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A Constitutional Theory of Territoriality: The Case of Puerto Rico

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A CONSTITUTIONAL THEORY OF TERRITORIALITY: THE CASE OF PUERTO RICO

JOEL COLÓN-RÍOS* & YANIV ROZNAI**

ABSTRACT

This Article offers an analysis of the relationship between Puerto Rico and the United States that, unlike most of the existing literature, goes beyond discussions of the jurisprudence of U.S. courts. It also avoids providing merely descriptive or justificatory accounts of the status quo. Using the tools of constitutional theory, we seek to describe the nature of what we call the "basic structure of territoriality," the way that structure reproduces itself, and the possibility of its replacement. The basic structure of territoriality, we argue, is comprised by ten fundamental legal rules and five principles. Although those principles are not legally enforceable, they inform in important ways the relationship between Puerto Rico and the United States. Whenever the island or the U.S. Government take any action that contradicts them, a tension underlying the basic structure of territoriality is brought to the surface—the tension between U.S. legal sovereignty over the island and Puerto Rican historical claims to political sovereignty. The Article concludes with a series of thought experiments that allow us to address the question of the identity of Puerto Rico's constituent subject. We argue that the answer to that question is not to be found in the fundamental legal rules of the relationship but, rather, depend on who is able to effectively (and unilaterally) replace the basic structure of territoriality. As of now, it seems that that entity is the U.S. Congress, whose power under the Territorial Clause of the U.S. Constitution would even allow it to "dispose" of the territory without the consent (and even with the objection) of Puerto Rico. That does not mean, however, that such a situation will (or should) continue indefinitely.

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I. INTRODUCTION

When lawyers examine Puerto Rico's territorial status, they usually focus on the jurisprudence of U.S. courts. They describe, for example, the development of the distinction between incorporated and unincorporated territories,[1] the extent to which the U.S. Constitution applies in the latter,[2] the effect of the extension of U.S.

[1] *See* Downes v. Bidwell, 182 U.S. 244, 287 (1901) (determining that "the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution"). For a recent discussion, see Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of 'Territorial Federalism*,' 131 HARV. L. REV. F. 65, 74 (2018).

[2] *See* Balzac v. People of Porto Rico, 258 U.S. 298, 312 (1922) (expressing that the U.S. Constitution "is in force in Porto Rico as it is wherever and whenever the sovereign power of

citizenship to Puerto Ricans in 1917,[3] or the place of the so-called *Insular Cases* in U.S. constitutional law.[4] Other works denounce the most dramatic interventions of the federal government in the island,[5] and some offer more or less justificatory accounts of the territorial relationship by providing novel ways of understanding it (some of the most recent attempts do so by developing concepts such as "compacted sovereignty,"[6] "territorial federalism,"[7] or "federacy"[8]). This Article's point of departure is that despite the many insights those types of analyses can bring to the understanding of the nature of a territory under U.S. law, they barely touch on the problem presented by territoriality. This is most clearly illustrated by the fact that no decisions of the U.S. Supreme Court, from *Downes*[9] to *Sanchez Valle*,[10] or any of the recent interventions of the United States in the regulation of the island's finances, has changed in any way the fact that the U.S. Congress has the power to legislate for the island. And *that* is the problem of territoriality or, to use more international terminology, this is why the territorial problem is a *colonial* problem. It is thus surprising to still see legal analyses of Puerto Rico's territorial status (particularly those that seek to defend slightly

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that government is exerted," but that not all of its provisions and limitations apply everywhere); *see, e.g.*, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 11–12 (Christina Duffy Burnett & Burke Marshall eds., 2001).

[3] *See* Balzac, 258 U.S. at 305 (determining that the extension of U.S. citizenship through the Jones Act did not have the effect of incorporating Puerto Rico into the U.S.).

[4] *See* Gerald L. Neuman & Tomiko Brown-Nagin, RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE xiii (2015); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JURÍDICA U.P.R. 224, 228 (1996); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 45 (1985); *see also* Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 YALE L.J.F. 312, 313 (2020).

[5] *See* Dean Delasadas, *La Promesa Cumplida [The Promise Fulfilled]: How the U.S. Constitution has Enabled Colonialism*, 67 CATH. U. L. REV. 761, 764 (2018) (arguing that "PROMESA is one of many examples of how Congress has wielded [its] power to treat the U.S. Territories as colonies and thereby betray the United States' democratic values").

[6] *See* Samuel Issacharoff et. al., *What is Puerto Rico?*, 94 IND. L.J. 1, 36 (2019) (arguing that the concept of compacted sovereignty "capture[s] the notion of subordination of Puerto Rico, but subordination entered into by virtue of an exercise of popular sovereignty").

[7] *Territorial Federalism*, 130 HARV. L. REV. 1632, 1653 (2017) (emphasis omitted) (arguing that the relationship has developed toward a status of territorial federalism which would require courts to "actively scrutinize congressional intervention in territorial self-governance").

[8] David A. Rezvani, *The Basis of Puerto Rico's Constitutional Status: Colony, Compact, or "Federacy"?*, 122 POL. SCI. Q. 115, 116–17 (2007) (arguing that Puerto Rico is a federacy, "a territory within the international legal boundaries of a state that has been allocated some entrenched (very difficult to take away) final decision-making powers without being a member unit of a federation").

[9] Downes v. Bidwell, 182 U.S. 244, 287 (1901).

[10] Commonwealth of Puerto Rico v. Sánchez Valle, 136 U.S. 1863, 1876–77 (2016).

reformed versions of the status quo) proceed as if the routine applicability of ordinary federal laws in the island, despite the lack of voting representation in the U.S. Congress, was only occasionally an issue. Consider the following passage, contained in a recent and sophisticated law review article on the subject:

> [Residents of Puerto Rico] are entitled to self-government yet cannot vote in elections for federal office in the United States, save in U.S. presidential primaries. But Puerto Ricans are U.S. citizens, and at the same time popularly elect their own governor and bicameral legislature to control local government. Puerto Ricans are holders of American passports, can enter the United States freely, and may establish residency and voting eligibility upon disembarking without customs or special legal barriers. The United States manages Puerto Rico's foreign affairs and defense, but Puerto Rico sends its own team to the Olympics. Puerto Ricans fight in the U.S. military and are represented by the federal government in the United Nations. Puerto Ricans pay no federal taxes yet are eligible for federal benefits, with twenty-four percent of the island's population currently drawing Social Security benefits, a higher percentage than almost any U.S. state. Indeed, prior to Hurricane Maria, nearly half the island's population was on Medicaid. More incongruous still is the application of federal economic regulations to Puerto Rico. Under the Jones Act, any shipping between U.S. ports must be on U.S.-flagged ships, which not only raises the cost of goods brought to Puerto Rico but also prevents the island from transitioning to natural gas . . . . The application of U.S. minimum wage laws to Puerto Rico results in labor costs roughly double those in Puerto Rico's Caribbean counterparts and has been estimated to reduce employment on the island by eight to ten percent.[11]

While all of those statements are accurate,[12] a reader unfamiliar with the nature of the territorial relationship would be forgiven for thinking that Puerto Rico enjoys a unique system of internal self-government (it has exactly the same as a U.S. state), that in virtue of some special arrangement the United States manages its foreign affairs and defense (there is no such special arrangement, the U.S. government plays exactly the same role in the island's "foreign affairs" and "defense" as it does with respect of North Dakota or Alabama),[13] and that for some historical reason U.S. minimum wage

[11] Issacharoff et al., *supra* note 6, at 6–7. The reader of that article has to wait until footnote 155 to learn "literally hundreds" of federal laws apply in the island. *Id.* at 26.

[12] The non-payment of federal income tax does not imply a lack of contribution to the federal treasury. *See* United States v. Vaello-Madero, 356 F.3d 12, 24 (1st Cir. 2019) (noting that "[t]he residents of Puerto Rico not only make substantial contributions to the federal treasury, but in fact have consistently made them in higher amounts than taxpayers in at least six states, as well as the territory of the Northern Mariana Islands. From 1998 to 2006, when Puerto Rico was hit by its present economic recession, Puerto Rico consistently contributed more than $4 billion annually in federal taxes and impositions into the national fisc.").

[13] The fact that the International Olympic Committee allows Puerto Rico to participate in this competition is of little or no relevance to understand Puerto Rico's territorial status, just as the fact that the European Broadcasting Union allows Australia to participate in the Eurovision song contest, although it is outside the European Broadcasting Area, is irrelevant to Australia's political status.

laws and some maritime trade requirements apply in Puerto Rico (the general rule is that, in addition to those U.S. laws that only apply to Puerto Rico, *all* U.S. federal laws apply in the territory as they do in the states).[14]

Our objective in this Article is to go beyond traditional jurisprudential, critical, and justificatory approaches of the territorial relationship and, instead, to provide a theoretical framework that identifies its main features, the way they relate to each other, and the manners in which they have been (and may be) challenged. We begin by identifying what we will call the *basic structure of territoriality*. That basic structure is comprised of a series of fundamental legal rules and principles whose violation or non-realization brings to the surface a tension that lies at the basis of the current territorial status. Every time that tension resurfaces, the colonial relationship is put under strain. The tension is this: Puerto Ricans have historically seen themselves as possessing ultimate authority over the island (an idea usually presented in terms of the right to self-determination), while the U.S. Congress exercises a seemingly unlimited law-making power over Puerto Rico in light of the Territorial Clause of the U.S. Constitution.[15]

Although these two perspectives are ultimately inconsistent with each other, they are able to co-exist because they operate in different conceptual spheres. That is to say, Puerto Ricans have historically claimed ultimate *political* sovereignty over the island; the U.S. claims *legal* sovereignty over it. Claims of Puerto Rican political sovereignty sometimes find their way into the legal system but are mostly made at the level of political discourse. The process that led to the creation of the Constitution of the Commonwealth of Puerto Rico in 1952, as we will see, is full of examples. Claims of U.S. legal sovereignty, on the contrary, are sometimes explicitly made at the level of U.S. constitutional law (in judgments and other official documents) but, more generally, are simply reflected in the territorial status itself, i.e., in the U.S. Congress' authority to create ordinary and constitutional law for the island.

In Parts II and III, we argue that the basic structure of the relationship between Puerto Rico and the United States is comprised of ten fundamental legal rules and five principles. In Part IV, we consider in more detail the distinction made above between claims to political and legal sovereignty. We also identify a number of governmental acts (some originating in the United States and others in Puerto Rico)[16] that, by failing

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[14] *See* United States v. Acosta-Martínez, 252 F.3d 13, 18 (2001) (noting that "the default rule for questions under the Puerto Rican Federal Relations Act is that, as a general matter, a federal statute does apply to Puerto Rico"). *See infra* Part II for examination of the rules establishing the application of U.S. laws in the island.

[15] U.S. CONST. art. IV, § 3, cl. 2 ("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; . . . ."). The U.S. Congress' law-making power is of course limited in different ways by the U.S. Constitution, and (barring a constitutional amendment) there are thus some types of laws that it would be unable to validly enact (whether for the United States, for Puerto Rico, or for any other territory). Those limits, however, are constitutional restrictions originating in U.S. domestic constitutional law that have little to do with United States-Puerto Rico relations.

[16] These are: President Truman's veto of the 1946 referendum law, the decision that the U.S. Federal Death Penalty Act applied in Puerto Rico, the holding of the 2012 referendum by the government of Puerto Rico, the U.S. Supreme Court's decision in Commonwealth of Puerto

to realize the principles that comprise the basic structure of territoriality, have brought the tension between political and legal sovereignty to the surface, and put the relationship under strain. By this, we do not mean that those acts will lead (or have led) to a decisive reaction (i.e., that the relationship will change or become unsustainable), but simply that the internal contradictions and injustices of the basic structure of territoriality become more visible. Building on this analysis, in Part V we consider some of the problems that would be present in an attempt to formally replace that basic structure. We do so by considering the place of constituent power (and the limits of constitutional change) in the context of the relationship between Puerto Rico and the U.S. through three thought experiments. Part V concludes.

