis M. Sánchez Valle's attorneys were well aware of it.[41]

2016. Maite Oronoz Rodríguez was confirmed as Associate Justice in 2014 and later nominated and summarily confirmed (without public hearings) as Chief Justice in 2016. Ángel Colón Pérez succeeded her as Associate Justice in June 2016. Associate Justice Anabelle Rodríguez Rodríguez is now the only Justice on the court appointed prior to 2009. Because both Hernández Denton and Fiol Matta were appointed by PDP administrations, and have been succeeded by PDP appointees, the "balance of power" has remained the same.

[40] *See*, *e.g.*, Rivera Schatz v. Estado Libre Asociado de Puerto Rico, 2014 T.S.P.R. 122 (2014) (overruling Col. de Abogados de P.R. v. Schneider, 112 P.R. Dec. 540 (1982)); E.L.A. v. Nw. Selecta, 185 P.R. Dec. 40 (2012) (overruling R.C.A. v. Gobierno de la Capital, 91 P.R. Dec. 416 (1964)); Roselló Puig v. Rodríguez Cruz, 183 P.R. Dec. 81 (2011) (partially overruling Toppel v. Toppel, 114 P.R. Dec. 775 (1983)); E.L.A. v. Crespo Torres, 180 P.R. Dec. 776 (2011) (overruling among others, Sepúlveda v. Depto. de Salud, 145 P.R. Dec. 560 (1998); Aulet v. Depto. Servicios Sociales, 129 P.R. Dec. 1 (1991); A.C.A.A. v. Bird Piñero, 115 P.R. Dec. 463 (1984); Cartagena v. E.L.A., 116 P.R. Dec. 254 (1985); American R.R. Co. of P.R. v. Wolkers, 22 P.R. Dec. 283 (1915); Arandes v. Báez, 20 P.R. Dec. 388 (1914)).

[41] After the case ended in the United States Supreme Court, Sánchez Valle's attorneys from the Legal Aid Society ("Sociedad para la Asistencia Legal") stated publicly that they initially saw the case as one of civil rights only, and were "unaware" of its political ramifications until the Puerto Rico Solicitor General Office appeared before the Court of Appeals. That statement, however, should hardly be taken seriously. *See* José A. Delgado and Cynthia López Cabán, *Habita en suelo federal la soberanía de Puerto Rico*, EL NUEVO DÍA (June 10, 2016, 12:00 AM), http://www.elnuevodia.com/noticias/politica/nota/habitaensuelofederallasoberaniadepuertorico-2208796/ [https://perma.cc/S4ZR-ZJAP] (in Spanish).

B. The Case in Puerto Rico

1. The Court of First Instance

In September 2008, several complaints were filed against Sánchez Valle in Commonwealth courts for violations of the Puerto Rico Weapons Act, alleging that he illegally sold and transferred a weapon and ammunition.[42] In June 2010, Sánchez Valle asked the Court of First Instance to dismiss the charges against him because he had already been sentenced to prison, house arrest, and supervised release in federal court for the same acts for which he was being prosecuted in Puerto Rico. Like López Andino and Castro García before him, Sánchez Valle argued that his second prosecution constituted double jeopardy because the Commonwealth and the federal government were the same sovereign for double jeopardy purposes.[43]

While acknowledging in a single paragraph that *Castro García* held exactly the opposite,[44] the Court of First Instance nonetheless held that:

> [D]ue to historical reasons and reasons of political, social, judicial and constitutional reality, the doctrine of 'dual judicial sovereignty' does not apply to the controversy at hand. We believe that sovereignty or the source of power of Puerto Rico to prosecute its

[42] Judicial proceedings in Puerto Rico are conducted in Spanish. All quotations to judgments of the Court of First Instance and the Court of Appeals, as well as opinions of the Supreme Court, refer to the certified translations of such decisions included in the parties' joint appendix to the United States Supreme Court in *Puerto Rico v. Sánchez Valle*. Joint Appendix, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (No. 15-108) [hereinafter SVJA].

[43] *Id*. at 308a–09a.

[44] *Id*. at 319a–20a.

> citizens resides and emanates from the federal government through Congress.[45]

In closing, the court added that:

> [I]t cannot be concluded in any way that with the mere approval of an Insular Constitution (at the mercy of legislative action by Congress), Puerto Rico (which never had any degree of sovereignty throughout its historical trajectory), acquired a sovereignty similar to that of the States of the Union, which is the basis of their judicial sovereignty *vis-à-vis* the judicial sovereignty of the central federal government. *This is the current political, legal and constitutional reality between Puerto Rico and the United States of America. Regardless of what legal fiction may be formulated to state otherwise, no matter how many times it is enunciated or how well it may be disguised in jurisprudence, it will never cease to exist in its chimerical setting and become a reality*.[46]

These strong words came from a judge who was openly contradicting clear binding precedent from the highest court of his jurisdiction. The court felt no need to distinguish the case from *Castro García* or explain why that case was no longer good law. Instead, it mostly cited approvingly the understanding of sovereignty espoused in a law review article[47] and misleadingly suggested that one of the leading Criminal Law and Criminal Procedure scholars in Puerto Rico, professor Ernesto L. Chiesa Aponte, supported the court's venture into a question settled long ago in Puerto

[45] *Id*. at 321a.

[46] *Id*. at 324a–325a (emphasis added).

[47] *Id*. at 333a. *See also* Fermín Arraiza Navas, *Soberanía v. Soberanía Dual*, 25 REV. JUR. U.I.P.R. 645 (1991).

Rico.[48] The reason why the court was not worried about *stare decisis* should be apparent by now: there was a new Supreme

[48] Professor Chiesa merely stated the following:

> [T]he particular status of the Commonwealth raises passionate controversies regarding the applicability of the doctrine of dual sovereignty for purposes of the protection against double jeopardy, in the federal-insular context. Of course, when faced with a prosecution by another State, followed or preceded by a federal prosecution, the doctrine of dual sovereignty is applied. But when faced with a criminal prosecution under the laws of the Commonwealth, followed or preceded by a federal prosecution, the applicability of the doctrine of dual sovereignty will depend on the answer to the following question: [do] the criminal laws of the Commonwealth emanate from an independent sovereignty or, ultimately, from the federal government? This question has not been addressed—and will probably not be addressed—by the [United States] Supreme Court.
>
> . . . .
>
> Castro is not the last word regarding the applicability of the doctrine of dual judicial sovereignty to Puerto Rico; under the Fifth Amendment, the federal courts can rule otherwise, that is, as stated in the dissenting opinion. Additionally, it is also not clear whether Castro has the scope to interpret the Commonwealth's constitutional clause against double jeopardy and the barring of multiple prosecutions in Article 63 of the Penal Code, to deny protection in cases involving inter-jurisdictional (federal-state) prosecutions. On one hand, it can be said that what the Supreme Court had before it was a constitutional matter involving double jeopardy, basis of the appealed decision, and not a statutory matter under Article 63 of the Penal Code. On the other hand, it can be said that what is being appealed is the sentence and not its grounds, for which reason Article 63

Court in San Juan. Before getting there, however, Puerto Rico's intermediate appellate court would weigh in on the matter.

2. The Court of Appeals

The Court of Appeals unanimously reversed, although every member of the three-judge panel seemed to rely on somewhat different grounds. Through Judge Carlos Cabrera, the court held that Puerto Rico was a sovereign for double jeopardy purposes.[49] The appellate court extensively discussed *Lanza* and its progeny, as well as *López Andino*, but did not reopen the question or respond to any of the lower court's assertions, instead reciting what the Supreme Court of Puerto Rico held in *Castro García*, and applying it as binding precedent. Unlike the lower court's judgment, which referred to Puerto Rico as "the Island" and consciously talked about the "local" and "Insular" Constitution, the appellate court referred to Puerto Rico as "[o]ur country."[50]

Judge Teresa Medina Monteserín issued a short concurring opinion in which she acknowledged that *Castro García* controlled, but expressly asked the Puerto Rico Supreme Court to overrule the opinion and adopt Judge Rebollo López's dissenting position because, in her view, Puerto Rico remained "an unincorporated territory of the United States of America."[51]

> was implicitly rejected as basis to confirm the appealed decision.

ERNESTO L. CHIESA APONTE, DERECHO PROCESAL PENAL DE PUERTO RICO Y ESTADOS UNIDOS 429–30 (Tercer Mundo Limitada ed. 1991).

[49] SVJA, *supra* note 42, at 280a–81a (emphasis added) (internal citations omitted).

[50] In explaining the defendants' arguments, the court stated that they claimed that "[o]ur country continues to be an unincorporated territory of the United States of America." *Id*. at 279a. The practical political, and thus legal, relevance of referring to Puerto Rico as a nation or country will be addressed in Part IV *infra*.

[51] *Id*. at 284a.

Judge Troadio González Vargas filed an important "particular vote" that sets forth the pro-Commonwealth view. The judge humbly recognized at the outset that "the present legal controversy, though legitimate, is inevitably impacted or influenced by the omnipresent debate about the subject of the political status of Puerto Rico,"[52] adding that "the legal analysis of this controversy is inevitably intertwined with, and influenced by, the ideological debate surrounding the subject of the status, for which reason we cannot realistically separate both matters."[53] After his disclaimer, the judge argued in detail that, through the enactment of the Federal Relations Act in 1950 and the subsequent adoption of the Constitution of the Commonwealth in 1952, Puerto Rico ceased to be an unincorporated territory of the United States subject to Congress' plenary powers under the Territorial Clause, as previously decided by the United States Supreme Court; instead, with the consent of the People of Puerto Rico, Puerto Rico became a Commonwealth, meaning a distinct political entity, "sovereign" over matters not delegated to the United States through "a compact" of association. In plain terms, the judge claimed that Puerto Ricans exercised their right to self-determination as a nation under international law, and thus the source of the Commonwealth's criminal laws emanates from the People of Puerto Rico.

Therefore, the judge concluded that:

> It is legally unacceptable and contrary to the dignity of every Puerto Rican to argue that even the adoption of their criminal laws and the indictment for the violation of same are merely the result of gifts or graces by the people of the United States, as if we found ourselves in the times of the crudest colonial regime. We find it to be equally offensive to the dignity of the people of the United States to be accused of

[52] *Id*. at 286a.
[53] *Id*. at 287a–88a.

> such colonial brutality in the dawn of the [21st] century, and of being and acting as an international felon in front of the community of nations, in which they care to be regarded as a leader of international morality.[54]

The judge referred to Puerto Rico as "our country" and "a nation" on numerous occasions.[55]

3. The Supreme Court of Puerto Rico

As expected, the Supreme Court of Puerto Rico expressly overruled *García Castro*. Through Justice Martínez Torres, the pro-statehood majority concluded that "the Commonwealth of Puerto Rico is not a sovereign entity inasmuch as, being a territory, its ultimate source of power to prosecute offenses is derived from the United States Congress."[56] Thus, the court held that "a person who was prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts because that would constitute a violation of the constitutional protection against double jeopardy, as provided in the Fifth Amendment [of the United States Constitution]."[57]

The court explained that under *Grafton v. United States*,[58] a case decided almost one hundred years earlier, a territory of the United States is not sovereign for double jeopardy purposes. Instead, "a territory owes its existence wholly to the federal government, and its tribunals exert all their powers by authority of the United States."[59]

---

[54] SVJA, *supra* note 42, at 304a–05a.
[55] *Id*. at 286a–305a.
[56] *Id*. at 66a (emphasis omitted).
[57] *Id*. at 67a.
[58] Grafton v. United States, 206 U.S. 333 (1907).
[59] SVJA, *supra* note 42, at 23a (quoting *Grafton*, 206 U.S. at 354).

The majority also found support in *Wheeler*, where the United States Supreme Court reiterated that "City and State, or *Territory and Nation, are not two separate sovereigns*."[60] Unlike their predecessors in *Castro García,* who believed that the statements contained in *Puerto Rico v. Shell Co.*[61] were *dicta* "devoid of any legal basis and should be left to rest in peace,"[62] the new majority found them "[o]f particular importance" to the case before them. Although the new Puerto Rico Supreme Court did not refute the claim that this statement was *dictum*, the court nonetheless relied heavily on it, perhaps finding it too crucial to be ignored.