II. THE BASIC STRUCTURE OF TERRITORIALITY

In comparative constitutional law, the idea of the "basic structure" is usually associated to a doctrine, developed in India in the 1960s and 1970s, according to which the power of the legislature to amend the constitution according to the established procedures does not include the authority to change the constitution's identity.[17] This approach has been applied various times in India to strike down constitutional amendments that violated basic features of the Indian constitutional order, such as the separation of powers, secularism, and judicial independence.[18] Since its appearance in India, the basic structure doctrine has migrated to various other countries such as Bangladesh, Pakistan, Kenya, Peru, and Slovakia.[19] Scholars have also considered the potential application of the basic structure doctrine at the U.S. state level.[20]

The main idea behind the doctrine is that there are some features that arise from a structural reading of a constitutional charter that are so tied to its identity that their abandonment would result in the creation of an entirely different constitution. In other words, the doctrine assumes that "every constitutional arrangement is based upon a set of core principles which cannot be changed and which can be regarded as intrinsic to its specific identity . . . . These superconstitutional provisions could be referred to as the genetic code of the constitutional arrangement."[21] It has been argued that the notion of the basic structure gives "coherence to the Constitution and make[s] it an

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Rico v. Sánchez Valle, the adoption of PROMESA, and the 2021 U.S. Department of Justice report on the Puerto Rican Self-Determination Act. *See infra* Part IV for discussion.

[17] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India).

[18] *See generally* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2d ed. 2011) (showing deep analysis of the basic structure doctrine in India).

[19] *See, e.g.*, Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, 61 AM. J. COMPAR. L. 657, 684–85, 694–96, 708–09 (2013).

[20] *See generally* Manoj Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441 (2014).

[21] Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, *in* HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 405, 428 (Carlo Fusaro & Dawn Oliver eds., 2011).

organic whole."[22] The unamendability of these core features (which, as noted earlier, usually include things such as the separation of powers, secularism, and judicial independence, but also the democratic form of government, and the recognition of certain rights and freedoms),[23] is sometimes seen as reflecting a decision to remain faithful to a particular constitutional identity.[24] These features can take the form of written fundamental rules (e.g., a rule prohibiting torture or requiring that all members of a legislature are elected), of principles implicit in fundamental rules contained in a constitutional text (e.g., the principle of the separation of powers), and they can also be expressly protected from the amending authority through an eternity clause.

The relationship between Puerto Rico and the United States has its own basic structure.[25] The purpose of this Part is to unearth the features that comprise it. This involves, first, the identification of the fundamental legal rules that regulate the relationship between the island and the United States and, second, the identification of the principles that are implicit in those fundamental legal rules and the manner through which they have been applied throughout history. The rules that regulate the territorial relationship are legally enforceable and establish prohibitions and authorizations that are either violated or complied with. The principles, in contrast, demand that the territorial system constantly moves in a certain direction but do not require a specific result.[26] Every now and then, the full realization of these principles is prevented by acts originating either in the United States or in Puerto Rico. As demonstrated in Part IV, the failure to respect those principles puts the current colonial

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22 Dietrich Conrad, *Basic Structure of the Constitution and Constitutional Principles*, *in* LAW AND JUSTICE: AN ANTHOLOGY 186, 199 (Soli J. Sorabjee ed., 2003).

23 Territorial integrity is often regarded as an essential feature included withing a constitution's basic structure. From a constitutional theory point of view, territory is one of the elements that make a state and is an important element of state authority. Sometimes the territorial integrity is even designed as an eternal or unamendable principle in the constitution. Consider Ukraine, for example. The Constitution of 1996 emphasizes the territorial unity of Ukraine and defines Crimea as an inseparable constituent part of Ukraine. UKRAYNSKA KONSTITUZIYA art. 135, cl. 2 & art. 157, cl. 1 (Ukr.). See Yaniv Roznai & Silvia Suteu, *The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle*, 16 GERMAN L.J. 542, 545 (2015) for discussion on how this unamendability plays in the context of the Crimea crisis. *See also* Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, 40 CARDOZO L. REV. 905, 942–43 (2018); Tom Ginsburg & Mila Versteeg, *From Catalonia to California: Secession in Constitutional Law*, 70 ALA. L. REV. 923, 935–36 (2019).

24 GARY J. JACOBSOHN, CONSTITUTIONAL IDENTITY 325–37 (2010).

25 The notion of the basic structure of the territorial relationship between Puerto Rico and the United States is related to, but should not be confused with, the "constitution" of the island, that is, the set of entrenched constitutional rules that actually regulate the exercise of power in the island that go well beyond the Constitution of 1952. *See* Joel I. Colón-Ríos, *The Constitution of Puerto Rico*, *in* THE OXFORD HANDBOOK OF CARIBBEAN CONSTITUTIONS 391–392 (Richard Albert et al. eds., 2020).

26 *See* Ronald M. Dworkin, *Model of Rules*, 35 U. CHI. L. REV. 14, 25–26 (1967) (arguing that rules "are applicable in an all-or-nothing fashion[,]" while a principle "states a reason that argues in one direction, but does not necessitate a particular decision").

relationship under strain, bringing to the surface the tension between legal and political sovereignty. The full abandonment of these principles—even if the abovementioned fundamental legal rules remain intact—would change the basic structure of territoriality and therefore result in either a more intense form of colonialism or in a successful exercise of self-determination.

A. Fundamental Legal Rules

The basic structure of the current territorial relationship between Puerto Rico and the United States is inseparable from a series of rules contained in various laws. The first of those is Public Law 600, adopted on 3 July 1950.[27] This was the U.S. law that authorized the island's legislature to call a "Constitutional Convention" that would draft a constitution subject to popular ratification by the Puerto Rican electorate. In Section 1, Public Law 600 established: "[F]ully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." Section 2 further added that it "shall provide a republican form of government and shall include a bill of rights." According to Section 5 of Public Law 600, the Jones Act of 1917,[28] with the exception of the provisions related to the structure of the island's internal government (which would cease to apply once the new constitution came into effect), would continue in force and would be referred to as the Puerto Rican Federal Relations Act (PRFRA).

One of the repealed provisions of the Jones Act was contained in Section 34: "All laws enacted by the Legislature of Porto Rico shall be reported to the Congress of the United States, as provided in section twenty-three of this Act, which hereby reserves the power and authority to annul the same." Although the U.S. Congress' power under Section 34 was never exercised (in contrast to the ultimate veto power granted by that section to the U.S. President over bills approved by the Puerto Rican legislature),[29] it was considered particularly problematic by some in Puerto Rico, to the point that, during the debates at the Constituent Convention (the phrase "Constitutional Convention" was translated to Spanish as "*Convención Constituyente*"), its repeal was presented by some delegates as evidence of a fundamental change in the territorial relationship. For example, Delegate Benjamín Ortiz argued that there were two aspects of Public Law 600 that suggested that the United States had transferred to Puerto Rico some "ingredients of sovereignty:" (1) the fact that "the [article of the PRFRA] that says that Congress has the power to derogate our laws has been specifically repealed;"

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[27] Act of July 3, 1950, Pub. L. No. 81–600, ch. 446, 64 Stat. 319. The territorial relationship did not start in 1950 but in 1898 with the signing of the Treaty of Paris by Spain and the United States. Treaty of Peace, Spain–U.S., Dec. 10, 1898, 30 Stat. 1754. See Colón-Ríos, *supra* note 25, at 392 for a recent account of the development of the relationship since 1898.

[28] Puerto Rican Federal Relations Act, Pub. L. No. 64–368, ch. 145, 39 Stat. 951 (1917). The Jones Act was an organic law adopted by the U.S. Congress that served as Puerto Rico's second written constitution since 1900 (when the Foraker Act was adopted). Puerto Rico Civil Code, Pub. L. No. 56–191, ch. 191, 31 Stat. 77 (1900).

[29] *See infra* Part V.

and (2) the fact that Public Law 600 states that it has been adopted "in the nature of a compact."[30]

Governor Luis Muñoz Marín, in his capacity as a Constituent Convention delegate, went further, arguing that given that the U.S. Congress had not exercised its powers under Section 34, "the colonial system had in practice ceased to exist a long time ago;" Public Law 600 merely transformed that reality into law.[31] Moreover, according to Muñoz-Marín, not only had the U.S. Congress failed to exercise those legal powers, but it was so clear that it would never do it (in light of the moral force of democratic considerations) that in reality it was as if they did not exist in law even before they were formally repealed.[32] However, among the provisions of the Jones Act that would continue to apply was Section 9, which stated: "[t]he statutory laws of the United States not locally inapplicable,[33] except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws . . . ."[34] The same was the case with the provision of the Jones Act that maintained that "all citizens of Porto Rico" who were not "citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States."[35]

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30 DIARIO DE SESIONES: PROCIDIMIENTOS Y DEBATES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO 528 (1961) [hereinafter DIARIO].

31 *Id.* at 1465–66.

32 *Id.* at 1466. Muñoz Marín can be understood here as describing what in the English constitutional tradition is known as a "constitutional convention" (i.e. a politically binding custom). If a custom had developed requiring the non-applicability of federal statutes in the island, the colonial character of the territorial relationship between Puerto Rico and the United States would have been greatly ameliorated: Puerto Rico would have had a status similar to British "dominions" during the first part of the 20th century. See Peter C. Oliver, *"Dominion Status": History, Framework and Context*, 17 INT'L J. CONST. L. 1173, 1173 (2020) for a discussion of the development of the "dominion status" under the British Empire.

33 The meaning of the phrase "locally inapplicable" in Section 9 of the PRFRA is not settled. In fact, there have been a number of scholarly attempts at developing tests that would significantly limit the number of federal statutes that apply in Puerto Rico. None of those attempts have been successful, and the reality is that most federal laws apply in the island, regardless of whether the U.S. Congress has expressly indicated so. *See* Jasmine B. Gonzalez Rose, *The Exclusion of Non-English Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497, 536 (2011) (explaining that "[t]here is no settled rule to determine whether a federal statute is locally inapplicable to Puerto Rico"); Elizabeth Vicens, Note, *Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350, 353, 363–64 (2005) (proposing a model of statutory interpretation that would require courts to consider whether there is an "overriding local interest that weighs against application" of a federal law in the island, and stating that "Puerto Rico has been treated as a state with respect to most federal laws.").

34 Puerto Rican Federal Relations Act, Pub. L. No. 64–368, ch. 145, 39 Stat. 951 (1917).

35 In 1952, the U.S. Congress passed legislation granting birthright citizenship to persons born in the island: "All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth." 8 U.S.C. § 1402.

Four key rules emerge from Public Law 600 (in combination with the PRFRA): (R1) Puerto Rico has the right to organize a government pursuant to their own constitution; (R2) the Puerto Rican government must be republican in form and be subject to a constitutional bill of rights; (R3) with the exception of internal revenue laws, U.S. federal laws, unless locally inapplicable, apply in Puerto Rico; and (R4) individuals born in the island are U.S. citizens. In addition to these rules, we also need to consider a series of provisions contained in the constitution adopted under the framework established by Public Law 600. These rules are not constitutive of the relationship but protect it. They take the form of an "eternity clause" required by the U.S. Congress as a condition for the entering into force of the Amendment Rule of the Constitution of 1952. A few months after the draft constitution was ratified by the Puerto Rican electorate, the U.S. Congress issued a resolution approving most of the text, but also requiring a number of changes.[36] The federal legislature, for example, refused to approve Section 20 of the Bill of Rights, which listed a series of (explicitly non-justiciable) social and economic rights.[37] It also required a change in the constitution's Amendment Rule: it would not have any effect until the following eternity clause was added (as Section 3 of Article VII):

> Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving the constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact[.]

The resolution also stated that the draft constitution would come into effect "when the Constitutional Convention of Puerto Rico shall have declared in a formal resolution its acceptance in the name of the people of Puerto Rico of the conditions of approval" established by the U.S. Congress.[38] The Constituent Convention reconvened on July 7th, 1952 to consider those conditions. A few days later, it issued its Resolution No. 34, accepting the changes required by the U.S. Congress. In the general election of November 1952, these changes were ratified by the electorate.[39] Regarding the modifications to the Amendment Rule, the resolution stated that "it was always understood by the people of Puerto Rico" that "amendments to the Constitution would have to be adopted in conformity with the fundamental provisions embodied in

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[36] Act of July 3, 1952, Pub. L. No. 82–447, ch. 567, 66 Stat. 327. Justice Breyer, in his dissent (joined by Justice Sotomayor), described these as "minor amendments" to the draft constitutional change. Puerto Rico v. Sánchez Valle, 579 U.S. 59, 87 (2016) (Breyer, J., dissenting).

[37] These rights were largely inspired in the Universal Declaration of Human Rights proclaimed by the U.N. General Assembly a few years earlier. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948). The U.S. Congress also determined that Section 5 of Article II would not come into force until a constitutional amendment was adopted so that it would be clear that a provision regarding compulsory education in public schools would not apply in those cases where education was being received in private institutions. Act of July 3, 1952.

[38] Act of July 3, 1952.

[39] Colón-Ríos, *supra* note 25, at 406.

the Compact agreed upon between the people of Puerto Rico and the Congress of the United States."[40] Importantly, the draft constitution already contained an eternity clause which prohibited the alteration of the republican form of government and of the Bill of Rights. That eternity clause, however, only applied to *amendments* (that is, proposals that originate in the ordinary legislature) and not to *revisions* (proposals that originate in a Constituent Convention called under Article VII).[41] In contrast, the U.S. Congress' mandated the eternity clause would also apply to a future Constituent Convention.

Three fundamental legal rules emerge from Section 3, Article VII of the Constitution of 1952: (R5) The power to reform the constitutional text, even when exercised by a Constituent Convention, is permanently subject to a series of material limits contained in the resolution approving the draft constitution and in Public Law 600 (those limits would prohibit, for example, the reinsertion into the constitutional text of the rejected social and economic rights provisions);[42] (R6) the content of the Constitution of 1952 must always be consistent with that of the U.S. Constitution; and (R7) the power to reform the constitution cannot be used to change any of the fundamental legal rules that regulate the relationship between the United States and Puerto Rico.[43]

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[40] *Id.* at 405.

[41] Puerto Rico's Constitution states:

> The Legislative Assembly may propose amendments to this Constitution by a concurrent resolution approved by not less than two-thirds of the total number of members of which each house is composed. [. . .] Each proposed amendment shall be voted on separately and not more than three proposed amendments may be submitted at the same referendum[;]
>
> The Legislative Assembly, by a concurrent resolution approved by two-thirds of the total number of members of which each house is composed, may submit to the qualified electors at a referendum, held at the same time as a general election, the question of whether a constitutional convention shall be called to revise this Constitution. [. . .] Every revision of this Constitution shall be submitted to the qualified electors at a special referendum for ratification or rejection by a majority of the votes cast at the referendum[;]
>
> No amendment to this Constitution shall alter the republican form of government established by it or abolish its Bill of Rights. Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, of the Eighty-first Congress, adopted in the nature of a compact.
>
> P.R. CONST. art. VII, §§ 1–3.

[42] The U.S. Supreme Court recently recognized this point: "Before giving its approval, Congress removed a provision recognizing various social welfare rights (including entitlements to food, housing, medical care, and employment); added a sentence prohibiting certain constitutional amendments, including any that would restore the welfare-rights section[.]" Puerto Rico v. Sánchez Valle, 579 U.S. 59, 64 (2016).

[43] P.R. CONST. art. VII, § 3.

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The final three rules to be considered legalize further the subordination of Puerto Rican law to federal laws and regulations and indirectly deprive Puerto Ricans of political rights at the U.S. federal level. They originate in the U.S. Constitution.[44] It is not entirely clear which exact provisions of the U.S. Constitution apply in the island, but among the ones which application is not in doubt is of course the Territorial Clause contained in its Article IV, Section 3: "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 . . . ."[45] It is often said that, in virtue of the Territorial Clause, the U.S. Congress has "plenary powers"[46] over the island, but this is only true in a manner of speaking. The U.S. Congress is a limited legislature, and there are certain types of laws that it is just not constitutionally allowed to adopt. For example, the U.S. Congress could not validly enact legislation establishing an official religion in the island or making it illegal to publish a newspaper in Puerto Rico.[47]

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[44] *See* Balzac v. Puerto Rico, 258 U.S. 298, 312 (1922) (holding that "[t]he Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted[,]" but that not all of its provisions and limitations apply everywhere). There are some provisions of the U.S. Constitution that may not apply in Puerto Rico in the same way they do in the states, but many of them do (as determined by U.S. federal courts in numerous cases). *See, e.g.*, In re Conde Vidal, 818 F.3d 765, 766 (1st Cir. 2016) (holding that the rights to due process and equal protection, as protected by the 14th and 5th Amendments, "have already been incorporated as to Puerto Rico[]"); Trailer Marine Transp. Corp. v. Rivera, 977 F.2d 1, 7 (1st Cir. 1992) (holding that "Puerto Rico is subject to the constraints of the Dormant Commerce Clause doctrine in the same fashion as the states[]"); Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 330–31 (1986) (examining the constitutionality of an Act of the Puerto Rican legislature in light of the First Amendment to the U.S. Constitution); Torres v. Puerto Rico, 442 U.S. 465, 471 (1979) (concluding that the Fourth Amendment's restrictions on searches and seizures apply in Puerto Rico); *see also* David M. Helfeld, *How Much of the U.S. Constitution & Statutes Are Applicable to the Commonwealth of Puerto Rico?*, *in* APPLICABILITY OF THE U.S. CONSTITUTION & FEDERAL LAWS TO THE COMMONWEALTH OF PUERTO RICO, 110 F.R.D. 449, 452 (1986).

[45] U.S. CONST. art. IV, § 3, cl. 2.

[46] In *Downes*, the U.S. Supreme Court (speaking through Justice Brown) expressed that the U.S. Congress' "general and plenary" power was limited by "certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." Moreover, the Court suggested (in obiter) that those constitutional prohibitions that "go to the very root of the power of Congress to act at all, irrespective of time or place" might have direct application in the island. Downes v. Bidwell, 182 U.S. 244, 268, 277, 280 (1901). Some years later in *Balzac*, the Court noted that "[t]he guarant[e]es of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico[.]" Balzac v. Puerto Rico, 258 U.S. 298, 312–13 (1922).

[47] *See, e.g.*, First Nat. Bank v. County of Yankton, 101 U.S. 129, 132–33 (1879) ("The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.").

What is clear, however, is that the U.S. Congress is able to do things to a territory that it would not be able to do to a state, such as discriminating against it as long as there is a rational basis to do so.[48] The applicability in the island of the Supremacy Clause (and, as a result, of the doctrine of preemption) is not in question either.[49] Finally, the constitutional provisions that relate to the election of the members of the U.S. House of Representatives (Article I, Section 2) and the U.S. Senate (Article 1, Section 3), as well as those related to the Presidential election (Article II, Section 1), mean that Puerto Ricans lack voting representation in the United States,[50] and do not participate in the election of the President. There are thus three more fundamental legal rules to add to our list: (R8) The U.S. Congress is not always required to treat Puerto Rico as a state; (R9) in virtue of the doctrine of preemption, laws adopted by the Puerto Rican legislature will be invalid when in conflict with federal laws; and (R10) Puerto Ricans living in the island lack full political rights in the U.S. political system.

B. The Principles of Territoriality

The distinction between rules and principles is well established in the literature. As Ronald Dworkin has written, "[r]ules are applicable in an all-or-nothing fashion."[51] Rules are legal directives that by their design require strict compliance. Questions about whether they have been breached demand a binary yes-or-no answer. "The maximum speed-limit in this road is 70 mph." This is a legal rule. It demands strict compliance, and it either is or is not violated. Principles, in contrast, are more general guidelines. They can be balanced against other principles and public interests and may

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[48] *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (holding that the lower level of reimbursement provided to Puerto Rico as compared to that provided to the states, under the Aid to Families with Dependent Children program, did not violate the Fifth Amendment's equal protection guarantee, and that the U.S. Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."); *see also* Califano v. Gautier Torres, 435 U.S. 1, 2–4 (1978) (reversing a district court decision holding that the denial of benefits under the Supplementary Security Income provisions of the Social Security Act to a former resident of Connecticut that moved to Puerto Rico violated his constitutional right to travel).

[49] U.S. CONST. art. VI, § 1, cl. 2; *see, e.g.*, Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 323 (1st Cir. 2012) (arguing under the Supremacy Clause that the laws of Puerto Rico are functionally equivalent to state laws, such that any Puerto Rico law "which interferes with or is contrary to federal law, must yield"); P.R. Dep't of Consumer Affs. v. Isla Petrol. Corp., 485 U.S. 495, 499 (1988) (holding that for preemption purposes, the laws of Puerto Rico are equivalent to state laws); *see also* Club Gallístico de P.R. v. United States, 414 F. Supp. 3d 191, 204 (2019) (holding that "Congress has the undeniable authority to treat the Commonwealth of Puerto Rico *uniformly* to the States" and that "[t]he source of this authority rests primarily in the Commerce Clause and Supremacy Clause and alternatively in the Territorial Clause"); Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 118 (2016) (holding that the Federal Bankruptcy Code preempted the recently adopted Puerto Rican bankruptcy law).

[50] Under Section 36 of the PRFRA, Puerto Rico has a non-voting "Resident Commissioner" who sits in the U.S. House of Representatives. Puerto Rican Federal Relations Act, Pub. L. No. 64–368, ch. 145, § 36, 39 Stat. 951, 963–64 (1917).

[51] Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977).

be realized in various degrees.[52] "Careful driving" is a principle that, in contrast to the previous rule, is more general, more abstract, and has semantic elasticity, meaning that it may be realized to different rates. Implicit in the ten fundamental legal rules identified above (and in the manner they have been applied throughout history) are five principles that, are important components of the relationship between Puerto Rico and the United States.

These principles are the following: (P1) the principle of autonomy; (P2) the principle of subordination; (P3) the principle of consent; (P4) the principle of passive U.S. citizenship; and (P5) the principle of progressive equalization. These principles, like the previously discussed fundamental legal rules, are part of the basic structure of territoriality but, unlike them, do not require a specific legal result. For example, while R9 requires a court to invalidate any Puerto Rican law in conflict with applicable U.S. legislation, P1 only demands that the actions of the U.S. Government move in the direction of respecting the island's autonomy. A decision running in the opposite direction to one of these principles (as long as it is made in accordance with the relevant legal procedures), would be perfectly valid. One may ask, then, what is the importance, and legal significance, of these principles? Why are they part of the basic structure of territoriality? Their main role, as we will see below, is to protect the continuing legitimacy of the status quo.

1. The Principle of Autonomy (P1)

The principle of autonomy means that there should be certain areas of social and economic life which are to be regulated by norms adopted by Puerto Rican institutions. In the words of the U.S. Supreme Court, Puerto Rico has been recognized to have a "degree of autonomy and independence normally associated with States of the Union[.]"[53] The abolition of the Puerto Rican legislature through federal legislation, for example, would amount to a radical rejection of this principle. The principle of autonomy has been informing the relationship between the United States and Puerto Rico since the very beginning, that is, since U.S. troops invaded the island in 1898.[54] At that time, a military governor was vested by the U.S. President with the power to legislate by decree.[55] Two years later, the previously mentioned Foraker Act was adopted, establishing a civil government in the island, which included an elected lower legislative chamber.[56] Seventeen years later the Jones Act was adopted, establishing a fully elected bicameral legislature.[57] In 1947, the Jones Act was amended in order

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[52] Robert Alexy, *On the Structure of Legal Principles*, 13 RATIO JURIS. 294, 295 (2000).

[53] Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976).

[54] Major General John R. Brooke, *General Orders Number 184*, *in* ANNUAL REPORT OF MAJOR GENERAL JOHN R. BROOKE, U.S. ARMY, COMMANDING THE DIVISION OF CUBA 1, 1–2 (1899).

[55] *Id.* at 2.

[56] Puerto Rico Civil Code, Pub. L. No. 56–191, ch. 191, § 27–28, 31 Stat. 77, 82 (1900).

[57] Puerto Rican Federal Relations Act, Pub. L. No. 64–368, ch. 145, § 25–39, 39 Stat. 951, 958–65 (1917).

to provide for the popular election of the Puerto Rican Governor.[58] And in 1952, through Public Law 600, the Puerto Rican legislature was authorized to call a Constitutional Convention and draft a new constitution.[59] The level of autonomy achieved in 1952 was enough to convince a majority at the UN General Assembly to vote in favor of the removal of the island from its list of Non-Self-Governing territories.[60]

2. The Principle of Subordination (P2)

The principle of autonomy, however, is in a constant tension with P2: the principle of subordination. According to the principle of subordination, the decisions of Puerto Rican institutions are ultimately subject to federal override.[61] This principle (implicit in R6 to R9) is reflected in the application of the Supremacy Clause of the Federal Constitution to the island, in the resolution of the U.S. Congress approving the Constitution of 1952, and in the limits that resolution placed on the potential content of the island's written constitution. The principle of subordination, by itself, would be consistent with the repeal by the U.S. Congress of Public Law 600 and the replacement of the Constitution of 1952 with a federal organic law.[62] But its interplay with the principle of autonomy (and the principle of consent, discussed below), means that such an action would be ultimately inconsistent with the basic structure of the relationship. The principle of subordination does not only empower the U.S. government to act in ways that contradict the decisions made by Puerto Rican institutions, but also requires Puerto Rican institutions to respect the authority of the federal government. For example, if the Puerto Rican legislature called a new Constituent Convention with the purpose of re-inserting into the Constitution of 1952 the provisions that were not accepted by the U.S. Congress, it would not have only acted ultra vires to the constitution's eternity clause but also contrary to the basic structure of territoriality.[63]

3. The Principle of Consent (P3)

Before discussing P3 in any detail, we should make clear that we are not arguing that the current territorial status is necessarily grounded on the consent of Puerto Ricans. As we will see in Part IV, it is increasingly clear that it is not. Moreover, the principle of consent is related to, but should not be confused with, another notion which was highly influential during the 20th century and that is now known as the

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[58] Act of Aug. 5, 1947, Pub. L. No. 80–362, ch. 490, § 1, 61 Stat. 770, 770–71.