The majority also pointed out that other federal courts of appeals had refused to apply the dual sovereignty doctrine to United States territories.[63] In what it considered "an exercise of intellectual honesty,"[64] the court explained that in *United States v. Sánchez*[65] the Eleventh Circuit correctly applied *Shell Co.* as binding precedent when it held that Puerto Rico remained a territory of the United States for double jeopardy purposes, and thus not a separate sovereign, notwithstanding the fact that it directly conflicted with the First Circuit's holding in *López Andino*.

The court then got to the crux of its argument: the Insular Cases[66] declared Puerto Rico to be an unincorporated

[60] *Id.* at 24a (quoting *Wheeler*, 435 U.S. at 321) (emphasis added).

[61] Puerto Rico v. Shell Co., 302 U.S. 253 (1937).

[62] *Castro García*, 20 P.R. Offic. Trans. at 799.

[63] Gov't of Virgin Islands v. Dowling, 633 F.2d 660, 669 (3rd Cir. 1980), *cert. denied*, 449 U.S. 960 (1980) (asserting that the Territory of the United States Virgin Islands and the United States government constitute a single sovereignty for purposes of the clause against double jeopardy).

[64] SVJA, *supra* note 42, at 30a.

[65] United States v. Sánchez, 992 F.2d 1143 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

[66] For a comprehensive sociological and legal analysis of the Insular Cases and the history of the relationship between Puerto Rico and the U.S. by a pro-independence commentator, *see* EFRÉN RIVERA RAMOS, AMERICAN COLONIALISM IN PUERTO RICO: THE JUDICIAL AND SOCIAL LEGACY (Markus Wiener Publishers ed., 2009). For further discussion of the Insular Cases

territory, and neither the enactment of the Puerto Rico Federal Relations Act in 1950 nor the Constitution adopted pursuant to it in 1952 altered that constitutional reality. [67]

Decided by the United States Supreme Court in the early part of the 20th century, the Insular Cases deal with the "acquisition" of new lands by the United States following the Spanish-American War.[68] Although each case addressed a particular issue, commentators characterized the underlying question that needed to be settled by the Court as "whether the Constitution followed the flag." The answer was an

---

and Puerto Rican constitutional law, *see generally* JOSÉ J. ÁLVAREZ GONZÁLEZ, DERECHO CONSTITUCIONAL DE PUERTO RICO Y RELACIONES CONSTITUCIONALES CON LOS ESTADOS UNIDOS (2009).

For pro-Commonwealth commentators, *see* Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 REV. JUR. U.P.R. 946, 954 (2011); JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO (1980); *but see* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997). For pro-statehood commentators, *see* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE & UNEQUAL (1985); *see also* Gustavo A. Gelpí, *Los casos insulares: Un studio histórico comparativo de Puerto Rico, Hawái y las Islas Filipinas*, 45 REV. JUR. U.I.P.R. 215 (2011); Carlos Saavedra Gutiérrez, *Incorporación de jure o incorporación de facto: Dos propuestas para erradicar fantasmas constitucionales*, 80 REV. JUR. U.P.R. 967 (2011); Christina Duffy Burnett & A.I. Cepeda Derieux, *Los casos insulares: Doctrina desanexionista,* 78 REV. JUR. U.P.R. 661 (2009).

For a collection of essays on the Insular Cases from commentators of different ideological persuasions, *see* Gerald L. Neuman & Tomik Brown-Nagin, RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (2015).

[67] SVJA, *supra* note 42, at 33a–62a.

[68] *See* The Diamond Rings, 183 U.S. 176 (1901); Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 221 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901). *See also* Ocampo v. United States, 234 U.S. 91 (1914); Ochoa v. Hernández, 230 U.S. 139 (1913); Dowdell v. United States, 221 U.S. 325 (1911); Kopel v. Bingham, 211 U.S. 468 (1909); Kent v. People of Porto Rico, 207 U.S. 113 (1907); Trono v. United States, 199 U.S. 521 (1905); Rasmussen v. United States, 197 U.S. 516 (1905); Dorr v. United States, 195 U.S. 158 (1904); Kepner v. United States, 195 U.S. 100 (1904); González v. Williams, 192 U.S. 1 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903).

unequivocal "not necessarily." In *Downes v. Bidwell*,[69] the United States Supreme Court held that Puerto Rico had become a "territory" of the United States after the signing of the Treaty of Paris between the United States and Spain in 1898, coining a phrase forever ingrained in Puerto Rican legal culture: Puerto Rico belonged to, but was not a part of, the United States.[70] As such, Congress had "plenary power" over Puerto Rico, subject only to some basic principles "which are the basis of all free government."[71] Justice White's concurring opinion in *Downes* established what would later become the basic holding of the Insular Cases.[72] Under his view, there were two types of territories: Those that Congress intended to "incorporate" as part of the Union, in which the Constitution applied *ex proprio vigore*, and those that remained "unincorporated," in which the Constitution did not apply except for those provisions deemed basic or fundamental. Puerto Rico fell into the latter group. This situation did not change after Congress enacted a new organic charter known as the Jones Act in 1917,[73] by virtue of which Puerto Ricans became United States citizens.[74]

---

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

[70] *Id*. at 287 ("We are therefore of opinion that the island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not a part of the United States. . .") (emphasis added).

[71] *Id*. at 290–91.

[72] *Id*. (White, J., concurring). *See also* Balzac v. Porto Rico, 258 U.S. 298 (1922).

[73] Jones Act, ch. 190, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 731 (1987). For more on the effects of American citizenship in Puerto Rico, *see* EFRÉN RIVERA RAMOS, AMERICAN COLONIALISM IN PUERTO RICO, *supra* note 66, at 145–89. *See also* José Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978); JOSÉ TRÍAS MONGE, 1 HISTORIA CONSTITUCIONAL DE PUERTO RICO 70–110 (1981) (in Spanish); RAÚL SERRANO GEYLS, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO-DOCUMENTOS-JURISPRUDENCIA-ANOTACIONES-PREGUNTAS 467–70 (1986) (in Spanish).

[74] *Balzac*, 258 U.S. at 306 ("Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference.").

After relying on *Boumediene v. Bush*[75] for the proposition that "[d]espite the criticism of its disdainful and contemptuous tone towards the inhabitants of the territories, and of the obsolescence of much of the holdings of the Insular Cases, the core part of the doctrine has continued to be used,"[76] the Puerto Rico Supreme Court in *Sánchez Valle* turned to congressional history to show why the adoption of the Commonwealth Constitution did not change the territorial status of Puerto Rico.[77] The court extensively quoted then-Governor Luis Muñoz Marín's statements that Congress could unilaterally amend the Puerto Rican Federal Relations Act "if the People of Puerto Rico should go crazy,"[78] as well as then-Resident Commissioner Antonio Fernós Isern's assertions that the Act "would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris."[79] The majority also pointed out that the United States Supreme Court has continued to treat Puerto Rico as a territory after the creation of the Commonwealth,[80] in addition to the Executive Branch of the United States government.[81] Thus, the court concluded that there was unanimity among the three federal branches regarding this matter. At no point in its sixty-nine page opinion did the majority refer to Puerto Rico as a nation or a country.

---

[75] Boumediene v. Bush, 553 U.S. 723, 759 (2008) ("[T]he Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter").

[76] SVJA, *supra* note 42, at 40a.

[77] *Id*. at 41a–46a.

[78] *Id*. at 41a.

[79] *Id*. at 42a.

[80] *Id*. at 46a–59a.

[81] *Id*. at 59a–62a (citing The Presidential Task Force on the Status of Puerto Rico, http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Report_Espanol.pdf [https://perma.cc/LQ2J-7CZE] (in Spanish).

Then-Chief Justice Fiol Matta issued a lengthy concurring opinion,[82] which was joined by then-Associate Justice Oronoz Rodríguez. Perhaps the most consistently-liberal Justice to ever sit on the Supreme Court of Puerto Rico, Fiol Matta[83] concluded that double jeopardy applied "not because Puerto Rico lacks sovereignty to prosecute the petitioners,[84] but because under the circumstances of this case, doing so would violate the protection against double jeopardy that our [Puerto Rican] Constitution[85] guarantees them."[86] The Chief Justice adopted a view that no party or prior judge had advanced—and that the majority consciously avoided—by interpreting the Commonwealth's Double Jeopardy Clause more broadly than its federal counterpart in order to reject the application of the dual sovereignty doctrine.[87] This was a position that, if accepted by the majority, would have made the court's ruling unreviewable by the United States Supreme Court.[88] According to then-Chief

[82] The certified translation of Chief Justice Fiol Matta's concurring opinion contains one hundred and twenty pages. *See* SVJA, *supra* note 42, at 71a–190a. Although Fiol Matta was well-known for issuing long opinions, her concurrence in *Sánchez Valle* was the longest one in her twelve years on the Court.

[83] For an analysis on Justice Fiol Matta's judicial philosophy, *see* Ricardo Ortiz Morales & Michelle R. Robles Torres, *Figuras jurídicas en contexto: añálisis del discurso de la jueza Fiol Matta en la adjudicaciòn de controversias ante el Tribunal Supremo de Puerto Rico*, 80 REV. JUR. U.P.R. 11 (2011) (in Spanish).

[84] In Parts IV & IV of the opinion, the Chief Justice discusses in detail why she believes that it is well settled in both federal and Commonwealth courts that in 1952 Puerto Rico ceased to be a territory of the United States subject to the plenary powers of Congress. *Id*. at 116a–164a. Because her position regarding this matter does not relevantly differ from that espoused by Justice Rodríguez Rodríguez in her dissenting opinion, I will focus on the latter.

[85] P.R. CONST. art. II, § 11.

[86] SVJA, *supra* note 42, at 73a.

[87] The Chief Justice clarified that her view was not based only on the "so-called 'broader scope' of the Commonwealth Constitution," but on "an imperative resulting from the inviolability of the dignity of the human being" consecrated in the Puerto Rican Bill of Rights. *Id*. at 186a–87a.

[88] As stated in the opinion, several states have enacted statutes similar to Rule 1.10 of the Model Penal Code, which limits the authority of

Justice Fiol Matta, "[i]n its haste to undermine the spirit of our [Puerto Rican] Constitution and our efforts to affirm ourselves as a *nation*, the majority has ignored the actual controversy involved in this case: The fundamental inconsistency between the possibility of prosecuting an individual twice for the same criminal acts and the crucial guiding principle of Puerto Rico's Constitution, the inviolability of human dignity."[89]

The lone dissenter this time was Justice Anabelle Rodríguez Rodríguez.[90] Like she has done repeatedly since 2008, Justice Rodríguez Rodríguez issued a scathing dissent, stating at the outset that "[o]nce again, a majority of this [c]ourt hastens to overrule, on questionable grounds, firmly-established precedents of our legal system."[91] Also, just like the majority relied mostly on pro-statehood legal scholars, Justice Rodríguez Rodríguez relied heavily on pro-Commonwealth ones.[92] She claimed that the court's decision

---

a jurisdiction to prosecute a person for conduct for which he or she has already been prosecuted in another jurisdiction. *See* Comm. v. Mills, 286 A.2d 638, 643–644 (1971). Other states afford the same protection expressly in their Constitution, *see* MONT. CONST. art. II, § 25, or their highest court has recognized it as a state constitutional mandate. *See* State v. Hogg, 118 N.H. 262, 267 (1978).

[89] SVJA, *supra* note 42, at 73a (emphasis added).

[90] The author clerked for Justice Rodríguez Rodríguez during the October 2011 Term.

[91] SVJA, *supra* note 42, at 192a.

[92] In footnote 3, Justice Rodríguez Rodríguez states that "[t]here is no doubt that Mr. José Trías Monge, who presided this Court from April 19, 1974, to September 30, 1985, has been our most distinguished jurist." SVJA, *supra* note 42, at 193a. In footnote 24, the Justice refers to him as "the most eminent Puerto Rican jurist." *Id.* at 217a. Trías Monge's contributions as a judge and as a scholar are widely recognized and appreciated by the Puerto Rican legal community, and deservedly so. His contributions, like those of other commentators mentioned here, should not be diminished because of his known position on the status question; however, they should be contextualized. Though the conclusion that Trías Monge is "our most distinguished" or "most eminent jurist" is more-easily drawn by pro-Commonwealth scholars, it is fair to say that many other legal minds would also consider him the Puerto Rican John Marshall. And even Trías Monge himself referred to the Commonwealth as "the oldest colony in

was based "more on ideology than on law"[93] and expressly asked the United States Supreme Court to reverse it.[94]

The dissent accused the majority of engaging in "disconcerting historical revisionism,"[95]stating as follows:

> [T]here can be no doubt that the Court majority's objective is to advance its ideology on the status of Puerto Rico and has used, and will continue to use, legal opinions to do so. This, despite the fact that ideological campaigns are incumbent on the political process, not court decisions. With such an objective, the majority disregards the provisions of our Constitution, our laws, what the social wellbeing of *our Country* demands and even the provisions of the U.S. Constitution and the precedents of the U.S. Supreme Court. In short, nothing persuades, nothing matters to this majority, when arguments are inconvenient to certain ideological posture. It appears that the only thing that matters to them is achieving through [c]ourts what has not been achieved and should be done through the political process. That is, they are using the court's function as another mechanism to exercise political pressure to pursue their political ideologies, which conveniently translates into simplistic and out-of-context legal interpretations. In the process, all of our prior opinions regarding Puerto Rico constitutional framework are dismantled. To use this higher court for such purposes is profoundly anti-democratic and, therefore,

the world" after leaving the Court. *See* TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD, *supra*, note 66.

[93] SVJA, *supra* note 42, at 194a.

[94] *Id*. at 196a.

[95] *Id*. at 241a.

> notably and ironically anti-American. It contravenes fundamental notions of how politics should be done and, in the process, tarnishes the legitimacy of this Court. As I have stated before: What a shame![96]

Justice Rodríguez Rodríguez followed the traditional pro-Commonwealth vision relied upon by the Supreme Court of Puerto Rico in *Castro García* and the First Circuit in *López Andino*. In essence, she rejected that *Shell Co.* controlled, claiming that the statements contained therein were *dicta*[97] that could not apply to Puerto Rico after 1952 because it had ceased to be a territory belonging to the United States and instead had become a *sui generis,* "atypical" "sovereign entity,"[98] "at least, with regard to its internal affairs."[99] The dissent criticized the majority for adopting an "anachronistic" view of sovereignty[100] and questioned the validity of the "so-called Insular Cases,"[101] arguing that, with the consent of the Puerto Rican people, Congress "*relinquished* its plenary powers regarding Puerto Rico in what pertains to its internal affairs."[102] In what constitutes classic pro-Commonwealth legal parlance, Justice Rodríguez Rodríguez concluded that "*the Constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. Public Law 600 offered to the people of Puerto Rico a 'compact' under which, if the people accepted it, as they did, they were authorized to 'organize a government pursuant to a constitution of their own adoption*.'"[103]

---

[96] *Id*. at 241a–42a (emphasis added).

[97] *Id*. at 209a.

[98] On "atypicality," *see id*. at 215a, n.23.

[99] SVJA, *supra* note 42, at 239a.

[100] On "sovereignty", *see infra* Part IV; SVJA, *supra* note 42, at 219a–225a.

[101] *Id.* at 208a, n.16.

[102] *Id.* at 230a.

[103] *Id*. at 226a–27a, n.33 (quoting Figueroa v. People of Puerto Rico, 232 F.2d 615, 620 (1st Cir. 1956).

Unlike the majority, Justice Rodríguez Rodríguez referred to Puerto Rico as "our Country" on several occasions throughout her opinion; unlike Fiol Matta, she did not use the term "nation."[104]

C. The Case Before the United States Supreme Court

The Commonwealth filed its petition for Writ of Certiorari in the United States Supreme Court on July 15, 2015, which the Court granted on October 1, 2015. At that point, it was unclear what position the Obama Administration would assume in the case, if any. Though the federal government had occasionally stated in different contexts throughout the years that Puerto Rico remained a territory, as explained in the lower courts' decisions, not once since the creation of the Commonwealth had the Department of Justice unambiguously assumed that position before the Supreme Court, much less validated the Insular Cases. In fact, in *López Andino* the federal government took the opposite view when it asked the First Circuit to hold that Puerto Rico was a separate sovereign for double jeopardy purposes.[105]

That being the case, the people who believed that the federal government would adopt a similar position in *Sánchez Valle* should hardly be faulted for their view. On December 23, 2015, the United States filed an *amicus* brief in support of Respondents. Acknowledging that it was changing its prior position, the United States asserted that "[t]hose briefs do not

[104] In Part II, the dissent briefly dismissed Chief Justice Fiol Matta's argument that, although the Puerto Rico possessed sovereignty for double jeopardy purposes, the Commonwealth Constitution's Double Jeopardy Clause nonetheless barred the second prosecutions in the case. Justice Rodríguez Rodríguez concluded that "'[t]here is no basis to hold that the clause was given or should be given greater content' in the Puerto Rican constitutional order.'" *Id*. at 202a (quoting Ernesto L. Chiesa Aponte, *Doble Exposición*, 59 REV. JUR. U. P.R. 479, 480 (1990)).

[105] *See* United States v. López Andino, 831 F.2d at 1167–68 (1st Cir. 1987).

reflect the considered view of the Executive Branch."[106] Instead, the United States now argued that "[a]lthough Puerto Rico exercises significant local authority, with great benefit to its people and to the United States, Puerto Rico remains a territory under our constitutional system. Puerto Rico does not possess sovereignty independent of the United States, and its prosecutions cannot invoke the dual sovereignty doctrine under the Double Jeopardy Clause."[107] By a six to two vote, the Court agreed.[108]

In an opinion by Justice Kagan, the Court held that Puerto Rico and the federal government are the same sovereign for double jeopardy purposes "because the oldest roots of Puerto Rico's power to prosecute lie in federal soil."[109] The majority began by analyzing Congress's historical treatment of Puerto Rico. As most courts usually do, the Court focused on the various "organic acts" that Congress has enacted to rule over the island.[110] The story goes as follows: Puerto Rico became a United States territory following the Spanish-American War through the Treaty of Paris of 1898, when Spain "ceded" the island to the United States, "and tasked Congress with determining '[t]he civil rights and political status' of its inhabitants.'"[111] Congress then "established" a "civil government" in 1900 through what is commonly referred to as the Foraker Act.[112] Puerto Ricans became United States citizens in 1917 when Congress passed the Jones Act, which also "granted" additional autonomy.[113]

---

[106] Brief for the United States as Amicus Curiae Supporting Respondents at 32, n.6, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016) (No. 15-108) [hereinafter USAB].

[107] *Id*. at 34.

[108] Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016).

[109] *Id*. at 1868.

[110] *Id*. at 1884.

[111] *Id*. at 1868.

[112] *Id.*

[113] *Id*.

In 1947, Congress "empowered the Puerto Rican people to elect their own governor, a right never before accorded in a [United States] territory."[114] Then, through Public Law 600, in 1950 Congress "enabled Puerto Rico to embark on the project of constitutional self-governance," which ultimately led to the adoption of a Constitution drafted by the Puerto Rican people, and was later approved by both Congress and Puerto Rico.[115] That Constitution "created a new political entity, the Commonwealth of Puerto Rico—or, in Spanish, Estado Libre Asociado de Puerto Rico," which proclaims that the Commonwealth's power "emanates from the people and shall be exercised in accordance with their will, within the terms of the *compact* agreed upon between the people of Puerto Rico and the United States."[116] It took the Court three pages to explain more than 115 years of Puerto Rico-United States relations, after which it claimed to "leave the lofty sphere of constitutionalism for the grittier precincts of criminal law."[117]

The majority explained that "[t]o determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes,"[118] the Court asks a "narrow, historically focused question": "whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same

[114] *Sánchez Valle*, 136 S. Ct. at 1868.

[115] *Id*.

[116] *Id.* at 1868–69 (emphasis added).

[117] *Id*. at 1869.

[118] In the first footnote of the opinion, the Court stated that it had "no occasion to consider" whether the Double Jeopardy Clause "applies to Puerto Rico" "[b]ecause the parties in this case agree" that it does. *Id*. at 1885, n.1. As fascinating as that may sound, the Court seemed to forget that in 1976 it ruled that "that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico," hence inventing yet another "peculiar" doctrine applied to Puerto Rico, the "either-or doctrine." Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 600 (1976).

'ultimate source.'"[119] The Court then held that while both states and Indian tribes possess an independent source of sovereignty from the United States, the Commonwealth does not. In a sentence that will probably be added to the those Insular Cases phrases forever ingrained in Puerto Rican legal culture, the Court bluntly enunciated that "[t]he island's Constitution, significant though it is, does not break *the chain*,"[120] thus finally officially debunking one of the most commonly-held myths in Puerto Rico. Justice Kagan then concluded her opinion as follows:

> Puerto Rico boasts 'a relationship to the United States that has no parallel in our history.' And since the events of the early 1950's, an integral aspect of that association has been the Commonwealth's wide-ranging self-rule, exercised under its own Constitution. As a result of that charter, Puerto Rico today can avail itself of a wide variety of futures. But for purposes of the Double Jeopardy Clause, the future is not what matters—and there is no getting away from the past. Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U. S. Capitol—the Commonwealth and the United States are not separate sovereigns. That means the two governments cannot 'twice put' respondents Sánchez Valle and Gómez Vázquez 'in jeopardy' for the 'same offence.' We accordingly affirm the judgment of the Supreme Court of Puerto Rico.[121]

---

[119] *Sánchez Valle*, 136 S. Ct. at 1867.
[120] *Id*. at 1876 (emphasis added).
[121] *Id*. 1876–77 (internal citations omitted).

The majority went as far as to call "deeply disturbing" the dissent's argument that "it is difficult to . . . conclude that the tribes do possess this authority but Puerto Rico does not," rebutting that it has been settled for nearly two centuries that the tribes have "inherent authority."[122] Yet denying the same treatment to Puerto Rico, a community constituted politically decades before any of the original states had even been founded, did not disturb the Court.[123]

The Court never referred to Puerto Rico as a nation. The word colony was nowhere to be found in the opinion, except when the Court once referred to Puerto Rico as a *Spanish* colony that was "ceded" by Spain to the United States in 1898, fifty-four years before it supposedly evolved "into a constitutional democracy exercising local self-rule."[124] Conspicuously omitted, too, was the term "unincorporated territory" or any mention whatsoever of the Insular Cases, the very doctrine which the Court necessarily relied upon in order to so easily validate Congress's constitutional authority over Puerto Rico.

Justice Ruth Bader Ginsburg issued a concurring opinion, joined by Justice Clarence Thomas. Though she agreed with the majority in full, it appears that she would overrule the dual sovereignty doctrine recognized in *Lanza* "in a future case in which a defendant faces successive prosecutions by parts *of the whole USA*."[125] Justice Thomas filed a separate opinion concurring in part and concurring in judgment. He disagreed with the Court's "portions of the opinion concerning the application of the Double Jeopardy

[122] *Id*. at 1873, n.5.

[123] Perhaps Taíno descendants in Puerto Rico now have a better shot at sovereignty under American constitutional law than do Puerto Ricans themselves. According to traditional historical accounts, the Taínos were the native group that predominated in Puerto Rico (Borikén, as they called it) before and during the first centuries of Spanish conquest over the island.

[124] *Sánchez Valle*, 136 St. Ct. at 1868.

[125] *Id*. at 1877 (Ginsburg, J., concurring) (emphasis added).

Clause to successive prosecutions involving Indian tribes."[126] Thus, it appears that he would at least overrule *Wheeler* and its recognition of Indian tribe sovereignty for double jeopardy purposes.