[59] Act of July 3, 1950, Pub. L. No. 81–600, ch. 446, § 2, 64 Stat. 319, 319.

[60] G.A. Res. 748 (VIII), at 200 (Nov. 27, 1953).

[61] U.S. CONST. art. IV, § 3, cl. 2.

[62] There is an old debate about whether the U.S. Congress would legally abrogate the Constitution of 1952 (e.g. by simply repealing Public Law 600). As we will explain in Part V, even though the U.S. Congress could certainly do that as a matter of U.S. constitutional law, such an action would raise important questions about the place of constituent power in the context of the relationship between the United States and Puerto Rico.

[63] This point in fact was raised at the Constituent Convention. *See* DIARIO, *supra* note 30, at 3130.

"compact theory."[64] According to the compact theory, the relationship between Puerto Rico and the United States is based on an agreement: the U.S. Congress offered to authorize Puerto Rico to draft a new constitution (through the adoption of Public Law 600), and Puerto Ricans accepted that offer in a referendum.[65] As a result of that agreement, it is said, Puerto Rico ceased to be a U.S. colony and acquired self-governing powers.[66] This was the theory that U.S. and Puerto Rican officials successfully presented at the U.N. General Assembly in 1953.[67]

There is a considerable amount of literature devoted to debunking the compact theory by pointing to different times when the United States has intervened in the island's self-government.[68] That debunking is probably unnecessary. At the time of writing, as in 1900 and 1953, thousands of U.S. laws and regulations routinely apply in the island, and that is more than enough to show that any attempt to present Puerto Rico as a "self-governing" entity, compact or not, is simply a non-starter. Nonetheless, the compact theory does describe an important aspect of the basic structure of territoriality: many, if not the majority, of Puerto Ricans (e.g., status quo supporters and many, if not most, of supporters of annexation as a state to the United States) do not object to the operation of U.S. institutions in the island.[69]

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[64] *See, e.g.*, Jason Adolfo Otario, *Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum*, 27 FORDHAM INT'L L.J. 1806, 1848–53 (2004) (analyzing the compact theory between the people of Puerto Rico and the U.S. government).

[65] *Id.* at 1851.

[66] *Id.* at 1851–52.

[67] *See* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 121–24 (1997). When the United States government informed the U.N. Secretary General about its decision to cease the transmission of information about Puerto Rico under Article 73 of the U.N. Charter, it noted in the memorandum accompanying that communication:

> By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision. Those laws which directed or authorized interference with matters of local government by the Federal Government have been repealed.

Comm. on the Info. from Non-Self-Governing Territories, Cessation of the Transmission of Info.: Commc'n from the Gov't of the United States of Am. Concerning Puerto Rico, Annex II at ¶ 21, U.N. Doc. A/AC.35/L.121 (Apr. 3, 1953). Note that this statement, by itself, gives little indication of the continuing routine application of ordinary federal statutes in the island.

[68] *See, e.g.*, *The International Place of Puerto Rico*, 130 HARV. L. REV. 1656, 1656, 1659 (2017); Gerardo J. Cruz, *The Insular Cases and the Broken Promise of Equal Citizenship: A Critique of U.S. Policy Toward Puerto Rico*, 57 REV. DERECHO PUERTORRIQ. 27, 28–29 (2017); Torruella, *supra* note 1, at 67, 85.

[69] Issacharoff et al., *supra* note 6, at 2–3.

This idea, which we call the principle of consent, at first sight, may appear controversial. For example, recent attempts to condition the application of U.S. federal statutes on a territory on the specific consent of the people of the latter have failed or have been treated as non-binding.[70] It is, however, the reason why some still insist in the so-called compact theory: even if the United States has not always respected the principle of autonomy, and has lately interfered in dramatic ways in the economic and political life of the island, such interference is ultimately accepted (or at least tolerated) by a great number of Puerto Ricans.[71] Put differently, although compact theory should not be taken seriously, consent has played a role in the legitimation of colonialism in the island. Arguably, the willingness to consent to a relationship of subordination is, at least to some extent, related to the role that U.S. institutions play in the provision of social services in Puerto Rico and in responding to natural emergencies, even if the amount of these federal contributions frequently falls short to those received by U.S. states.[72]

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[70] Consider, for example, the Memorandum Opinion of the U.S. Office of Legal Counsel of the Department of Justice on a bill (the Guam Commonwealth Act) that contained the following provisions:

> In order to respect the self-government granted to the Commonwealth of Guam under this Act, the United States agrees to limit the exercise of its authority so that the provisions of this Act may be modified only with the mutual consent of the Government of the United States and the Government of the Commonwealth of Guam . . . . Except as otherwise intended by this Act, no Federal laws, rules or regulations passed after the date of this Act shall apply to the Commonwealth of Guam unless mutually consented to by the United States and the Government of the Commonwealth of Guam.

Guam Commonwealth Act, H.R. 100, 105th Cong. §§ 105, 202 (1997). The Memorandum maintains that: "The power of [the U.S.] Congress to delegate governmental powers to non-state areas thus is contingent on the retention by Congress of its power to revise, alter, and revoke that legislation. Congress therefore cannot subject the amendment or repeal of such legislation to the consent of the non-state area." Mutual Consent Provisions in the Guam Commonwealth Legislation, __ Op. O.L.C. Supp __, slip op. at 6 (July 28, 1994) available at https://www.justice.gov/file/163646/download. A provision requiring mutual consent before the amendment, or repeal on a "covenant" with a territory, was also included in the Covenant to Established a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America. Act of Mar. 24, 1976, Pub. L. No. 94–241, § 105, 90 Stat. 263, 264. In the previously mentioned Memorandum, it was suggested that such a provision is non-binding, a view reaffirmed by a recent report of the U.S. Department of Justice. *See* Puerto Rico Self-Determination Act of 2021, H.R. 2070, 117th Cong. (2021).

[71] Issacharoff et al., *supra* note 6, at 2–3.

[72] *See, e.g.*, Charley E. Willison et al., *Quantifying Inequities in U.S. Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, BMJ GLOB. HEALTH (Jan. 18, 2019), https://gh.bmj.com/content/4/1/e001191; Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH. U. J.L. & POL'Y 215, 218 (2017); Edwin Park, *Addressing Puerto Rico's Medicaid Funding Shortfalls Would Help Ensure Fiscal Stability & Growth*, CTR. ON BUDGET POL'Y & PRIORITIES (SEPT. 19, 2016), https://www.cbpp.org/research/health/addressing-puerto-ricos-medicaid-funding-shortfalls-would-help-ensure-fiscal.

Notwithstanding the above, from the perspective of P3, whether the territorial relationship actually benefits the island is beside the point, as is the fact that the territorial relationship began with a military invasion and has involved violence, human rights violations, and political repression.[73] What matters is that territoriality is perceived as legitimate by a significant part of the population.[74] The principle of consent, as seen in Part IV, has been recently undermined in important ways, to the point that the relationship may be becoming unsustainable. Nonetheless, it is still a key part of the basic structure of territoriality. Without it, the principle of subordination, and the territorial relationship itself, would appear as a transparent form of colonialism impossible to justify in the modern world. The principle of consent is also an important part of the reason why the creation of the Commonwealth of Puerto Rico in 1952 is seen by some contemporary observers as a democratically palatable, even if sub-optimal, political status.[75]

4. The Principle of Passive U.S. Citizenship (P4)

The distinction between passive and active citizenship was at one point pervasive in the public law of most, if not all, jurisdictions, even if not always identified with those terms. Passive citizens are those individuals who (at least in theory) possess certain civil rights against the state (e.g. freedom of religion, freedom of association, right to property), but lack full political rights (e.g. the right to vote and the right to run for an elected office).[76] Historically, passive citizens have included women, foreigners, domestic servants, indigenous peoples, the illiterate, and those who did not own enough property to be trusted with the well-being of the community.[77] Active citizens were those tax paying individuals considered the true members of the polity and therefore capable of participating in its administration.[78] Since the adoption of the

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[73] *See, e.g.*, Emilio Pantojas-Garcia, *The Puerto Rican Paradox: Colonialism Revisited*, 40 LATIN AM. RES. REV. 163, 165 (2005); RAMÓN BOSQUE-PEREZ & JOSÉ JAVIER COLÓN-MORERA, PUERTO RICO UNDER COLONIAL RULE: POLITICAL PERSECUTION AND THE QUEST FOR HUMAN RIGHTS 2 (2006); René Francisco Poitevin, *Political Surveillance, State Repression, and Class Resistance: The Puerto Rican Experience*, 27 SOC. JUST. 89, 89–90 (2000).

[74] Issacharoff et al., *supra* note 6, at 2–3.

[75] *Id.* at 23, 36. Issacharoff et al. goes as far as to describe the adoption of the Constitution of 1952 as a “constitutional moment” and refer to the island’s subordination as “subordination entered into by virtue of an exercise of popular sovereignty.”

[76] For a general discussion, see Bryan S. Turner, *Outline of a Theory of Citizenship*, 24 SOCIO. 189 (1990).

[77] See RAFFAELE ROMANELLI, HOW DID THEY BECOME VOTERS: THE HISTORY OF THE FRANCHISE IN MODERN EUROPEAN REPRESENTATION 21–25 (1998) for a historical discussion focused on Europe.

[78] See Rafe Blaufarb, *The French Revolution: The Birth of European Popular Democracy?,* 37 COMP. STUD. SOC. & HIS. 608, 611–12 (1995) for a discussion of the distinction between active and passive citizenship in 18th century France.

Jones Act in 1917, Puerto Ricans living on the island[79] have enjoyed passive U.S. citizenship (a fact reflected in the frequently used label "second class citizenship"):[80] Their civil rights are guaranteed by the U.S. Constitution largely to the same degree[81] as in U.S. states (and protected by U.S. federal courts), but they lack full political rights in the federal government.[82] The principle of passive citizenship mandates that while able to exclude Puerto Ricans from formally participating in U.S. politics, any systematic violation of their civil rights would be contrary to the basic structure of territoriality.

5. The Principle of Progressive Equalization (P5)

The principle of progressive equalization emerges not so much from any specific legal document, but from the way the territorial relationship has developed since 1898. The principle holds that any major differentiation between the U.S. states and Puerto Rico to the detriment of the latter is to be avoided.[83] The principle, to be sure, does not require an absence of differentiation: the entire territorial relationship is based on the inequality between the island and the United States. But such inequality has been progressively reducing since 1898, to the extent that some scholars think that the island has for a long time "functionally mimicked a state."[84] By 1952, Puerto Rico, like states of the United States, could elect their own governor and their own legislative assembly, and had an internal constitution that entrenched the same type of

[79] Individuals born in Puerto Rico that later move to a U.S. state enjoy the full rights of citizenship. 8 U.S.C. § 1402.

[80] Nelson D. Hermilla, *Puerto Rico 1898-1998: The Institutionalization of Second Class Citizenship*, 16 DICK. J. INT'L L. 275, 278 (1998) (arguing that "island inhabitants are second class citizens that do not have a voting representative in the United States and cannot vote for the President"); Emilio Pantojas-García, *The Puerto Rican Paradox: Colonialism Revisited*, 40 LATIN AM. RES. REV. 163, 170 (2015) (referring to "the paradox that lies behind the status of Puerto Ricans as second-class citizens" as "grounded on the ethno-juridical and cultural assumptions that framed American imperialism in 1898"); DIARIO, *supra* note 30, at 533–36, 1440.

[81] Balzac v. People of Porto Rico, 258 U.S. 298, 309–12 (1922) (explaining the right to trial by jury guaranteed by the Sixth Amendment of the U.S. Constitution has been explicitly determined not to apply in Puerto Rico). For a discussion, see Jasmine B. Gonzalez Rose, *supra* note 33, at 511; Elizabeth Vicens, *supra* note 33, at 357; Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 77 (2013). *See generally* Andrew Kent, *The Jury and Empire: The Insupar Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375 (2018) (providing a general discussion to the right to jury trials in U.S. territories); Charles F. Catterlin, *Procedural Right to Jury Trial in an Unincorporated Territory*, 6 HASTINGS L.J. 197 (1955) (providing a general discussion on the right to jury trials in U.S. territories).