Justice Stephen Breyer sided with the Commonwealth in a dissenting opinion, which was joined by Justice Sotomayor. He disagreed with the majority's conclusion that a historical inquiry would "reveal" Congress as the ultimate source of power in Puerto Rico, responding that the Court does not mean literally what it says because it does not trace the island's "source of power back to Spain or Rome or Justinian," just like it does not trace "the Federal Government's source of power back to the English Parliament or to William the Conqueror or to King Arthur."[127] Instead, Justice Breyer posits, several "historical considerations" suggest that, by virtue of Public Law 600 and the creation of the Commonwealth Constitution in 1952, Congress "determined that the 'political status' of Puerto Rico would for double jeopardy purposes subsequently encompass the sovereign authority to enact and enforce—pursuant to its own powers—its own criminal laws."[128]

III. *PUERTO RICO V. FRANKLIN CALIFORNIA TAX-FREE TRUST*: THE COMMONWEALTH'S PLEA TO GO BANKRUPT

A. The Commonwealth's Economic Struggle

For many decades, the Commonwealth was sold by its supporters as "the best of both worlds," a sort of Caribbean paradise with a healthy United States economy. Usually characterized as the "Vitrina del Caribe" (loosely translated as "The Caribbean's Window [to Latin America]"), the island served as a laboratory for American economic policies in the

[126] *Id*. (Thomas, J., concurring).
[127] *Id*. at 1878 (Breyer, J., dissenting).
[128] *Id*.

region decades before the Chicago Boys attempted the "Chilean Miracle" in the seventies.[129] By the early 1940s, the combination of the last presidentially-imposed American governor in Puerto Rico, liberal Rexford Tugwell, and the rise of the Washington-friendly Luis Muñoz Marín as leader of the newly-created PDP led to a series of New Deal policies in Puerto Rico known as the Chardón Plan.[130] Through the creation of many of the public corporations that remain in place today, the Puerto Rican government became the driving force behind the island's economy by providing both the necessary infrastructure and the actual jobs for a big part of the population. Although the Chardón Plan succeeded in providing better conditions for the Puerto Rican people, it was superseded in the 1950s by a different economic plan known as "Operación Manos a la Obra" (Operation Bootstrap).[131] This new strategy focused on incentivizing American private investment in Puerto Rico by providing tax exemptions like never before, so that companies would relocate to the island and create jobs. Combined with the creation of the Commonwealth and the massive wave of government-promoted emigration to the United States, mostly to New

[129] The Chilean Miracle refers primarily to the reorientation of the Chilean economy during dictator Augusto Pinochet's military regime based on economic liberalization and privatization of state-owned corporations, designed by a group of Chilean economists trained by Milton Friedman at the University of Chicago known as "the Chicago Boys." Since then, many economists continually describe it as the model to follow for economic growth in Latin America and elsewhere. *See* Bryce Breslin, *Chile: Democracy and the Chilean Miracle*, BERKELEY REV. OF LATIN AM. STUD., Fall 2007, http://clas.berkeley.edu/research/chile-democracy-and-chilean-miracle [https://perma.cc/CK9H-V8TV].

[130] Carlos E. Chardón Palacios was an influential Puerto Rican politician that held several important public positions during the period. He served as Administrator of Puerto Rico Reconstruction Administration, Chancellor of the University of Puerto Rico, and Executive Director of the Lands Authority, among others.

[131] The English name is said to have arisen from Luis Muñoz Marín's statements to Congress in 1949 that "[we] are trying to lift ourselves by our own bootstraps." *See Puerto Rico Constitution: Hearings H.R. 7674 and S. 3336 Before the H. Comm. on Public Lands*, 81st Cong. 1–32 (1950) (statement of Luis Muñoz-Marín, Governor of Puerto Rico).

York,[132] the economy and the atmosphere of prosperity certainly grew during the fifties, and did so quickly.[133]

Nothing exemplified the new economic mindset better than § 936 of the Internal Revenue Code.[134] Congress enacted § 936 in 1976 to give American companies an exemption from federal taxes on income, whether from operations or interests on local bank deposits, earned in Puerto Rico. Section 936's effects were felt immediately. Many important American chemical, electrical, and pharmaceutical companies moved to Puerto Rico to take advantage of the tax incentives and the low wages that they could pay to a skilled, college-educated workforce. The Commonwealth government could then use a local "tollgate tax" on the profits that these companies repatriated to the United States, thus strengthening its fisc. Indeed, for most of the second half of the 20th century, Puerto Rico enjoyed a standard of living relatively higher than many, if not most, Caribbean and South American countries.

By the 1990s, § 936 had become increasingly unpopular in Washington, with many suggesting that it was simply a way for big corporations to avoid paying taxes.[135] Almost all sectors in Puerto Rico recognized that § 936's repeal would have deleterious consequences on the island's economy and hence strongly opposed its elimination; but some favored

---

[132] Hence the term "Nuyorican" to refer to those Puerto Ricans born and raised in New York since then. Though the term may have been used pejoratively at some point, I do not believe that to be the case today, if ever.

[133] Scott Greenberg & Gavin Ekins, Tax Policy Helped Create Puerto Rico's Fiscal Crisis (June 30, 2015), http://taxfoundation.org/blog/tax-policy-helped-create-puerto-rico-s-fiscal-crisis [https://perma.cc/A5VD-RUHF].

[134] Puerto Rico and Possession Tax Credit, Pub. L. No. 94-455, title X, § 1051(b), 90 Stat. 1643 (codified as amended at 26 U.S.C. § 936 (2014)).

[135] *See* Larry Rohter, Puerto Rico Fighting to Keep Its Tax Breaks for Businesses, N.Y. TIMES (May 10, 1993), http://www.nytimes.com/1993/05/10/business/puerto-rico-fighting-to-keep-its-tax-breaks-for-businesses.html?pagewanted=all [https://perma.cc/BN7K-SAMY].

it anyway.[136] Even more prevalant than the criticism of § 936 as corporate welfare, was the call from pro-statehood Puerto Ricans to eliminate § 936 simply because it treated Puerto Rico differently than states. In 1996, President Clinton signed the Small Business Job Creation Act, which phased out § 936 over a period of ten years.[137] Puerto Rican subsidiaries of United States businesses became subject to the same federal corporate income tax as any other subsidiary in 2006.[138]

Since the phase out of § 936 and the signing of several important free-trade agreements between the United States and other nations, Puerto Rico's economy has fallen into a deep recession. The dominance of big American corporations in most industries suppressed any possibility of an autochthonous economy to fill the void after § 936's repeal. While the tax base became smaller, the Commonwealth government continued to issue debt in order to function. In 1917, Congress determined that Commonwealth municipal bonds could not be taxed by either federal, state, or territorial governments,[139] and investors kept buying them regardless of the island's financial downturn. According to official numbers, the Commonwealth's deficit for the 2013–14 fiscal year reached $650 million.[140] The combined deficit of the three main public utilities in fiscal year 2012–13 was approximately $800 million, and their overall combined debt reached $20 billion.[141]

In order to address this reality, in June 2014, the Puerto Rican Legislature enacted the Puerto Rico Public

[136] *Id.*

[137] Small Business Job Creation Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755.

[138] *Id.*

[139] Act of Mar. 2, 1917, ch. 145, § 3, 39 Stat. 953 (codified as amended at 48 U.S.C. § 745 (1917)).

[140] Brief for the Commonwealth at 5–6, Franklin Cal. Tax-Free Trust v. Puerto Rico, 805 F.3d 322 (2015) (No. 15-233).

[141] *Id.*

Corporations Debt Enforcement and Recovery Act,[142] which established a mechanism that would allow its public utilities to restructure their debt.[143] Creditors were not happy, and they challenged the statute in federal court the very day it was signed into law.[144]

B. The Case in Federal Court

1. The District Court

Two groups of investors holding nearly two billion dollars in bonds issued by the Puerto Rico Electrical Power Authority ("PREPA") filed separate suits against the Commonwealth, the Puerto Rico Government Development Bank ("GDB"), and several Commonwealth officials, seeking declaratory judgment that the Recovery Act was unconstitutional.[145] They argued, primarily, that § 903(1) of Chapter 9 of the Bankruptcy Code preempted the Recovery Act.[146]

The main issue can be simplified as follows: Congress enacted the Bankruptcy Code,[147] pursuant to its bankruptcy

---

[142] 2014 P.R. Laws Act No. 71 [hereinafter "Recovery Act"].

[143] Harvard Law Review, *Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71*, 128 HARV. L. REV. 1320, 1320 (2015).

[144] Franklin Cal. Tax-Free Trust v. Puerto Rico, 805 F.3d 322 (2015).

[145] *Id.*

[146] *Id.* at 324–25. Collectively, they also brought Contract Clause and Takings Clause claims, as well as challenges to the Recovery Act's provisions that allow stays of federal court proceedings when a public corporation files for debt relief under the Act. Although the district court reached the merits of these other claims, ruling mostly against the Commonwealth, the First Circuit did not address them in view of its holding on the preemption question. Because they were not part of the case before the United States Supreme Court, they are irrelevant for purposes of this article. *Id.*

[147] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. (2010)).

power under the Constitution.[148] The Code prohibits states from filing for bankruptcy.[149] Chapter 9 of the Code, however, allows states to authorize their "municipalities," i.e., political subdivisions, public agencies, or instrumentalities of a state, to restructure their debt under that chapter. Since the Bankruptcy Code was amended in 1984, the Code's general definition of "state" expressly includes Puerto Rico, "except for the purpose of defining who may be a debtor under Chapter 9."[150] Thus, it is undisputed that Puerto Rico's municipalities, including PREPA, are excluded from filing for bankruptcy under Chapter 9. The question is whether Puerto Rico's exclusion from Chapter 9 in 1984 means that Congress intended the Commonwealth to be able to "fill the gap" by creating its own debt-restructuring mechanism for its municipalities—as the Commonwealth argued—or whether Congress intended to prohibit Puerto Rico from authorizing Chapter 9 relief *or any other debt-restructuring mechanism*—as the plaintiffs argued.

The district court held that the Recovery Act in its entirety was void pursuant to the Supremacy Clause of the United States Constitution.[151] Judge Francisco A. Besosa concluded that, by enacting § 903(1), Congress expressly preempted state laws that prescribe a method of composition of municipal indebtedness that binds nonconsenting creditors.[152] Because § 101(52) of the Code provides that the term "State" includes Puerto Rico, and the Recovery Act would prescribe a method of composition of Commonwealth municipal indebtedness that would bind nonconsenting

[148] "The Congress shall have Power . . . [t]o establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

[149] 11 U.S.C. § 903(1) (2010).

[150] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421(j)(6) (codified as amended at 11 U.S.C. § 101(52) (2016).

[151] Franklin Cal. Tax-Free Trust v. Puerto Rico, 85 F. Supp. 3d 577, 583 (D.P.R. 2015).

[152] *Id.* at 596.

creditors, the court mechanically concluded that the statute could not survive.[153] According to the court, the case was not a close one.[154]

2. The First Circuit

The First Circuit unanimously affirmed the lower court's conclusion that § 903(1) of the Bankruptcy Code preempted the Recovery Act.[155] Through Judge Sandra L. Lynch, the majority explained that whether § 903(1) preempts the Recovery Act turns on whether the definition of "State" in the Federal Bankruptcy Code—as amended in 1984—renders § 903(1)'s preemptive effect inapplicable to Puerto Rico.[156] The court held that it did not.[157]

The court rejected what it deemed the Commonwealth's "structural argument" that § 903(1) could not itself preempt Puerto Rico laws because it is a proviso to a provision within a chapter that does not apply to Puerto Rico.[158] In the court's view, however, "[t]he terms of § 101(52) do not *exclude* Puerto Rico municipalities from federal relief; rather, they *deny* to Puerto Rico the authority to decide when they might access it."[159] But the appellate court did not stop there, also holding that conflict preemption principles would invalidate the Recovery Act regardless of whether § 903(1) expressly did so.[160]

The court continually emphasized Puerto Rico's constitutional status as a territory of the United States subject to Congress's plenary powers, something that it had

---

[153] *Id*. at 601.

[154] *Id*.

[155] Franklin Cal. Tax-Free Trust v. Puerto Rico, 805 F.3d 322 (1st Cir. 2015).

[156] *Id*. at 325.

[157] *Id*. at 337.

[158] *Id*. at 338.

[159] *Id*. at 343.

[160] *Id*. at 343–34.

been extremely reluctant to do since the creation of the Commonwealth. For example, it rejected the Commonwealth's claim that the canon of constitutional avoidance weighed against preemption in this case because that interpretation would raise a constitutional question under the Tenth Amendment, easily concluding that "the limits of the Tenth Amendment do not apply to Puerto Rico, which is '*constitutionally* a territory,' because Puerto Rico's powers are not '[those] reserved to the States' but those specifically granted to it by Congress under its constitution."[161] Thus, with unambiguous language supported by a subtle citation to Torruella's concurrence, the First Circuit seemed to signal that it, too, would have disregarded its holding in *López Andino* and held that the Commonwealth lacked sovereignty for double jeopardy purposes if the issue had reached the court again.

The court admitted that the legislative history was "silent as to the reason for the exception set forth in the 1984 amendment,"[162] yet had no trouble suggesting that the silence cut against the Commonwealth, speculating that:

> One apparent possibility concerns the different constitutional status of Puerto Rico. Because of this different status, the limitations on Congress's ability to address municipal insolvency in the states discussed above are not directly applicable to Puerto Rico. Accordingly, Congress may wish to adopt other—and possibly better—options to address the insolvency of Puerto Rico municipalities that are not available to it when addressing similar problems in the states.[163]

[161] *Franklin Cal. Tax-Free Trust*, 805 F.3d at 344–45 (citing *United States v. López Andino*, 831 F.2d at 1172 (1st Cir. 1987) (Torruella, J., concurring)).

[162] *Id.* at 337.

[163] *Id.* (internal citations omitted).

And to make matters clearer, the court added that their statutory construction:

> is consistent with a congressional choice to exercise such other options 'pursuant to the plenary powers conferred by the Territorial Clause.' If Puerto Rico could determine the availability of Chapter 9 for Puerto Rico municipalities, that might undermine Congress's ability to do so. Similarly, Congress's ability to exercise such other options would also be undermined if Puerto Rico could fashion its own municipal bankruptcy relief. The 1984 amendment ensures that these options remain open to Congress by denying Puerto Rico the power to do either.[164]

Judge Torruella again issued an important concurring opinion for purposes of this Article. He agreed that the Recovery Act contravened § 903(1) of the Bankruptcy Code and thus could not survive.[165] However, the concurring judge went much further, holding that the 1984 amendment, by which Puerto Rico was *included* as a "State" but *excluded* from Chapter 9 relief, was also unconstitutional—an argument that the Commonwealth did not have reason to advance because it was seeking to uphold the validity of its own statute and its municipalities never filed for Chapter 9 relief.[166] Thus, the pro-statehood judge would have applied federal law as it existed prior to the 1984 amendments to grant Puerto Rico the opportunity to allow its municipalities to participate in Chapter 9 proceedings. Like Chief Justice Fiol Matta in *Sánchez Valle*, the case was too significant for Torruella to simply agree with one side while leaving other important questions unanswered, even if it meant invalidating a federal

[164] *Id*. (internal citations omitted).
[165] *Id*. (Torruella, J., concurring).
[166] *Id*.

provision whose constitutionality no party directly challenged.

In the last part of his opinion, entitled "The 'Business-as-Usual' Colonial Treatment Continues," Judge Torruella accused the United States of engaging in blatant colonialism:

> The majority's disregard for the arbitrary and unreasonable nature of the legislation enacted in the 1984 Amendments showcases again this court's approval of a relationship under which Puerto Rico lacks any *national* political representation in both Houses of Congress and is wanting of electoral rights for the offices of President and Vice-President. That discriminatory relationship allows legislation—such as the 1984 Amendments—to be enacted and applied to the millions of *[United States] citizens residing in Puerto Rico* without their participation in the democratic process. This is clearly a *colonial relationship*, one which violates *our Constitution* and the Law of the Land as established in ratified treaties. Given the vulnerability of these citizens before the political branches of government, it is a special duty of the courts of the United States to be watchful in their defense. As the Supreme Court pronounced in *United States v. Carolene Products Co.*, "prejudice against . . . insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[167] I am sorry to say this special duty to perform a 'more searching inquiry' has been

[167] 304 U.S. 144, 152 n.4 (1938).

> woefully and consistently shirked by this court when it comes to Puerto Rico, with the majority opinion just being the latest in a series of such examples.
>
> When the economic crisis arose, after considering Congress's cryptic revocation of Puerto Rico's powers to manage its own internal affairs through the 1984 Amendments, Puerto Rico looked elsewhere for a solution. It developed the Recovery Act enacted pursuant to the police powers this very court had sustained, to fill the black hole left by the 1984 Amendments introducing of the definition now codified in § 101(52). And while I agree with the majority that Puerto Rico could not take this step because [C]hapter 9 applies to Puerto Rico in its entirety, I commend the Commonwealth for seeking ways to resolve its predicament.
>
> Even if one ignores the uncertain outcome of any proposed legislation, questions still remain: why would Congress intentionally take away a remedy from Puerto Rico that it had before 1984 and leave it at the sole mercy of its creditors? What legitimate purpose can such an action serve, other than putting Puerto Rico's creditors in a position that no other creditors enjoy in the United States? While favoring particular economic interests—i.e., Puerto Rico creditors—to the detriment of three-and-half million [United States] citizens, is perhaps 'business as usual' in some political circles, one would think it hardly qualifies as a

> rational constitutional basis for such discriminatory legislation.[168]

Though strongly denouncing colonialism, Torruella never referred to Puerto Rico as a nation, instead continually stressing the importance of safeguarding the rights of the "three-and-a-half million [United States] citizens residing therein."

C. The Case Before the United States Supreme Court

The Commonwealth filed its petition for Writ of Certiorari in the United States Supreme Court on August 25, 2015, which the Court granted on December 4, 2015. Even after the federal government filed its brief in *Sánchez Valle*, it was unclear which position the Obama administration would assume in this second case.

As it turned out, the Obama administration did not take a position. The Department of Justice did not appear before the Court as an intervenor or an *amicus* in favor of either party. Instead, while the case was briefed, argued, and submitted, the third branch of the federal government showed up. In April 2016, the Committee on Natural Resources of the House of Representatives[169] introduced "a Bill to establish an Oversight Board to assist the Government of Puerto Rico, including its instrumentalities, in managing its public finances, and for other purposes," called the Puerto Rico Oversight, Management, and Economic Stability Act

---

[168] *Franklin Cal. Tax-Free Trust*, 805 F.3d at 355–56 (emphasis added) (internal citations omitted).

[169] In yet another "peculiar" aspect of the relationship between Puerto Rico and the United States, the House Committee on Natural Resources is in charge of handling matters regarding the island. *See* STAFF OF H. COMM. ON NATURAL RESOURCES, Rule X of the Rules of the U.S. House of Representatives, 114th Cong., http://naturalresources.house.gov/about/jurisdiction.htm [https://perma.cc/D5KP-4CXA].

("PROMESA," quite insultingly).[170] After the Junta-imposing PROMESA was introduced,[171] many believed that the Court would delay issuing an opinion because the bill could moot the case if Congress passed any Chapter 9-like process.

In a strange "coincidence," the same day in which the Court decided *Sánchez Valle* to disperse any lingering doubts as to the Commonwealth's lack of sovereignty as a United States territory,[172] the House of Representatives passed PROMESA expressly relying on Congress's plenary powers under the territorial clause.[173] The Court decided *Puerto Rico v. Franklin California Tax-Free Trust* on the following scheduled opinion day, affirming judgment by a five to two vote.[174]

In an opinion by Justice Clarence Thomas, the Court found that "[t]he plain text of the Bankruptcy Code begins and

---

[170] Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (PROMESA), H.R. 4900, 114th Cong. (2016).

[171] Although it does much more than that, PROMESA imposes a fiscal control Board ("Junta de Control Fiscal"), whose members, unelected by Puerto Ricans, would have authority to rule over the island unrestricted by the Commonwealth Constitution. It is the first time that Congress has attempted to directly govern Puerto Rico's "internal affairs" since the creation of the Commonwealth. *Id*.

[172] On June 9, 2016, the author had the "privilege" of being present when the Court reiterated that Puerto Rico remained a territory subject to Congress's plenary powers during the morning and when the House used that plenary power to impose a Junta over "its property" during the afternoon.

[173] The Senate passed PROMESA on June 29, 2016.

See PROMESA, S. 2328, 114th Cong. (2d Sess. 2016). President Obama signed it into law the following day. *See* PROMESA, Pub. L. No. 114-187. On August 31, 2016, the President announced the members of PROMESA's Junta and thus single-handedly appointed Puerto Rico's new government: Andrew G. Biggs; José B. Carrión III; Carlos M. García; Arthur J. González; José R. González; Ana J. Matosantos; and David A. Skeel, Jr. The Junta became effective the next day. It met for the first time on September 30, 2016, in Wall Street, and elected José B. Carrión III as its president.

[174] Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938 (2016).

ends" the analysis.[175] Because the Code's definition of "State" includes Puerto Rico[176] and the Recovery Act is a statute prescribing a method of composition of indebtedness that may bind nonconsenting creditors, the Court concluded that the Recovery Act could not survive.

"By excluding Puerto Rico 'for purposes of defining who may be a debtor under Chapter 9,'" the majority explained, "the Code prevents Puerto Rico from authorizing its municipalities to seek Chapter 9 relief," "[b]ut Puerto Rico remains a 'State' for other purposes of Chapter 9, including that chapter's pre-emption provision."[177] "Had Congress intended to alter this fundamental detail of municipal bankruptcy," the Court asserted, "we would expect the text of the amended definition to say so. Congress, does not, one might say, hide elephants in mouseholes."[178]

The Court was not persuaded by the Commonwealth's structural argument that it would be "nonsensical" to hold that a provision contained in a chapter of the Code that "does not apply" to Puerto Rico nonetheless preempts one of its statutes. The Court replied saying that the argument "rests on the faulty assumption that Puerto Rico is, 'by definition,' excluded from Chapter 9" when "it is not."[179]

The Court never referred to Puerto Rico as a nation. Instead, it reiterated for the second time in five days what it had been reluctant to express clearly for decades: Puerto Rico remained a Territory of the United States uninterruptedly since 1898.[180] The term "colony" was also absent from the opinion. Judge Torruella's accusations of colonialism were

[175] *Id*. at 1946.

[176] 11 U.S.C. § 101 (2016).

[177] *Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1942.

[178] *Id*. at 1947 (brackets and internal citations omitted).

[179] *Id*. at 1941.

[180] *Id*. at 1945 ("The Third provision of the Bankruptcy Code at issue is the definition of 'State,' which has included Puerto Rico since it became a Territory of the United States in 1898").

simply ignored, just like his call to invalidate the 1984 simultaneous inclusion-exclusion of Puerto Rico for Chapter 9 purposes.[181]

Justice Sotomayor issued a dissenting opinion, which Justice Ginsburg joined. In their view, "[t]he structure of the Code and the language and purpose of § 903 demonstrate that Puerto Rico's municipal debt restructuring law should not be read to be prohibited by Chapter 9."[182] Read "in context," Sotomayor found, "Section 903 by its terms presupposes that Chapter 9 applies only to States who have the power to authorize their municipalities to invoke is protection" and "[b]ecause Puerto Rico's municipalities cannot pass through the § 109(c) gateway to Chapter 9, nothing in the operation of a Chapter 9 case affects Puerto Rico's control over its municipalities."[183]

Responding to the majority's assertion that "Congress 'does not, one might say, hide elephants in mouseholes,'" Sotomayor accused the Court of ignoring "that Congress already altered the fundamental details of municipal bankruptcy when it amended the definition of 'State' to exclude Puerto Rico from authorizing its municipalities to take advantage of Chapter 9" without even explaining why it did so.[184] In her view, then, it is undisputed that Congress *did* hide an elephant in a mousehole; the question is what it intended by doing so. "Finding pre-emption here," she concluded, "means that *a* government is left powerless and with no legal process to help *its* 3.5 million citizens."[185]

The dissent did not use the words "nation" or "colony" either, nor did it refer to those 3.5 million citizens as an insular minority of United States citizens who just so happen

[181] Franklin Cal. Tax-Free Trust v. Puerto Rico, 805 F.3d 322, 346 (1st Cir. 2015) (Torruella, J., concurring)

[182] *Id*. at 1949. (Sotomayor, J., dissenting).

[183] *Id*. at 1952,

[184] *Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1953.

[185] *Id*. at 1954 (emphasis added).

to inhabit an unincorporated territory belonging to the United States Congress. In fact, the term "territory" did not make it into Justice Sotomayor's opinion.

IV. SOLIDIFYING CONSTITUTIONAL COLONIALISM: THE INTERPLAY BETWEEN LEGAL FICTION AND SOCIAL REALITY

The combination of these two decisions illustrates perfectly why Puerto Rico remains a 21st century colony of the United States. Because of the unique test used in *Sánchez Valle* to determine whether a jurisdiction is worthy of recognition as a sovereign under the dual sovereignty doctrine, i.e., whether that jurisdiction derives its powers from the same ultimate source, the Court could not—or did not want to—adopt the "Puerto-Rico-is-kind-of-like-a-state" rationale that many courts usually employ to avoid the status issue. Instead, the Court directly addressed the great historical question and rejected the Commonwealth supporters' claim, stating as clearly as it ever has that "[t]he island's Constitution, significant though it is, d[id] not break the chain."[186] And because this is so, it was not difficult to predict that the Court would reject the Commonwealth's "Congress-could-not-possibly-have-intended-this" claim in *Franklin California Tax-Free Trust*. The Court's response was straightforward: Congress *could* and it *did* because Puerto Rico is a territory and as such is subject to its plenary powers. And that, through a bill that supersedes the Commonwealth's non-sovereign Constitution, Congress was already taking action to handle Puerto Rico's municipal debts.