[82] *See generally* SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE (2019).

[83] *Territorial Federalism*, *supra* note 7, at 1636.

[84] *Id.* at 1654.

government that is guaranteed in the U.S. Constitution to the States of the Union.[85] Puerto Rico is also subject, like U.S. states, to federal laws. There are of course some exceptions in this tendency toward equalization. For example, Puerto Rico's access to U.S. welfare programs is not as extensive as that of the states, and this state of affairs has been historically sanctioned by federal courts, even though there is currently a potential movement in the opposite direction.[86] The basic structure of territoriality allows a degree of inequality but would be negated by a significant regression in the movement towards equalization.[87]

The principles described above have not necessarily operated during the entire history of the territorial relationship, and not all of them emerged as a result of the constitution-making process that took place in the early 1950s. For example, the principle of passive U.S. citizenship originated as a result of the adoption of the Jones Act in 1917, the principle of subordination (and perhaps the principle of progressive equalization) has arguably been operating in some form since the very signing of the Treaty of Paris in 1898, and the principles of autonomy and consent, while pre-existing Public Law 600, acquired a special importance after the adoption of the Constitution of 1952.[88]

The previous discussion suggests that some of these principles pull in opposite directions. Most dramatically, the principles of consent and autonomy stand in direct tension with the principle of subordination. Subordination means that one will be subject to norms regardless of one's consent, and that one's ability to self-rule (i.e., to be autonomous), will always be at the mercy of someone else's will. How is it possible for these principles to be part of a same "basic structure?" At a more abstract level, it

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[85] U.S. CONST. art. IV, § 4; Letter from The Acting Secretary of the Interior (Northrop) to the Secretary of State (Oct. 9, 1952), in 3 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, UNITED NATIONS AFFAIRS 1429 (Ralph R. Goodwin, ed. 1979), https://history.state.gov/historicaldocuments/frus1952-54v03/d902.

[86] Harris v. Rosario, 446 U.S. 651, 662 (1980). *See* United States v. Vaello-Madero, 356 F.3d 12, 32 (1st Cir. 2019). Petition for a writ of certiorari to the Supreme Court granted on March 1, 2021. The First Circuit Court of Appeals did not seek to abandon the notion that the U.S. Congress can discriminate against Puerto Rico as long as there is a rational basis for its decision, but rather that the exclusion of Puerto Ricans from the benefits of the Supplementary Security Income provisions of the Social Security Act "is not rationally related to a legitimate government interest." 42 U.S.C. §§ 1381–1382(f).

[87] At the same time, the principle of equalization can sometimes be problematic: treating Puerto Rico as a state, in situations where it lacks full representation in the U.S. Congress, can sometimes increase its subordinate status. An example of this is provided by the application in Puerto Rico of the U.S. Federal Death Penalty Act, discussed in Part IV of this Article. In *Franklin*, the U.S. Supreme Court recently determined that Puerto Rico was not a state for the purposes of the U.S. Bankruptcy Code, but it was a state for preemption purposes. Puerto Rico v. Franklin Cal. Tax-Free Trust, 579 U.S. 115, 124–126 (2016). The consequence was that the recently adopted Puerto Rican Recovery Act (passed with the purpose of dealing with the island's financial crisis) was invalid, and that Puerto Rican municipalities could not access the federal bankruptcy process. *Id.* This case was decided a few days before PROMESA (discussed in Part V of this Article) was adopted by the U.S. Congress. *Id.*

[88] Letter from The Acting Secretary of the Interior (Northrop) to the Secretary of State, *supra* note 85.

is not unthinkable that the core identity or "basic structure" of a constitutional order would include conflicting principles that are in tension. In fact, constitutional identity is not static but emerges from the interplay of inevitably disharmonic elements.[89] As we will see below, in the context of the relationship between Puerto Rico and the United States, the tension between the principles of consent, autonomy, and subordination is a result of the fact that, despite establishing and protecting the legal superiority of the U.S. Congress over the island, the basic structure of territoriality makes possible the co-existence of competing claims to sovereign authority.

III. Between Political and Legal Sovereignty

A. Two forms of Sovereignty?

The basic structure described above allows for the uneasy co-existence between Puerto Rico's claim to political sovereignty and the United States' legal sovereignty over the island. One of the most famous discussions of the distinction between political and legal sovereignty occurs in A.V. Dicey's *Law of the Constitution*. According to Dicey, political sovereignty is held by "that body . . . in a state the will of which is ultimately obeyed by the citizens of the state," while legal sovereignty, in contrast, is "a merely legal conception, and means simply the power of law-making unrestricted by any legal limit."[90] In Dicey's view, although the English Parliament could be said to be politically controlled by the people (or the electorate), from a legal perspective it is a different body—the King, Lords and the House of Commons acting together—which possesses legal sovereignty.[91] Put differently, the existence of a legally sovereign legislature does not exclude the existence of a politically sovereign people.

In the context of the relationship between Puerto Rico and the United States, U.S. claims to legal sovereignty over the island are reflected in the basic structure of territoriality itself: both the fundamental legal rules and the principles identified above are premised on the idea that if there is an absolute legal power over Puerto Rico, that power belongs to the U.S. Congress. This idea also finds expression in the *Insular Cases* as well as in the recent jurisprudence of U.S. federal courts,[92] but the prevailing view in U.S. jurisprudence was well summarized by the U.S. District Court for Puerto Rico in a 2016 decision:

> [T]erritorial governments are entirely a creation of Congress. They owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which, as a Congressional delegation, are liable to be withdrawn, modified or repealed at any time by Congress. What is more, the right of Congress to revise, alter and revoke delegated powers

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[89] Gary J. Jacobsohn, Constitutional Identity 21–22 (J.K. Tulis and S. Macedo eds., 2010).

[90] A.V. Dicey, Introduction to the Study of the Law of the Constitution 70–72 (8th ed. 1915).

[91] *See* Mark D. Walters, A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind 179–80 (2020).

[92] *See* Puerto Rico v. Sánchez Valle, 579 U.S. 59, 76 (2016). *See generally Franklin*, 579 U.S. 115; Fin. Oversight and Mgmt. Bd. for P.R. v. Aurelius Inv., L.L.C., 140 S. Ct. 1649 (2020).

> does not diminish the powers while they reside in the territory. Congress retains plenary power over the territorial government until such time as the territory is made independent. There is no indication that—even if it could—Congress has surrendered any such power to Puerto Rico.[93]

It is difficult to negate that this is the status quo: from a legal perspective, the U.S. is sovereign over its territories. Nonetheless, many Puerto Ricans (even if recognizing U.S. legal sovereignty) would insist that the ultimate decision-making power over the island lies in Puerto Rico. Even if, from the perspective of the U.S. legal system, that view is demonstrably incorrect, this is not necessarily so from a political perspective. The tension between these two conceptions is expressed in the very first provision of the Constitution of 1952: "The Commonwealth of Puerto Rico is hereby constituted. Its political 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 of America."[94] On the one hand, this provision suggests that a new constitutional order was created (i.e., the Commonwealth of Puerto Rico) in *the exercise of a power held by the Puerto Rican people*. Indeed, the process that led to the adoption of the Constitution of 1952 has been recently described as "the exercise of a constituent power among the affected population that expresses a will to sovereignty."[95] On the other hand, the second part of the provision limits the exercise of the political power of the resulting entity to the "terms of the compact" between the island and the United States.

How does one understand the part of the provision that attributes the creation of the Commonwealth of Puerto Rico to the Puerto Rican people? Does it really amount to a claim of "political" sovereignty? An examination of the debates of the Constituent Convention suggests that those questions should be answered in the affirmative. Many of those who participated in the process that led to the creation of the Constitution of 1952 thought that they were acting on behalf of a sovereign people.[96] For example, Antonio Fernós Isern argued that even in 1898, when Puerto Rico went through a change of "sovereign" (from Spain to the United States), it did not "renounce neither its natural right, nor the attributes of democratic sovereignty." Puerto Rico's "right to liberty, as that of all peoples," he maintained, is "immanent."[97] In drafting a new constitution, the Constituent Convention was affirming that reality.[98] In a similar vein, Jorge Font Saldaña expressed that in accepting Public Law 600 and engaging in a constitution-making process, "we are exercising our sovereignty to govern ourselves," and that through this process, Puerto Rico's "inherent sovereignty" was being recognized.[99]

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[93] United States v. Lebrón-Caceres, 157 F. Supp. 3d 80, 97 (D.P.R. 2016) (citations omitted).

[94] P.R. CONST. art. I, § 1.

[95] Issacharoff et al., *supra* note 6, at 38.

[96] *See, e.g.*, DIARIO, *supra* note 30, at 528.

[97] *Id.* at 451–52.

[98] *Id.* at 451.

[99] *Id.* at 506–08.

Fernós Isern and Font Saldaña were key members of the political party who campaigned in favor of Public Law 600, but other less known supporters of that party, such as Juan Bautista Soto, made similar expressions.[100] Soto referred to the "inherent" and "immanent" sovereignty that accompanies an exercise of "constituent power," noting that, even though after 1952, Puerto Rico would only be able to exercise a limited degree of political authority, it would do so in virtue of a constitution founded on the island's own sovereignty and not in an organic law adopted by the United States.[101] Perhaps more tellingly, even those delegates who saw Public Law 600 as simply reproducing the territorial relationship that had existed since the very beginnings of the 20th century[102] and as part of a "false propaganda" directed at legitimizing colonialism, referred to the "sovereignty of our people to demand representation in the U.S. Congress."[103] That was the case of Héctor González Blanes and his colleague Ramiro Colón Castaño, who believed that, legally speaking, the United States retained sovereign power over Puerto Rico but that the island possessed a sovereign right to determine its future political status (which, in their view, should be that of becoming a U.S. state).[104]

In a discussion about the content of the new constitution's preamble, it was made clear that these views should not be discarded as instances of empty political rhetoric.[105] The question was whether the preamble should refer to the establishment of a "permanent union" with the United States.[106] The amendment was rejected by the

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[100] *Id.* at 508, 2091.

[101] *Id.* at 2092.

[102] González Blanes described the 1950 process as follows:

> Law 600 neither affects nor alters in any form the juridical-constitutional relations between the United States Congress and the United States. In other words, the jurisdiction [facultades] and congressional powers in relation to the territory of Puerto Rico remain intact, as they actually exist . . . . [Public Law 600] simply grants this island a greater internal autonomy, a higher degree of local self-government, in exchange of the Puerto Rican people's plebiscitary ratification of the present political, social, and economic relations with the United States.

Id. at 1476–77.

[103] *Id.* at 466.

[104] *Id.* at 238.

[105] *See* Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 722–31 (2010) (presenting a typology of constitutional preambles and discussing their different functions). *See generally* JUSTIN ORLANDO FROSINI, CONSTITUTIONAL PREAMBLES AT A CROSSROADS BETWEEN POLITICS AND LAW (2012) (examining the extent to which constitutional preambles are used as a tool of interpretation, of limiting constitutional amendments, and as a parameter in judicial review); Wim Voermans & Maarten Stremler CONSTITUTIONAL PREAMBLES: A COMPARATIVE ANALYSIS (2017) (providing a quantitative and qualitative analysis of constitutional preambles around the world).

[106] In the end, the relevant part of the new constitution's preamble read: "We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis . . . do ordain

majority of the delegates because it would suggest that the "door to independence would be forever closed."[107] Given the boycott of the Constituent Convention by the Puerto Rican Independence Party[108] and the remaining sympathy for independence among key members of the Popular Democratic Party, this was a thorny political issue. A decision in favor of a "permanent" union with the United States was thus seen as an abdication of what had been many times described at the Constituent Convention as the natural right of the people of the island to govern itself; an alienation of their political sovereignty.[109] That continuing claim to political sovereignty was part of the reason why Muñoz Marín could be seen as acting coherently (even if objectionably) when defending the legitimacy of the continuing application of U.S. federal laws in Puerto Rico[110] and, at the same time, maintaining that such situation would continue "until the moment our people decides it wants a different type of relationship and freely expresses that desire".[111]

When some of these same politicians participated in the public hearings about Public Law 600 at the U.S. Congress, they made often quoted statements that, prima facie, appeared to contradict the views discussed above.[112] For example, Muñoz Marín, seemingly accepting the legality of a future unilateral abrogation of Public Law 600 by the federal legislature, maintained that: "[O]f course, that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again."[113] Fernós Isern expressed that "H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. It would not commit the United States for or

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and establish this Constitution for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America." P.R. CONST. pmbl.