If one adopts a more cynical (perhaps a "realist approach" would be more fair) view of the Court's way of deciding controversies, it is not difficult to understand the outcome of these cases. By telling Commonwealth supporters that they indeed fell for a "monumental hoax"[187] in 1952 in

[186] *Sánchez Valle*, 136 S. Ct. at 1867.
[187] *Figueroa*, 232 F.2d at 620.

Sánchez Valle, conservative Justices solidified Congress's power to do with the territories whatever it wants, while liberals expanded a constitutional protection for criminal defendants in Puerto Rico. Especially considering the position of the United States, a "government liberal" like Justice Kagan was not likely to vote differently; neither was a more "activist liberal" like Justice Ginsburg.

This view is buttressed by the concurrences: Justice Thomas would deny recognition as a sovereign to Indian tribes, as well, while Justice Ginsburg would overrule the whole dual-sovereignty doctrine altogether. Since oral argument, it was clear that Justice Sotomayor was sympathetic to the Commonwealth's argument. Though she could be characterized as much an "activist liberal" as Justice Ginsburg, she could not ignore the significance of the Court's reasoning over the Puerto Rican people's right to organize themselves as a political entity. Thus, criminal defendants' rights would have to suffer this time, even if one would expect her to join Justice Ginsburg if the Court ever revisited the dual-sovereignty doctrine. And Justice Breyer, perhaps the Court's quintessential "government liberal," also voted as one would have expected in the first case. As a First Circuit judge from 1980 to 1994,[188] no other Justice has dealt with more cases arising from Puerto Rico. During that period, then-Chief Judge Breyer certainly subscribed to what Torruella called the First Circuit's "long-lasting Commonwealth-endorsing caselaw."[189]

Once *the collective right of the People of Puerto Rico versus the individual rights of criminal defendants* dichotomy is taken out of the picture in *Franklin California Tax-Free Trust*, the Justices' votes are even easier to predict, notwithstanding Justice Scalia's departure and Justice Alito's

[188] Then-Chief Judge Breyer was succeeded by Judge Torruella.
[189] *Franklin Cal. Tax-Free Trust*, 805 F.3d at 346.

recusal from the case.[190] Conservatives voted to protect bondholders—the overwhelming majority of which are Americans—based on the statute's clear text; "government liberals" joined them because the law was simply too clear to ignore, even though the fiscal and economic consequences on the Puerto Rican people would be disastrous, thus implicitly siding with the conspicuously missing United States; and the more "activist liberals" dissented based on the statute's structure, context, and consequences over the people of Puerto Rico and in favor of creditors.

Analyzed together, *Sánchez Valle* and *Franklin California Tax-Free Trust* are two sides of the same ugly coin; two nails in the Commonwealth's coffin. Only because of the former's holding can the latter's holding be so easily reached. In other words, because the Court continues to view Puerto Rico as a mere possession of Congress subject to its plenary powers (cause), the fact that a federal statute expressly denied the Commonwealth the opportunity to do what any sovereign country or any state of the Union can, is legally irrelevant (effect).

To be sure, the Court did include seemingly Commonwealth-endorsing language in *Sánchez Valle*. For example, the Court stressed that "for double jeopardy purposes," it "asks a narrow, historically focused question" and that "[t]he inquiry does not turn, as the term 'sovereignty' sometimes suggests, on the degree to which the second entity is autonomous from the first or set its own political course."[191] It also stated that "[t]ruth be told . . . 'sovereignty' in this context does not bear its ordinary meaning"[192] and that "the

[190] It is widely believed that Justice Alito held Puerto Rico bonds and thus decided to recuse himself to avoid a conflict of interest. *See* Greg Stohr & Michelle Kaske, *Scalia, Alito Court Absences Shape Puerto Rico Debt-Relief Bid*, BLOOMBERG POLITICS (March 21, 2016), http://www.bloomberg.com/politics/articles/2016-03-21/scalia-alito-court-absences-shape-puerto-rico-debt-relief-bid [https://perma.cc/UK6X-RDPX].

[191] *Sánchez Valle*, 136 S. Ct. at 1867.

[192] *Id*. at 1870.

inquiry [despite its label] does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity"[193] and that "Puerto Rico today has a distinctive, indeed exceptional, *status as a self-governing Commonwealth*,"[194] even going as far as saying that "the United States and Puerto Rico have forged a unique political relationship, built on the island's evolution into a *constitutional democracy*."[195]

I do not doubt that some people will hang on to these remarks for the proposition that the Commonwealth is not yet dead, or that the Court could use them to resuscitate it by resorting to the usual "Puerto-Rico-is-sort-of-like-a-state" argument, should it be necessary in a future case. But the Court's and the United States government's actions speak louder than its words, and, in these cases, some words speak much louder than others.

What other questions need be answered before one can conclude that Puerto Rico is a colony of the United States, if one accepts, as the Court correctly concluded, that Puerto Rico's Constitution "[did] not break the chain"[196] or that its ultimate source of power "[lies] in federal soil"?[197] In what world can a jurisdiction be both a constitutional democracy and an unincorporated possession subject to the plenary powers of a legislative assembly in which that jurisdiction's members are not represented? Only in the fictional world of the Insular Cases.

Professor Efrén Rivera Ramos brilliantly explained that, through the Insular Cases, the United States Supreme Court created a new "discursive universe" in order to legitimize United States expansionism at the turn of the 20th

[193] *Id*.
[194] *Id.* at 1874 (emphasis added).
[195] *Id.* at 1868.
[196] *Id*. at 1876.
[197] *Sánchez Valle*, 136 S. Ct. at 1868.

century.[198] The same ideas of American superiority and White supremacy that gave us *Dred Scott v. Sandford*[199] and *Plessy v. Ferguson*[200][201] led the Court to construct a "legal identity" for "Porto Rico" and "its inhabitants" that never coincided with the island's social reality or that of its people.

In keeping with this legal fiction, the United States Reports would never reflect that the United States invaded Puerto Rico on July 25, 1898 to take military control of the island, after Spain allegedly bombed the U.S.S. Maine. Instead, they would state that, on December 10, 1898, Spain "ceded" *its* colonies—Puerto Rico, Guam, and the Philippines—to the United States in exchange for $20 million.[202] As Justice Kagan stated in *Puerto Rico v. Sánchez Valle*, the treaty that secured this deal also "tasked Congress with determining '[t]he civil rights and political status' of

[198] *See* RIVERA RAMOS, *supra* note 66, at 127.

[199] Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that black persons were not, and could never be, U.S. citizens because the Framers never considered them part of "the People of the United States," and that the federal government had no power to regulate slavery in the federal territories acquired after the creation of the United States) *superseded by* constitutional amendment, U.S. CONST. amend. XIII-XIV.

[200] Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the constitutionality of state laws requiring racial segregation in public facilities under the "separate but equal" doctrine), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[201] Several commentators have noted the correlation between Plessy and the Insular Cases. *See, e.g.*, TORRUELLA, *supra* note 66. Much less has been written, however, about the correlation between the Insular Cases and Dred Scott, which I believe is more enlightening. The latter not only spoke extensively about the territories, but its treatment of black people as property is more similar to the treatment of Puerto Rico as a mere possession, than is Plessy's separate-but-equal fiasco, on which pro-statehood commentators who conceive themselves as Americans like to rely. *See, e.g.*, *The Enduring Legacy of Plessy v. Ferguson in Puerto Rico*, PUERTO RICO REPORT (Feb. 7, 2013), http://www.puertoricoreport.com/the-enduring-legacy-of-plessy-v-ferguson-in-puerto-rico/ [https://perma.cc/9F4F-H7RL].

[202] *Sánchez Valle*, 136 S. Ct. at 1868.

[Puerto Rico's] inhabitants."[203] The fact that Puerto Ricans took no part in this real estate transaction did not matter.[204]

But because the United States could not have colonies, of course, what was a European colony one day magically turned into an "unincorporated territory" overnight. Its people would never be referred to as a Latin American nation, but as mere "inhabitants." Through the "territorial clause," which grants Congress power to "dispose of and make all needful Rules and Regulations respecting the Territory *or other Property belonging to the United States*,"[205] the Court would constitutionally legitimize the "acquisition" (by conquest and purchase) of "distant possessions"[206] and the political and legal subordination of the "alien races";[207] "alien and hostile people";[208] and "distant ocean communities of a different origin and language from those of our continental people"[209] that inhabited them.[210]

---

[203] *Id.* (quoting Treaty of Peace Between the United States and Spain, Spain-United States, art. 9, Dec. 10, 1898, 30 Stat. 1759 (1898)).

[204] Ironically, in order to assuage the Cuban independence movement, which was in the middle of its second Independence War against Spain, in 1897 the European power had "granted" the Carta Autonómica to both islands, under which Puerto Ricans had more representation in the Spanish legislative body than we have ever had in Congress. *See* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997).

[205] U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

[206] *Downes*, 182 U.S. at 282.

[207] *Id.* at 287.

[208] *Id.* at 308.

[209] *Balzac*, 258 U.S. at 311.

[210] Perhaps no one has explained the Court's treatment of Puerto Rico and Puerto Ricans in the Insular Cases more eloquently than the Attorney General of the United States in *Downes*:

> We must not forget that "territory belonging to the United States" is the common property of the United States and is to be administered at the common expense and for the common benefit of the States united, who jointly, as a governing entity, own it.

Not one Justice questioned the legitimacy of the exercise of United States sovereignty over Puerto Rico, even though they themselves recognized that Puerto Ricans had never consented to it. Instead, the original divide was between those Justices who would have "annexed" the acquired property completely, thus granting (never "imposing") the new "dependent peoples" all the protections of the Constitution, and those Justices who strongly feared the consequences of such action. Ultimately, the latter group won and the "unincorporated territory"—nowhere found in the Constitution—was invented. Justice Brown explained the Court's rationale as follows in *Downes*:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require

---

> Porto Rico [sic] and the Philippines were not won by arms and taken over by treaty through the effort or influence or at the expense of its inhabitants, but through the might of the United States, upon their demand and upon their contribution of $20,000,000 to Spain, and upon the assumption by treaty of solemn national obligations which the United States, not the islands or their inhabitants, are bound to observe and keep.
>
> The inhabitants of the islands are not joint partners with the States in their transaction.
>
> The islands are "territory belonging to the United States," not a part of the United States. The islands were the things acquired by the treaty; the United States were the party who acquired them, and to whom they belong. The owner and the thing owned are not the same.

See RIVERA RAMOS, *supra* note 66, at 114 (quoting *De Lima*, 182 U.S. at 102 (emphasis added)).

> action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.
>
> . . . .
>
> A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies toward large ones in others, the result of a successful war in still others, may bring about conditions, which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible, and the question at once arises whether large concessions ought not be made for a time that ultimately our theories may be carried out, and the blessings of a free government under the Constitution extended to them.[211]

Unfortunately, this legal fiction's "constitutive effect"[212] has not only gotten stronger over the years, but is also now the very "objective" source from which the Executive, Legislative, and Judicial branches continue to justify the exercise of American sovereignty over Puerto Rico.[213] Indeed, though the

---

[211] RIVERA RAMOS, *supra* note 66, at 112 (quoting *Downes*, 182 U.S. at 282, 286–87).

[212] *Id.* at 121–42.

[213] Professor Rivera Ramos referred to the Court's methodological approach throughout the Insular Cases as "instrumental eclecticism":

Court did not mention them, these are the shameful precedents that *Sánchez Valle* and *Franklin California Tax-Free Trust* implicitly, but necessarily, validate.

Even without express racial and imperialist statements, the Court's interpretation of Congress's treatment towards Puerto Rico in *Sánchez Valle* is patronizing and disrespectful to Puerto Ricans. Like their predecessors, the majority validated Congress's plenary power to do with Puerto Rico as Congress wishes, based on an international treaty in which Puerto Ricans took no part. Puerto Rico is still not a nation in the United States Reports. The Court was very careful when referring to the island and its members. It is still safer, both politically and legally, to resort to phrases like "People of Puerto Rico" or the "citizens residing therein" because the limbo that is the territorial Commonwealth does not clearly allow the unambiguous use of the terms "Americans" (although "American citizens" is accepted as a legal reality) or "Puerto Ricans" (as a distinct national community under international law as opposed to merely persons residing on the island) when referring to the inhabitants of this particular land.[214]

> The alternation from a predominantly instrumentalist and contextualized interpretative technique in the 1901 decisions to a largely formalist approach in the second group of cases and back to instrumentalism and contextualism in Balzac provides a picture of a strategy of interpretation that is, ultimately, profoundly instrumentalist. In effect, this strategy of contextual selection of interpretative techniques—evident in those shifts as well as in the intermingling of approaches within some of the opinions themselves—can best be described as instrumental eclecticism.