107 DIARIO, *supra* note 30, at 1394.

108 The Puerto Rican Independence Party was founded in 1946 and obtained 10% of the popular vote in the 1948 general election. In 1952, it become the second political force in the island, receiving 19% of the vote. Joel Colon-Rios & Martin Hevia, *The Legal Status of Puerto Rico and the Institutional Requirements of Republicanism*, 17 TEX. HISP. J. L. & POL'Y 1 (2011); *Escrutinio de las Elecciones Generales del 2 de noviembre de 1948 Resultados para Candidatos a Gobernador de Puerto Rico*, EL ARCHIVO DE LAS ELECCIONES EN PUERTO RICO, https://electionspuertorico.org/archivo/1948.html (last visited Jan. 17, 2022).

109 See DIARIO, *supra* note 30, at 21, 451, for examples.

110 He argued that, unlike in U.S. states, where federal laws simply applied because they were approved by a number of representatives, in Puerto Rico they would apply because the people had determined it so in a referendum. *Id.* at 1469, 3086.

111 *Id.* at 1469. The same day in which it completed the draft constitution, the Constituent Convention issued a resolution that reflected this idea, declaring that the people of Puerto Rico "retain the right to propose and accept modifications in the terms of their relations with the United States of America, so that, at all times, these are the expression of the agreement freely concluded between the people of Puerto Rico and the United States." *Id.* at 3007 (quotation translated from original Spanish text).

112 *See* Puerto Rico Constitution: Hearings before the Comm. on Public Lands on H.R. 7674 and S. 3336, 81st Cong. 35 (1949–1950).

113 *Id.* at 33.

against any specific future form of political formula for the people of Puerto Rico."[114] He added that the adoption of the bill "would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris."[115] These statements were entirely consistent with U.S. Secretary of the Interior's report on the bill. According to that report, the adoption of Public Law 600 would not "in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status," that it "merely authorizes the people of Puerto Rico to adopt their own constitution," and that it "would not change Puerto Rico's political, social, and economic relationship to the United States."[116] All those statements refer to the reality that the United States possesses legal sovereignty over the island. That reality, and this is the main point of this Part, can co-exist (albeit problematically) with Puerto Rican claims to political sovereignty.

In fact, for some delegates, the view that Puerto Rico had some form of sovereignty over the island was reflected in the very notion of a compact—if the United States sought Puerto Ricans' consent for the passing of Public Law 600, it must have been because it recognized them as a sovereign people. Fernos Isern argued that under Public Law 600, "the sovereignty of the people of Puerto Rico has been implicitly recognized when its authority to convene is accepted; when, within the terms of the covenant, its authority to adopt a constitution, to constitute themselves, to be [themselves], is recognized."[117] That kind of approach found its way to a series of cases decided by federal courts in 1953.[118] For instance, in *Mora v. Torres*, the U.S. District Court for Puerto Rico expressed that the island enjoyed "the total substance of self-government . . . by consent".[119] In *Mora v. Mejías*, the same court (through a different judge) stated that the island was "a political entity created by the act and with the consent of the people of Puerto Rico" and that "it would seem to have become a State within a common and accepted meaning of the word."[120] Moreover, the court stated that "under the terms of the compact," Puerto Rico is "sovereign over matters

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114 *Id.*

115 *Id.*

116 ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF THE UNITED STATES TERRITORIAL RELATIONS 166 (1989).

117 DIARIO, *supra* note 30, at 508, 1627–28, 2090.

118 Mora v. Torres, 113 F. Supp. 309, 313–14 (D.P.R. 1953). The decision was affirmed by the United States Court of Appeals for the First Circuit, although judgment was reserved on whether the Constitution of 1952 was an actual constitution or a new organic law. Mora v. Mejías, 206 F.2d 377, 387 (1st Cir. 1953) (expressing that "[i]f the constitution of the Commonwealth of Puerto Rico is really a 'constitution' – as the Congress says it is . . . and not just another Organic Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution' of the United States and thus a 'State' . . .").

119 *Mora*, 113 F. Supp. at 313–14.

120 *Mejías*, 206 F.2d at 387.

not ruled by the Constitution of the United States."[121] That last statement confirms the territorial character of the relationship, the fact that the United States is Puerto Rico's legal sovereign. But as exemplified in the Constituent Convention debates, some would insist that that legal sovereignty was only made possible because, in the exercise of what the delegates frequently referred to as the island's "inherent sovereignty,"[122] Puerto Ricans agreed to it.

To be sure, this does not make the so-called "compact theory" correct, but it is ultimately based on an idea that is not only defensible politically but legally. To the extent that the Puerto Rican people have a right to self-determination under international law, they indeed have an "inherent sovereignty" to determine their future political status.[123] Further, to the extent the international right to self-determination is part of U.S. law (e.g., in virtue of the U.S. ratification of the International Covenant on Civil and Political Rights in 1992),[124] the potential exercise of that "inherent sovereignty" is, at least in theory, recognized by the U.S. legal system.[125] The idea

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121 *Id.* at 612.

122 DIARIO, *supra* note 30, at 508, 1627–28, 2090.

123 For a discussion of Puerto Rico's right to self-determination under international law, see, e.g., Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 235 (2018) (arguing that "the values underlying self-determination suggest that Puerto Ricans should have the ultimate say in whether to be more closely associated with the United States.").

124 Article 1 of the Covenant states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 3 states: "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." United Nations International Covenant on Civil and Political Rights art. 1, 3, Mar. 23, 1976, 999 U.N.T.S. 171. At the time of ratification, the U.S. Senate declared that Articles 1 to 27 "are not self-executing." About the effect of those reservations, see Torruella, *supra* note 1, at 100. *See generally* 138 CONG. REC. 8068-71 (1992).

125 If such a situation were to actually take place, one would expect some politicians and commentators (and possibly some courts), to maintain–in our view mistakenly–Uthat international law only recognizes a remedial right to self-determination in cases of "colonial dependence or alien subjugation, domination or exploitation", and that those features are not present in the relationship between Puerto Rico and the United States. Peter Hilpold, *Self-determination and Autonomy: Between Secession and Internal Self-Determination, in* AUTONOMY AND SELF-DETERMINATION: BETWEEN LEGAL ASSERTIONS AND UTOPIAN ASPIRATIONS 39 (Peter Hilpold ed., 2018); *see also* Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 285, 295 (Can.) (holding that "[t]he right of colonial peoples to exercise their right to self-determination by breaking away from the 'imperial' power is now undisputed . . . the other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context" and that "Quebec does not meet the threshold of a colonial people or an oppressed people."). Moreover, even if it is accepted that Puerto Rico, as a colony, has the right to external self-determination, the exercise of that right would certainly contradict both United States and Puerto Rican law (in the latter case, it would be directly contrary to Article VII, Section 3 of the Constitution of 1952).

that in the exercise of its right to self-determination, Puerto Rico may unilaterally decide, at any moment, to become an independent nation where it is only subject to its own laws, is currently taken as a given by most political actors (even by those strongly opposed to independence).[126] That very possibility, regardless of how unlikely it is for it to materialize in the near future, is perhaps the most extreme manifestation of the tension between political and legal sovereignty present at the bottom of the basic structure of territoriality. In that sense, that structure, to use Hannah Arendt's famous phrase, "is built on quicksand."[127]

B. The Potential Instability of Territoriality

The tension between claims to political and legal sovereignty is brought to the surface, and the basic structure of the relationship is thus put under strain, every time the principles described in Part IV are negated. In this Part, this Article identifies a series of events or decisions (originating in Puerto Rico or in the United States) which have negated those principles. In engaging in this analysis, this Article stresses that the negation of any of these principles is not necessarily problematic from a normative perspective. In fact, the end of the colonial relationship *requires* the very abrogation of the basic structure of territoriality. In order to understand that structure properly, one nonetheless needs to consider what types of official actions are inconsistent with it. Despite the examples given below, territoriality has proved extremely resilient, and even actions that go beyond the negation of its principles and that directly affect the operation of its fundamental legal rules have not resulted in a change in the territorial relationship. Indeed, some of the events or decisions discussed below, in the long run, may have had the effect of ensuring the long-term maintenance of the status quo.

1. President Truman's Veto

The 1940s were very active in terms of efforts, originating both in the United States and Puerto Rico, to change the island's political status.[128] After an initial failed

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[126] This is a widespread assumption that, since at the moment there is no majority support for independence, is rarely made explicit. *See Puerto Rico Democracy Act of 2009: Puerto Rico Democracy Act of 2009: Hearing before the H. Comm. on Natural Resources on H.R. 2499*, 111th Cong. 34–38 (2009) (statement of Carlos Romero Barceló, Former Governor of Puerto Rico) (suggesting that Puerto Rico could simply choose to become a separate sovereign). The United Nations Special Committee on Decolonization has approved, 39 times (the latest one on June 18, 2021), resolutions referring to the "Puerto Rican people['s] . . . inalienable right to self-determination and independence." *See* Press Release, Special Comm. on Decolonization, Special Committee on Decolonization Approves Text Calling upon United States to Promote Puerto Rico's Self-Determination, Eventual Independence, U.N. Press Release GA/3346 (June 18, 2021); Press Release, Special Comm. on Decolonization, Speakers Voice Concern about Environmental, Fiscal Challenges of Puerto Rico as Special Decolonization Committee Approves Annual Self-determination Text, U.N. Press Release GA/3337 (June 24, 2019).

[127] HANNAH ARENDT, ON REVOLUTION 77, at 163 (2d ed. 1965).

[128] This is not the place to give a full account of the context in which these efforts took place. For a discussion, see Frank Otto Gatell, *Independence Rejected: Puerto Rico and the Tydings Bill of 1936*, 38 HISP. AM. REV. 25, 25–26 (1958).

attempt to provide for the popular election of the Governor by federal legislation,[129] and after two federal status bills that would have granted independence to the island[130] were rejected by the U.S. Congress, Puerto Rico approved legislation to hold a local referendum on its political status. In this referendum, electors would be given the choice of voting for statehood, independence, or a "dominion" status and to trigger a process that could end in a special election in the island about who should be appointed by President Truman as the next Puerto Rican Governor.[131] Rexford G. Tugwell, the U.S. appointed Governor, vetoed both bills, arguing that they interfered with the constitutional prerogative of the President and with Congress's power to legislate on the island's relationship with the United States.[132] A two-thirds majority of the island's legislature, exercising the powers conferred by Section 34 of the Jones Act, overrode the Governor's veto.[133] In turn, Governor Tugwell referred the bill to President Harry Truman, who exercised its ultimate veto power under the Jones Act.[134] In vetoing the bills, President Truman stated:

> [The approval of the status referendum bill] might erroneously be construed by the people of Puerto Rico as a commitment that the United States would accept any plan that might be selected at the proposed plebiscite, and if the plan thus selected should not be acceptable to the Congress, it could then be argued that the United States was not keeping faith with the expressed will of the people of Puerto Rico. In view of this possibility, and the harmful effect

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129 77 CONG. REC. 6003 (1942) (Sen. Pagan introducing H.R.7352). *See* SURRENDRA BHANA, THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS QUESTION, 1936–1968, at 57–72 (1975).

130 In 1945, a bill was presented by U.S. Senator Millard E. Tydings "to provide for the withdrawal of the sovereignty of the United States over the island of Puerto Rico and for the recognition of its independence" (making clear, in Section 6, that the military or naval bases would not be transferred to the island's government). S. 227, 79th Cong. (1st Sess. 1945). In its preamble, the bill stated: "Whereas the people of Puerto Rico are entitled to full and complete independence both as a matter of principle and broad American policy." *Puerto Rico Hearings Before the Committee on Territories and Insular Affairs United States Senate on S. 952*, 78th Cong. 2 (1943). Senator Tydings had previously presented two bills that would have granted independence to the island, one in 1936 and the other one in 1943. The 1945 bill contained a more favorable economic transition process for the island. For a discussion of these proposals, see SURENDRA BHANA, THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS QUESTION 1936–1968, at 73–108 (1975).

131 S. 195 and S. 96 (both presented on February 21, 1946). For a discussion, see BHANA, *supra* note 130, at 86.

132 BHANA, *supra* note 130, at 86.

133 *Id.*

134 This was only the second time in history a U.S. President exercised this power over Puerto Rico's legislature. The other time the veto power was exercised, also in 1946, was with respect of a law adopted by the Puerto Rican legislature requiring the exclusive use of the Spanish language in public schools teaching. S. 51, 16th Leg., 2d Sess. (P.R. 1946). *See generally* Pablo Navarro-Rivera, *The University of Puerto Rico: Colonialism and the Language of Teaching and Learning*, 1 J. PEDAGOGY, PLUR., AND PRAC. 32 (1999).

> that such a misunderstanding would have on our relations with the people of Puerto Rico, this measure ought not, in my opinion, to be allowed to become law. The same principle is also applicable to the [bill providing or a poll of qualified voters of Puerto Rico for the purpose of recommending one of their citizens for appointment as Governor].[135]

Tugwell's and Truman's vetoes were, on the one hand, at odds with the principle of progressive equalization (P5) and the principle of consent (P3). They put a stop to a process that would have not only increased the degree of internal self-government in the island,[136] but provided an opportunity for Puerto Ricans to formally consent to some form of relationship to the United States.[137] On the other hand, by unilaterally approving a referendum on the island's political future with the purpose of putting an end to their colonial status, Puerto Ricans failed to abide by the principle of subordination (P2). From the perspective of the fundamental legal rules governing the relationship between Puerto Rico and the U.S., Governor Tugwell and President Truman's actions were entirely appropriate. However, from the perspective of P3 and P5, they were highly problematic because the Puerto Rican legislature's decision to call a referendum on the island political status (despite its inconsistency with P2) was a clear indication of a dissatisfaction with the relationship between Puerto Rico and the United States which came close to a formal expression against its continuation in

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[135] Harry S. Truman, *Statement by the President Upon Disapproving Bills of the Legislature of Puerto Rico*, AM. PRESIDENCY PROJECT (May 16, 1946), https://www.presidency.ucsb.edu/documents/statement-the-president-upon-disapproving-bills-the-legislature-puerto-rico.

[136] This was exemplified in President Franklin D. Roosevelt's message to Congress on March 9, 1943, in the context of the discussion of the elective governor bill, where he stated: "It has long been the policy of the Government of the United States progressively to reinforce the machinery of self-government in its Territories and island possessions." H.R. DOC. NO. 78-126, at 1–2 (1943) (message from President Franklin D. Roosevelt).

[137] In this context, Senator Tydings' words during the discussion of the elective governor bill are worth quoting:

> Puerto Rico was won by the United States by conquest. Its people never agreed by any sort of plebiscite to become a part of this country; and I should like to see the Puerto Ricans given their freedom, the right to determine in full their own destiny, subject always, of course, to the retention, with their consent, of military and naval bases on the island of Puerto Rico, for their protection as well as ours, and to give them such help as we could in order to make possible the transition from a state of dependence to a state of independence, as we have done in the case of the Philippine Islands. I should like to see the Puerto Ricans ask for that; I should like to see them go the whole length rather than merely to ask to elect their own Governor. I believe if such a course is taken, an end to the Puerto Rican problem will be reached, and until such a course is taken we will face a perpetual and never-solved problem pending continually before the Congress of the United States as well as with the Puerto Rican people.

Amendment of Organic Law of Puerto Rico–Election of Governor: Hearing Before the Senate Committee on Territories and Insular Affairs, 78th Cong. 1686 (1943) (statement of Sen. Tydings).

its then current form.[138] The vetoes were thus inconsistent with the basic structure of territoriality, and brought to the surface the tension between political and legal sovereignty. This did not go unnoticed by some U.S. officials. For example, Julius A. Krug, Secretary of the Interior, thought that the veto of the referendum bill "would be regarded by Puerto Rico, South America and the European nations…as a denial of [the] oft-expressed principle [of self-determination]."[139]

2. The U.S. Federal Death Penalty Act

The death penalty was abolished in Puerto Rico in 1929 and the Constitution of 1952 sought to protect that status quo from ordinary legislation.[140] Section 7 of Article II (Bill of Rights) thus reads: "[t]he death penalty shall not exist." That status quo was maintained until 1994, when the U.S. Congress passed the U.S. Federal Death Penalty Act (FDPA).[141] A few years later, two individuals convicted for acts that occurred in Puerto Rico (punishable by death under the 1994 federal law), requested the U.S. Court for the District of Puerto Rico to declare that the act providing for the federal death penalty was locally inapplicable within the meaning of Section 9 of the PRFRA. The court agreed, summing up its judgment in the following way:

> (1) [T]he purpose of establishing [the] Commonwealth status in Puerto Rico was to develop and enhance self-government by the people of Puerto Rico and create an autonomous political entity; (2) in voting to accept Public Law 600 adopted by Congress as a compact with the people of Puerto Rico the people of Puerto Rico accepted section 9 of the PRFRA, which provides for the applicability to the Commonwealth of all Federal law if not locally inapplicable; (3) the Commonwealth Constitution, which was adopted by the Puerto Rican people and approved by Congress, expressly prohibits capital punishment in Puerto Rico; (4) Puerto Rico's culture, traditions and values are repugnant to the death penalty; and (5) the FDPA was not specifically made extensive to Puerto Rico. Under these circumstances, the Court concludes that the FDPA is locally inapplicable within the meaning of section 9 of the PRFRA.[142]

Had this decision been sustained in the U.S. Court of Appeals, Puerto Rico's formal consent to its subordination to the United States would have been given an unprecedented juridical importance, or put differently, the balance between P2 and P3

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[138] After the resignation of Governor Tugwell in 1946, President Truman appointed for the first time a Puerto Rican as the island's governor and a few months later, the U.S. Congress proceeded to amend the Jones Act in order to make the office of the Governor an elected one. *See* BHANA, *supra* note 130, at 86.

[139] *Id.* at 87.

[140] *The Death Penalty in Puerto Rico*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/the-death-penalty-in-puerto-rico (last visited Oct. 25, 2021).

[141] Federal Death Penalty Act, 18 U.S.C. §§ 3591–98.

[142] United States v. Acosta Martínez, 106 F. Supp 2d 311, 321 (D.P.R. 2000) (emphasis omitted).

would have changed. That is to say, it would have meant that by ratifying Public Law 600 and adopting a constitution, Puerto Ricans had achieved, at least in some ways, a level of autonomy higher than that of the states (where the federal death penalty act would apply even if they had similar bans in their state constitutions).[143] But this is not what happened. For the Court of Appeals, the approval of the Constitution of 1952 in no way changed "the applicability of United States laws and federal jurisdiction in Puerto Rico," and even while accepting the island's "moral and cultural sentiment against the death penalty," its applicability in the island depended on "what Congress intended."[144] Given that there was no indication to the contrary, the court concluded that "[t]he death penalty is intended to apply to Puerto Rico federal criminal defendants just as it applies to such defendants in the various states."[145] In this sense, the court (consistent with P5), treated Puerto Rico as a state, reaffirmed its subordination to the United States, and discarded the notion that the 1952 "compact" in any way limited U.S. legal sovereignty over the island.[146]

Note that the realization of P5 in this situation was nonetheless particularly problematic. Puerto Rico's lack of representation in the U.S. Congress, in accordance with the principle of passive U.S. citizenship, meant that unlike a state, it was not able to fully participate in the law-making process that led to the adoption of the FDPA.[147] The decision of the Court of Appeals was not well received in Puerto Rico, with some calling it "a betrayal of the island's autonomy, culture and law, in particular its Constitution."[148] That reception, however, was more a result of the strong anti-death

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143 *See* Colin Miller, *Sovereign Impunity: Why Double Jeopardy Should Apply in Puerto Rico*, 73 WASH. & LEE L. REV. ONLINE 174, 185–86 (2016) (arguing that a defendant's claim that the application of FDPA in New York violated the Tenth Amendment failed "not because New York lacked the ability to make a Tenth Amendment objection; instead, the court noted that '[n]o official of the State of New York has objected to assisting the federal government in killing persons condemned to death in a federal criminal proceeding.' . . . This is because states and the federal government are dual sovereigns, meaning that the former can use the Tenth Amendment to challenge Congressional attempts to compel state officials into administering federal programs.") (citing United States v. Taveras, No. 04-CR-156, 2006 U.S. Dist. LEXIS 7408 (E.D.N.Y. Feb. 28, 2006)).

144 United States v. Acosta Martínez, 252 F.3d 13, 18, 19 (1st Cir. 2001).

145 *Id.* at 20.

146 This was not the first time the court reached that decision. *See* United States v. Quinones, 758 F.2d 40 (1st Cir. 1985) (holding that a federal wiretapping statute applied in Puerto Rico despite its prohibition by the Constitution of 1952.)

147 For a similar argument, see *The International Place of Puerto Rico*, *supra* note 68, at 1672.

148 Adam Liptak, *Puerto Ricans Angry that U.S. Overrode Death Penalty Ban*, N.Y. TIMES, July 17, 2003, at A1. For further comments about the reception of the decision in Puerto Rico, see *The International Place of Puerto Rico*, *supra* note 68, at 1671. The defendants in Acosta Martínez were acquitted. To this date, no person has been sentenced to death by a Puerto Rican jury. For a historical account of the application of the death penalty in the island, see JALIL SUED-BADILLO, LA PENA DE MUERTE EN PUERTO RICO: RETROSPECTIVA HISTÓRICA PARA UNA REFLEXIÓN CONTEMPORÁNEA (2000).

penalty culture in Puerto Rico than of the legal significance of the court's decision.[149] The court, in the end, did not change in any way the basic structure of territoriality. As noted earlier, the fundamental legal rules that comprise it provide for the application of U.S. laws in Puerto Rico and for the subordination of the Constitution of 1952 to federal legislation. The decision nonetheless put the territorial relationship under strain because it brought to the surface something meant to remain hidden—the tension between Puerto Rican claims to political sovereignty over the island and the legal sovereignty of the U.S. over its territories.

3. Vieques

During the Second World War, the U.S. Congress approved legislation to expropriate most of Vieques' land (an island-municipality located off Puerto Rico's eastern coast territory). As a result, between 21,000 and 26,000 of the island's 33,000 acres were taken for military use by the U.S. Navy.[150] This led to the relocation of 40% to 50% of the island's inhabitants.[151] At different times during the 1970s, the popular movement against this military presence increased considerably, and even the Puerto Rican government, through its Resident Commissioner, presented legislation in the U.S. Congress to limit military exercises in Vieques.[152] From the perspective of the U.S. Navy, Vieques was presented as "absolutely critical to the readiness, training, and preparation of our forces prior to their deployment overseas."[153] In 1999, when civilian David Sanes Rodríguez was killed by a 500 pound bomb dropped by an F-18 aircraft that went off target,[154] opposition to the U.S. Navy's presence in Vieques became a majoritarian cause in Puerto Rico.[155] Massive protests followed,[156] and a civil disobedience movement that extended for several months developed.[157]

The response of the U.S. Navy to peaceful protests had historically involved excessive use of force by federal marshals and the imposition of significantly high

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[149] Vicens, *supra* note 33, at 382–83.

[150] Jacqueline N. Font-Guzmán & Yanira Alemán, *Human Rights Violations in Puerto Rico: Agency from the Margins*, 12 J.L. & SOC. CHALLENGES 107, 135–38 (2010).

[151] *Id.* at 135.

[152] Katherine T. McCaffrey, *Social Struggle Against the U.S. Navy in Vieques, Puerto Rico: Two Movements in History*, 33 LATIN AM. PERSPS. 84, 89–93 (2006).

[153] Font-Guzmán & Alemán, *supra* note 150, at 139; *The Value of Vieques*, WALL ST. J., Nov. 15, 1999.

[154] Font-Guzmán & Alemán, *supra* note 150, at 134.

[155] *Id.* at 134–35.

[156] On February 21, 2000, 150,000 protesters met in San Juan to demand the end of the bombings. *See* McCaffrey, *supra* note 152, at 97.

[157] *See* Carmen I. Aponte, *U.S. Navy Versus Vieques, Puerto Rico: Social Justice Through Civil Disobedience*, 8 J. POVERTY 59, 70 (2004) (explaining that between February and May of 2000 more than 2,000 people participated in acts of civil disobedience).

sentences by the federal court for non-violent offences such as trespassing.[158] For example, in the late 1970s, demonstrators against the U.S. Navy received sentences of six months in federal prison under trespassing charges, and, after 1999, hundreds of peaceful civil disobedients were arrested, and some imprisoned for unusually long terms.[159] By the early 2000s, it became clear that a great majority of Puerto Ricans (informally and as represented by the governments of the day) demanded the end of the U.S. Navy's military activities in Vieques.[160] Among the population of Vieques, that rejection was formalized in a non-binding referendum organized in July 2001 by the government of Puerto Rico as a response to a planned federal sponsored referendum that never materialized.[161] Sixty-eight percent of registered voters in Vieques voted for the immediate cessation of bombings in the island.[162] Not long after these results were announced, the U.S. House of Representatives passed a bill cancelling the planned federal referendum and allowing the U.S. Navy to continue its training until an "equal or better" training site was identified.[163] The U.S. Navy ceased

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[158] Frances Olsen, *Civil Disobedience on Vieques: How Nonviolence Defeated the U.S. Military*, 16 FLA. J. INT'L L. 547, 549–50 (2004); Aponte, *supra* note 157, at 68; Font-Guzmán & Alemán, *supra* note 150, at 140–41.