Id. at 108 (internal citation omitted).

[214] After all these years, it appears that the Court still treats Puerto Rico as "foreign in the domestic sense." CHRISTINA DUFFY BURNETT & BURKE MARSHALL, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1 (2001).

Absent from the Court's historical account in *Sánchez Valle* was that the island was under direct United States military rule from 1898 to 1900.[215] The Foraker Act of 1900 would later "establish" (not "impose") a civil government in which the United States President appointed the governor, the whole Supreme Court, and the upper house of the Legislature.[216] As the Court correctly pointed out, "[f]ederal statutes generally applied in Puerto Rico."[217] The fact that Puerto Ricans never consented to such colonial subordination is still irrelevant to the Court a century later.

Then came the Jones Act of 1917, by which "Congress *granted* Puerto Rico additional autonomy" and "gave" (not "imposed" onto) "*the island's inhabitants* United States citizenship" (without acknowledging any sort of Puerto Rican internationally-recognized citizenship) and "replaced the upper house of the legislature with a popularly elected senate."[218] Puerto Ricans took no part in this process either. And Puerto Rico would have to wait until 1947 to elect its own governor, when Congress magnanimously "empowered the Puerto Rican people to elect their own governor, a right never before accorded in a [United States] territory."[219]

Finally, the Court reached Public Law 600 of 1950 and the creation of the Commonwealth of Puerto Rico through the adoption of its Constitution on July 25, 1952, *exactly* fifty-four years after the United States Navy invaded Puerto Rico in

---

[215] To put things in perspective, the official military occupation of Iraq after Operation Iraqi Freedom in 2003 was followed by the establishment of the Iraq Interim Governing Council in 2004; less time than it took the U.S. military to establish a "civil" government in Puerto Rico in 1900. *See* KENNETH KATZMAN, CONG. RESEARCH SERV., RL31339, IRAQ: U.S. REGIME CHANGE EFFORTS AND POST-SADDAM GOVERNANCE (2004); Library of Congress, *Chronology of Puerto Rico in the Spanish-American War*, https://www.loc.gov/rr/hispanic/1898/chronpr.html [https://perma.cc/5D53-KAUS].

[216] *Sánchez Valle*, 136 S. Ct. at 1868.

[217] *Id.* (emphasis added).

[218] *Id.*

[219] *Id.*

1898.[220] Amazingly, the majority in *Sánchez Valle* somewhat endorsed the traditional Commonwealth-supporting discourse according to which Puerto Ricans supposedly consented, while rejecting its most basic premise: that it was an act of sovereignty through which the Puerto Rican nation engaged in a process of self-determination. Indeed, the Court had its cake and ate it too.

The truth is that many Puerto Ricans did not participate in what they recognized as a hoax that would not alter the island's legal subordination to Congress.[221] It is also true that the majority of Puerto Ricans who participated undoubtedly voted in favor of the Constitution, and thus the creation of the Estado Libre Asociado.[222] But what exactly did

[220] July 25 is a very significant date in Puerto Rican history: United States forces invaded Puerto Rico on July 25, 1898; the Commonwealth was created on July 25, 1952; and the Cerro Maravilla Massacre occurred on July 25, 1978. The Cerro Maravilla Massacre is the name given by the Puerto Rican public and media to the events that transpired that day at Cerro Maravilla, a mountain in Puerto Rico, wherein two young pro-independence activists were murdered in a police ambush. The event sparked a series of political controversies where, in the end, the police officers were found guilty of murder and several high-ranking local government officials were accused of planning and/or covering up the incident. *See* Laura Rivera Melendez, *Romero: Mistake to Call Police "Heroes" in Cerro Maravilla*, http://www.puertorico-herald.org/issues/2003/vol7n38/RomeroMistake-en.html [https://perma.cc/CE5L-7JDM].

[221] According to Report 82-1832 of the United States House of Representatives, 41.61% of registered voters did not participate in the March 3, 1952 plebiscite to adopt or reject the Commonwealth Constitution. H.R. REP. NO. 82-1832, at 1896 (1952).

[222] The PDP and the statehood parties then in existence called for their supporters to vote in favor of the adoption of the Constitution; the PIP called for a vote to reject it. Of those who participated, 81.88% voted in favor. Pedro Albizu Campos and the Nationalist Party called on their followers to abstain and had even organized an armed insurrection less than two years earlier in order to denounce what they already perceived as another colonial organic charter. As one would expect the United States government to do in those circumstances, the rebellion was quickly suppressed and its followers both prosecuted and persecuted. Thus, while the constitutional convention was taking place, not only did independence supporters boycott it, but many of their leaders were actually incarcerated.

they consent to? They consented to what the Commonwealth argued in *Sánchez Valle*, which the Court rejected. They consented to what they mistakenly believed was a [s]overeign creature unbound by Congress's plenary power to handle its internal affairs, not one that lacks sovereignty even to criminally prosecute its people; one that Congress can mistreat statutorily by denying its municipalities the ability to restructure their debts; or one over which Congress can impose PROMESA's undemocratic Junta notwithstanding its Constitution's text. And they consented under the impression that something different was going on. It was precisely that generalized mistaken understanding that moved the United Nations to remove Puerto Rico from the list of nations that had not exercised their right to self-determination under international law in 1953 at the behest of the United States and Commonwealth supporters.[223]

Puerto Ricans never freely consented to the Commonwealth as described by the Court. And even if that were not the case, it is undisputed that neither independence nor statehood was ever "offered" to the Puerto Rican people. Thus, to use the approval of the Constitution as an excuse to legitimize the exercise of American sovereignty over the

---

[223] José A. Delgado, Puerto Rico's Case Before the UN, EL NUEVO DÍA, http://www.elnuevodia.com/english/english/nota/puertoricoscasebeforetheun-2212546/ [https://perma.cc/Q5PK-NNEF]. Since 1953, independence supporters (and those who advocate for a sovereign Commonwealth) have continually asked the Decolonization Committee of the United Nations to intervene on the matter and to put Puerto Rico back on the "colonies list." So have a few statehood supporters, albeit they prefer to look to Congress for a solution. Meanwhile, the United States has done nothing. In what is truly unprecedented, as soon as the United States filed its brief in *Sánchez Valle*, and again after the Court issued its decision, Governor Alejandro García Padilla, an avid Commonwealth supporter of the most orthodox wing of the PDP, turned to the U.N. to denounce what he believed was a historical change of position by the United States in favor of pure colonialism. *See also* Andre Lee Muñiz, *Puerto Rico's Colonial Case in the United Nations*, LA RESPUESTA (Aug. 17, 2014), http://larespuestamedia.com/puerto-ricos-colonial-case-in-the-united-nations/ [https://perma.cc/QZ7T-3FAX].

island is quite fantastic, considering that the Commonwealth was nothing more than a take-it-or-leave-it offer that did not change Congress's authority over the island. Under those circumstances, should Commonwealth supporters—and Puerto Ricans in general—be faulted for preferring the enactment of a Bill of Rights and a Constitution that would *fictitiously* grant them a greater level of autonomy and stronger individual rights over the more-direct colonial regime of the Jones Act of 1917? One would hardly think so.

More importantly, even if those Puerto Ricans had happily consented to a non-sovereign, unincorporated territorial Commonwealth (i.e., a colony), it is truly mindboggling how said "compact"—and, again, the Court finally admitted that it was not—has been able to survive for more than six decades either under American constitutional law or under the most basic principles of human rights under international law. Puerto Rico is a colony not merely because Puerto Ricans, whether "foreign nationals" or "real Americans," have never in 118 years *procedurally* consented to such a degrading treatment in a congressionally-binding legal process,[224] but also because Puerto Rico, and Puerto

[224] Since 1952, Congress has not taken any action with regard to the status of Puerto Rico. During the same period, there have been four referendums on the island. The (mistakenly-believed [s]overeign) Commonwealth option won in 1967 and 1993. NPP Governor Pedro Rosselló González attempted his second referendum in 1998, this time leaving out the Commonwealth option that he believed colonial in nature. Commonwealth supporters sued and the Puerto Rico Supreme Court, still "controlled" by PDP-appointed Justices, ordered that a "None of the Above" fifth column be added to the options. Commonwealth supporters voted for that option, which was understood to be the (still-mistakenly-believed [s]overeign) Commonwealth, and won the referendum.

In 2012, NPP Governor Luis Fortuño passed yet another referendum, this time consisting of a two-part process: the first question asked whether one wished to maintain the island's territorial status (in which the "No" won) and the second question asked one to choose between statehood, independence, and a sovereign nation in free association with the United States (in which "statehood" received the most votes). As usual, Commonwealth supporters criticized the referendum as biased and did not acknowledge its results. After Sánchez Valle was decided, there has been

Ricans, are *substantively* subordinated to the United States. Federal regulations apply in Puerto Rico exactly as if it were a state of the Union, but Puerto Ricans do not vote for the President or the Vice President. The District Court for the District of Puerto Rico interprets and applies federal law over Puerto Ricans (except when they "do not apply") even though an Executive that they do not elect appoints their judges. Federal law applies today because Congress said so a century ago, notwithstanding the fact that Puerto Ricans do not elect Senators or Representatives; instead, we elect one "Resident Commissioner" who sits on the House of Representatives, but does not vote.[225] No court in 2016 should continue to constitutionally validate such a degrading colonial relationship under the guise that it was consented to by some.

V. BREAKING THE CHAIN: THE ROLE OF THE UNITED STATES SUPREME COURT

It is clear that the real problem underlying *Sánchez Valle* and *Franklin California Tax-Free Trust* is not merely Puerto Rico's lack of [s]overeignty to criminally prosecute or Congress's different statutory treatment towards the island under the Bankruptcy Code, but the degrading colonial relationship between Puerto Rico and the United States that allows such constitutional and statutory discrimination. The solution is just as easily identifiable: the chain must be broken. And Puerto Ricans must break it under international law, not Congress unilaterally or the Court under American constitutional law.

---

discussion within the PDP to propose still another internal referendum, this time to ask Puerto Ricans whether they want statehood, anticipating that a majority would answer no to that question. None of these plebiscites mean anything because none have ever been sanctioned by either Congress or international bodies, and neither the NPP nor the PDP have taken political action based on their results.

[225] The Resident Commissioner can vote in House committees, but not for the approval of the final legislation. Rules of the House of Representatives, 114th Cong., Rule III, § 675 (2015).

Since I too hold some truths to be self-evident, no extensive discussion is warranted here to explain why Puerto Rico is sociologically a nation.[226] It is "a nation without its own sovereign state,"[227] but a nation nonetheless. "More to the point, it may be described as a nation in a relationship of political subordination to a metropolitan state."[228] In other words, Puerto Rico is Cuba, not Guantánamo Bay Naval Base. The time has come for the Court to acknowledge this sociological reality so that the correct legal conclusions can finally follow logically from the annals of the United States Reports.[229]

---

[226] On this topic, I must again defer to Professor Rivera Ramos, who addressed it as follows:

> Nations do not have essences, in the sense of immutable constitutive traits. Nation is rather a sociocultural construct used to refer to certain collective phenomena, which usually consist of groups or communities of people with perceptible common characteristics and a sense among its members of belonging to the collectivity. Beyond that basic notion, there may be great disagreement over the nature of the common elements necessary for a nation to be said to exist. There may also be discrepancies regarding the weight that should be accorded to so-called objective and subjective criteria. The debate may be of an academic nature. But, as the case of Puerto Rico shows, it is also a political polemic in which participants take positions influenced by their preferred visions of the community's future.

RIVERA RAMOS, *supra* note 66, at 11 (internal citations omitted).

[227] *Id.* at 13.

[228] *Id.*

[229] On August 13, 2016, Puerto Rican tennis player Mónica Puig gave the Island its first-ever Olympic gold medal. Each victory she obtained in Río was followed closely and celebrated in Puerto Rico as a national holiday in and of itself. Immediately after winning her championship match, Puig stated as follows: "I think I united a nation." Puerto Ricans of all walks of life rejoiced that night. Later, thousands of Puerto Ricans filled the streets to welcome her at the airport upon her arrival and many more thousands skipped their jobs on a Tuesday to attend the official celebration prepared by the Government. Such a reaction to Puerto Rican athletic

Because this is so, the People of Puerto Rico must freely exercise their right to self-determination under the United Nations' Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (Resolution 1514(XV)).[230] Puerto Ricans must do what Spain and the United States have never legally allowed us to do and what

performances, a cultural phenomenon that is not new in Puerto Rico, is best understood as a consequence of our collective need to affirm ourselves as a nation. *See* Sandra Lilley, *"This is for Them": Monica Puig Wins Puerto Rico's 1st Olympic Gold*, NBC NEWS (Aug. 12, 2016, 7:58 PM), http://www.nbcnews.com/news/latino/them-monica-puig-wins-puerto-rico-s-1st-olympic-gold-n630156 [https://perma.cc/GM2Z-5LNN]; Lee Moran, *Puerto Rico Loses it As Monica Puig Wins Island's First-Ever Olympic Gold*, THE HUFFINGTON POST (Aug. 14, 2016, 4:36 AM), http://www.huffingtonpost.com/entry/monica-puig-puerto-rico-picapower_us_57b01d95e4b007c36e4f09d2 [https://perma.cc/62DE-6XFC].

It is fair to say that Puerto Ricans' response had to do more with sociology and politics than sports, especially because of remarks made during the Olympics by a former tennis player born and raised in Puerto Rico, Beatriz "Gigi" Fernández, about the Island's choice of flag-bearer, a black man born in the Dominican Republic. Fernández drew attention to herself by suggesting that those who criticized her decision to represent the United States in Barcelona 1992 and Atlanta 1996 instead of Puerto Rico were hypocrites if they supported Puerto Rico's flag bearer. Fernández won Olympic gold for the United States in women's doubles twice alongside Mary Joe Fernández, herself born in the Dominican Republic. She was heavily criticized for her decision not to represent Puerto Rico. Regardless of what one thinks about this issue, its relevance for purposes of this Article is that it illustrates how the status question affects almost all aspects of Puerto Rican society and supports the notion that most Puerto Ricans, including those who favor statehood, conceive themselves, both consciously and subconsciously, as something other than Americans.

[230] Eighty-nine nations voted in favor of Resolution 1514(XV) on December 14, 1960, none voted against, and nine abstained: Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, United Kingdom, and United States. Except for the Dominican Republic, then under the right-wing dictatorship of Rafael Leónidas Trujillo Molina, the rest of those countries that abstained were major colonial powers, including the United States. UNITED NATIONS, YEARBOOK OF THE UNTIED NATIONS, 1960, 49–50 (1961). *See also* Letter from President Eisenhower to Prime Minister Macmillan (Dec. 10, 1960), *in* Foreign Relations of the United States, 1958-1960, Western Europe, Vol. 8, Pt. 2, Document 384 (1993), https://history.state.gov/historicaldocuments/frus1958-60v07p2/d384 [https://perma.cc7ENU-R37T].

Commonwealth supporters incorrectly believed that happened in 1952: freely decide our future as a political community based on the [S]overeignty that we do possess as a nation but which has been legally denied for centuries. Congress's role, then, should be limited to determining whether it will really accept Puerto Ricans' will if we vote in favor of becoming a state of the Union or instead immediately recognize the Puerto Rican People's national sovereignty under international law. Whether that sovereignty is then employed to remain an independent country, as that term is ordinarily understood, or to reach a truly sovereign economic or political agreement between two nations, through an internationally-recognized treaty binding on both parties, is a matter for Puerto Ricans to decide later and for the United States to ponder if the latter is preferred.

But what can the Court do in the meantime, if anything? As stated above, it should attempt to move the law closer to sociological reality. It must recognize that Puerto Rico is a nation and that Puerto Ricans must decide their future, not Congress alone; that it was the Executive that unilaterally took control of the island; that it was Congress that unilaterally made Puerto Ricans American citizens; that it was the Court itself that invented the "unincorporated territory" in order to justify Congress's plenary (colonial) powers over "Porto Rico" and "its inhabitants"; and that Puerto Ricans have never consented to such ridiculous treatment. Thus, the Court must finally revisit the Insular Cases.

A harder question is what the Court should replace the Insular Cases with. Here, perhaps like on the national element, I part ways with statehood supporters like district Judge Gelpí and circuit Judge Torruella, to whom the answer is simple: treat Puerto Ricans "equally" to Americans by fully applying the Constitution. They have advocated for this "solution" in several ways, one of which is overruling the Insular Cases or at least modifying them to declare Puerto Rico an "incorporated" territory, something that many

commentators see as nothing more than a judicially-sanctioned path to statehood, in part because there has never been an incorporated territory that has not become a state.[231] In *Franklin California Tax Free-Trust*, Torruella also suggested that different treatment towards Puerto Rico should be subjected to some form of heightened scrutiny.[232]

Though I share their sentiment that the full application of the American Constitution in Puerto Rico is preferable to the who-knows-what-applies situation currently in place, under which the United States government both exercises its proclaimed sovereignty while it denies people who it determined were American citizens the full rights of the Federal Constitution, I believe the Court should decline such invitations. Their approach fails to acknowledge that many Puerto Ricans do not see themselves as Americans, nor do they want to. Thus, judicial "incorporation" in order to bring "equality" (again, with Americans) conveniently ignores that many Puerto Ricans want, just as fervently, "equality" (with the rest of the nations of the world, including the United States itself). Thus, the reasoning is as problematic as that of many liberals in Congress who see PROMESA as a way to help Puerto Rico, ignoring the fact that no political party on the island supported that measure because the creation of a small, undemocratic Junta over the Puerto Rican people is an insult. Like all the Justices in the Insular Cases, these proponents do not really take issue with the validation of the exercise of American sovereignty over Puerto Rico through a treaty in which Puerto Ricans never participated; they simply

---

[231] *See* Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22 (D. P.R. 2008) (holding that, in view of the historical relationship between the United States and Puerto Rico, the latter has become an incorporated territory); *but see* Igartúa-De la Rosa v. United States, 417 F.3d 145 (1st Cir. 2005) (en banc) (rejecting such a view over Torruella's dissent). *See also* Saavedra Gutiérrez, *supra* note 66 (advocating for the same).

[232] *Franklin Cal. Tax-Free Trust*, 805 F.3d at 354 (Torruella, J., concurring).

would have sided with the initial minority that would have applied the Constitution in its entirety.

Why such an approach would be less colonial in nature is beyond me. Differentiation is not discrimination. The problem with the Insular Cases is the legal subordination of Puerto Rico, not its recognition as something other than the United States; 500 years of history show that it is. To suggest that equality within the Union is the only way to treat Puerto Ricans with dignity under the law, and that courts should decide so, is disrespectful to the collective right of the Puerto Rican people to determine their future as a political community. Even Puerto Ricans who see themselves as Americans and would like the island to be the fifty-first state should not favor the imposition of a law to which Puerto Ricans never consented. Just like independence advocates should not try to infuse the non-sovereign Commonwealth with attributes of sovereignty that it clearly never had just to play republic, neither should statehood advocates just to feel they are in a state of the Union. Regardless, after the October 2015 Term, attempts to constitutionally equate Puerto Rico with states, either because of the passage of time or otherwise, seem less likely to succeed than ever before. As Justice Kagan eloquently stated for the Court, "there is no getting away from the past."[233]

Instead of moving the Court to judicially "incorporate" Puerto Rico more and more, I would instead suggest a much more modest approach if it ever revisits the Insular Cases. Besides dropping the euphemistic historical account unfortunately reiterated by the Court in *Sánchez Valle*, the Court should acknowledge that most of what was said in the Insular Cases is not really constitutionally-mandated, but invented at a time when the Court's members could not see beyond their bigoted ideas of American superiority and White supremacy. No deference should be given to those holdings. Whether an avowed originalist or a critic, no Justice should

[233] *Sánchez Valle*, 136 S. Ct. at 1876.

feel compelled to follow that doctrine, just like none would rely on *Dred Scott*'s or *Plessy*'s rationale or statements.

The Court should use its newly-found flexibility in order to address responsibly the complexity of trying to apply American law, both constitutional and statutory, to a jurisdiction whose members, whether Americans or not, have never consented to it; and especially consider whether it should have power to do impose it at all. It should not.

Unfortunately, fashioning a judicial remedy to this court-created conundrum is difficult. The Puerto Rican in me would ask the Court to invalidate everything pursuant to international law or American constitutional principles (Pub. Law 600 and the territorial Commonwealth; the Jones Act of 1917; the Foraker Act of 1900; and the Treaty of Paris of 1898 itself), under the basic principle that the United States cannot acquire nations without their consent and treat their people as second-class citizens for over one hundred years. On the other hand, the lawyer in me cannot find a more non-justiciable political question than the one considered in this Article.

There may be alternatives for the short term, but not very good ones. The Court could, for instance, expressly adopt some *Chevron*-like deference with regard to cases coming from Commonwealth courts.[234] At least Commonwealth judges are appointed and confirmed by persons elected by Puerto Ricans. In fact, the Court had granted so few cases from Puerto Rico over the last sixty years that one wonders whether it had already internally adopted such an approach.

But what to do with to the United States District Court for the District of Puerto Rico, whose judges are appointed by a President, and confirmed by Senators, the Puerto Rican

[234] *See* Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that courts must defer to an agency's reasonable interpretation of an ambiguous statute).

people do not vote for? And even if their decisions were not reviewable, should Commonwealth judges have to apply federal law, either constitutional or statutory, even though Puerto Ricans do not participate in the federal ("national," from an American perspective) political process? There is simply no way around it. Unless the Court rules that the United States government cannot exercise its unilaterally proclaimed sovereignty over Puerto Rico anymore, the solution must be political in nature. The Court should at least assure that the decision not be taken for the Puerto Rican People through a court of law, whether federal or territorial.

As a result of the island's territorial status and its validation through the Insular Cases, questions of the utmost importance will continue to be addressed and answered by courts, and then undemocratically applied to Puerto Rico without its People's consent or participation in the political arena. The most contentious questions in the United States, such as those dealing with abortion, gay marriage, campaign finance regulations, gun control, among many others, have already been answered for Puerto Ricans. Whatever federalism concerns are usually involved in those cases, they are minimal compared to the problems that their imposition creates in Puerto Rico, regardless of whether one likes the particular outcome or not. In Puerto Rico, they are not recognitions of individual rights, but acts of pure colonialism.

VI. CONCLUSION

The October 2015 Term will go down in history as the most significant one for Puerto Rico-United States relations in more than a century. The United States Supreme Court opted to address the issues presented in a constitutional case arising from the Commonwealth courts and a statutory case arising from the United States District Court for the District of Puerto Rico, the answer to which directly related to one's understanding of the nature of the political status between both nations. In doing so, the Court set in motion a series of unprecedented actions that illustrate, now more clearly than

ever, why Puerto Rico legally remains a 21st century colony of the United States.

Unless Puerto Rico exercises its right to self-determination under international law through a process that legally forces the United States government to either allow Puerto Ricans to decide whether they wish to become a state of the Union or recognize Puerto Rico's full national sovereignty—completely removing the island from Congress's plenary powers under the territorial clause of the Constitution—both Commonwealth and federal courts will struggle to define how to apply American constitutional principles to a jurisdiction whose members have not even decided whether they are Americans at all. Until that day comes, attempts to reconcile Puerto Rico's sociological reality with American federalism principles will continue to erode both American constitutionalism and the Puerto Rican People's right to decide their political destiny on their own, solidifying America's century-old constitutional colonialism over Puerto Rico.

Because it was the United States Supreme Court that invented the doctrine that unabashedly justified the legal discriminatory treatment of Puerto Rico while granting unlimited political power to Congress without questioning the legitimacy of American rule over the island in the Insular Cases, the Court should revisit this doctrine sometime in the future. When it does, however, it will have to deal with the repercussions of trying to decide *legal* questions that will produce obvious *political* repercussions over the Puerto Rican people. Whatever decision the Court ultimately makes to overturn one of the most shameful doctrines it has ever developed, it should be mindful that every single constitutional and statutory interpretation that it reaches based on American law will unavoidably constitute yet another act of colonialism when applied to a nation whose members have been denied participation and representation in the federation's and in the international community's political bodies.