[159] Pedro Cabán, *Bombs, Ballots, and Nationalism: Vieques and the Politics of Colonialism*, 5 LATINO(A) RES. REV. 7, 24 (2002) (explaining that by August 2001, over 1,400 civil disobedients had been arrested, and noting that the New York Times had referred to the excessive sentences of the federal court in Puerto Rico). In 2002, the Special Committee on Decolonization of the U.N. issued a resolution urging the United States to "halt the persecutions, incarcerations, arrests and harassment of peaceful demonstrators; immediately release all persons incarcerated in this connection; respect the fundamental human rights of health and economic development; and decontaminate the impact areas" in Vieques. Press Release, General Assembly, Decolonization Committee Urges United States to Halt Military Maneuvers on Vieques Island, Return Occupied Land to People of Puerto Rico, U.N. Press Release GA/COL/3065 (June 10, 2002).

[160] Pedro Rosselló's pro-statehood administration (1996-1999), as well as commonwealth supporter Sila M. Calderón's (2000-2003), both demanded at different points the cessation of military exercises in Vieques. Elizabeth Becker, *President Halts Target Practice by Navy on Puerto Rican Island*, N.Y. TIMES, Dec. 4, 1999, at A1 (explaining that Governor Rosselló "told Congress that the live firing training on the island had created an unacceptably high unemployment rate for its residents, who have also had health problems, including a higher cancer rate" and "that 'bombs away, day after day' had threatened the coral reef and wildlife of the island"); Andrew Jacobs, *Navy Bombing is Betrayal, Puerto Rico's Governor Says*, N.Y. TIMES, April 29, 2001, at 24 (explaining that Sila M. Calderón led a successful political campaign in Puerto Rico under the promise that she would end the bombings in Vieques).

[161] Reuters, *Referendum on Vieques is Delayed*, N.Y. TIMES (Oct. 28, 2001); Memorandum on a Resolution Regarding Use of Range Facilities on Vieques Island, Puerto Rico, WEEKLY COMP. PRES. DOC. (Jan. 31, 2000).

[162] *Majority in Vieques Vote U.S. Navy Out*, CNN (July 29, 2001, 7:30 PM), http://edition.cnn.com/2001/WORLD/americas/07/29/vieques.vote/.

[163] Reuters, *Puerto Rico High Court Orders Vote Preparations*, BOSTON GLOBE, Oct. 18, 2001, at A9.

its military activities in Vieques in 2003, as had been announced by President George W. Bush a few years earlier.[164]

It is not difficult to see how these events put the relationship between Puerto Rico and the United States under strain. On the one hand, the harsh treatment of Puerto Rican protesters by U.S. institutions arguably ran contrary to the principle of passive U.S. citizenship.[165] On the other, the U.S. Navy's insistence in continuing its military activities in Vieques, and the continuing clashes between the Puerto Rican and U.S. governments over the issue, tested the limits of the principle of consent. Had the U.S. government not ordered the Navy to cease its activities in the island, the situation in Vieques may have not only put the territorial relationship under strain (as it did), but also result in a change in the basic structure of territoriality. In the end, however, that change did not take place, even though the principle of consent was seriously tested by the initial refusal of U.S. authorities to stop its military activities in Vieques. That result was achieved at a high price (e.g., the subjection of thousands of Puerto Ricans to arrests and potential incarceration in federal prisons) but, perhaps ironically, it may have contributed to the reproduction of the basic structure of territoriality.[166] Although, legally, the U.S. had the sovereign authority to maintain its military activities in Vieques, it was unable to do so in light of the clear political will of Puerto Ricans.

4. The 2012 Status Referendum

Since 1967, there have been six non-binding referendums on the island's political status.[167] All of them were triggered by the Puerto Rican Legislature, although there also were several failed attempts to pass status legislation in the U.S. Congress.[168] The 2012 referendum, unlike the other five, which asked electors to choose among different status alternatives, included two questions.[169] The first one asked the electors: "Do you agree that Puerto Rico should continue to have its present form of

164 *Bush Says Navy Will Quit Bombing Vieques*, CNN (June 14, 2001, 9:54 PM), https://www.cnn.com/2001/US/06/14/vieques.halt.04/ (quoting Bush expressing that: "There's been some harm done to people in the past. These are our friends and neighbors, and they don't want us there."). *See* Olsen, *supra* note 158, at 558–59. The ceasing of military activities in Vieques was not accompanied by a full clean-up and devolution of the expropriated lands. For a discussion, see Sherrie L. Baver, *'Peace is More than the End of Bombing': The Second Stage of the Vieques Struggle*, 33 LATIN AM. PERSPS. 102 (2006).

165 *See supra* Part II(b)(iv).

166 Aponte, *supra* note 157, at 68, 70.

167 Joel Colón-Ríos, *Scholars and the Politics of Puerto Rico's Constitutional Status*, IACL-AIDC BLOG (May 6, 2021), https://blog-iacl-aidc.org/2021-posts/2021/05/06-puerto-ricos-constitutional-status.

168 *Id.*; For a discussion of different attempts to pass status legislation at the U.S. Congress, see Manuel Rodriquez Orellana, *Puerto Rico and the U.S. Congress: The Road Ahead*, 21 TEX. HISP. J.L. & POL'Y 31 (2015).

169 Colón-Ríos, *supra* note 167, tbl. 1.

territorial status?"[170] The second asked them to choose between three "non-territorial" alternatives: statehood, independence, or free association (or a 'sovereign free associated state').[171] In the first question, 53.97% of the electors (on a 79% turnout) voted "no."[172] In the second question, statehood obtained a vote of 61.16%, independence obtained 5.49%, and free association obtained 33.34%.[173] The result of the second question was interesting. This was the first time statehood was supported by the majority of the electorate, and also that a relatively large number of voters (almost 40%) expressed their support for the island becoming a sovereign country, either as an independent nation or in free association with the United States. However, the result of the first question was the most significant one: a majority of the electorate rejected (i.e., formally withdrew its consent) to the current territorial status.

By deciding to ask that question, the Puerto Rican legislature, perhaps more than in 1946, directly challenged the principle of subordination and tested the limits of the principle of consent. This formal withdrawal of consent to the colonial status quo did not have any immediate effects on the relationship. Based on these results, in 2017, a new referendum was organized by the island's government.[174] Initially, the referendum would have fully excluded the territorial status as an option on the basis that it had been rejected by the electors in 2012.[175] It would have rather asked electors to choose between statehood and an independence/free association alternative.[176] If the latter option prevailed, a second referendum would take place where electors would decide between free association and independence.[177] A few months before the vote, the U.S. Department of Justice informed the Puerto Rican government that the use of federal funds in the referendum would be conditioned to the inclusion of the current territorial relationship as an alternative.[178] In response, the island's government amended the referendum law to include the status quo as an option,[179] an action that resulted in an electoral boycott and in an historically low (23%) turnout.[180]

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[170] *Official Ballot Sample*, STATE ELECTIONS COMM'N (Nov. 6, 2012), https://ww2.ceepur.org/sites/ComisionEE/es-pr/Documents/PapeletaModeloPlebiscito12.pdf.

[171] *Id.*

[172] Colón-Ríos, *supra* note 167.

[173] *Id.*

[174] *Id.*

[175] *Id.*; Puerto Rico Immediate Decolonization Act, 2017 P.R. Laws 7.

[176] Colón-Ríos, *supra* note 167.

[177] *Id.*

[178] Letter from Dana J. Beonte, Acting Deputy Att'y Gen., to Ricardo A. Rosselló, Governor of P.R. (April 13, 2017), https://www.puertoricoreport.com/wp-content/uploads/2017/04/Hon-Ricardo-Rossello-Nevares-Letter-DOJ-Apr-13-2.pdf.

[179] 2017 P.R. Laws 24.

[180] Plebiscite for the Immediate Decolonization of Puerto Rico, *Status Consultation Island Results*, (Jul. 25, 2017, 5:06 PM),

Although put under strain by the results of the 2012 referendum, the basic structure of territoriality once more emerged largely unscathed.

5. Sánchez Valle

From the perspective of the basic structure of territoriality, *Sanchez v. Valle*[181] is largely irrelevant for what it actually decided. Whether the U.S. federal government and Puerto Rico are separate sovereigns for purposes of the Double Jeopardy clause of the U.S. Constitution has little to do with the fundamental legal rules and principles that comprise that structure. Put differently, the decision of the U.S. Supreme Court in *Sánchez v. Valle* (in a 6-2 judgment) did not alter, or threaten to alter, the island's colonial status.[182] From the perspective of the basic structure of territoriality, the case is nonetheless important, not for what it decided, but for what it says. The decision contains language consistent with P1 ("[T]he United States and Puerto Rico have forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule.")[183] and P5 ("Over time, Congress granted Puerto Rico additional autonomy.")[184] It also includes references to the role of consent (P3) in the relationship.[185] Nonetheless, it contains expressions that directly challenge the notion that even though the United States currently holds legal sovereignty over the island, Puerto Rico's relationship with the United States is

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http://resultados2017.ceepur.org/Escrutinio_General_79/index.html#es/default/CONSULTA_DE_ESTATUS_Resumen.xml; Patricia Guadalupe, *Amid Historically Low Voter Turnout, Puerto Ricans Vote for Statehood*, NBC NEWS, (June 11, 2017, 6:00 PM), https://www.nbcnews.com/news/latino/amid-historically-low-turnout-puerto-ricans-vote-statehood-n770801.

[181] Puerto Rico v. Sánchez Valle, 579 U.S. 59, 78 (2016).

[182] Comments by some commentators, like the one following, are surprising given that Puerto Rico was not self-governing even before *Sanchez v. Valle*:

> And sovereignty matters. Sovereignty, after all, 'means freedom, the freedom of a people to choose what their future will be' — including what laws will govern them and their fellow citizens. It is understandable, then, that many Puerto Ricans would come to view *Sanchez Valle* — when joined with the Court's opinion in *Puerto Rico v. Franklin California Tax-Free Trust* and the enactment of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), all products of June 2016—as one prong of an unholy trinity signifying nothing short of a resurgence of a colonial condition long believed to have been discarded from their shores. In one commentator's words, 'Puerto Rico has been stripped naked and put on show to be shamed.' *Sanchez Valle* makes clear that Puerto Ricans are not free in the sovereign sense: they live under Congress's shadow, in the end subject to its will. Justice Kagan's talk of the Commonwealth's special relationship with the United States does nothing to lessen the sting.

Fifth Amendment: Puerto Rico v. Sánchez Valle, 130 HARV. L. REV. 347, 355–56 (2016).

[183] *Sánchez Valle*, 579 U.S. at 63.

[184] *Id.*

[185] *Id.* at 64–65, 73, 76.

ultimately based on the agreement of Puerto Ricans in the exercise of their "inherent" or political sovereignty. In so doing, the Court brought to the surface the tension underlying the basic structure of territoriality.

The basis of the U.S. Supreme Court's decision is that the test to determine whether the doctrine of dual sovereignty makes the Double Jeopardy clause applicable is not "the degree to which an entity exercises self-governance," which is usually connected to whether an entity is seen as "sovereign,"[186] but rather, the test takes the form of a historical inquiry that seeks to identify "the deepest wellsprings . . . of prosecutorial authority."[187] The Court explained that U.S. states, regardless of when they joined the federation, are deemed to possess "separate and independent sources of power and authority," so that state prosecutions have "their most ancient roots in an 'inherent sovereignty;' unconnected to, and indeed pre-existing, the U.S. Congress."[188] The same applied to Native American tribes, who were originally described as "self-governing sovereign political communities" holding an "inherent power to prescribe laws for their members and to punish infractions of those laws."[189] It may be true, the Court argued, that Puerto Rico is "'sovereign' in one commonly understood sense of that term," since in 1952 Congress "relinquished its control" over the island's "local affairs, granting Puerto Rico a measure of autonomy comparable to that possessed by the States."[190] However, those attributes of self-government derived from the U.S. Congress and not from an original Puerto Rican sovereignty:

> [C]ontrary to petitioner's claim, Puerto Rico's transformative constitutional moment does not lead to a different conclusion. True enough, that the Commonwealth's power to enact and enforce criminal law now proceeds, just as petitioner says, from the Puerto Rico Constitution as "ordain[ed] and establish[ed]" by "the people." . . . But that makes the Puerto Rican populace only the most immediate source of such authority—and that is not what our dual-sovereignty decisions make relevant. Back of the Puerto Rican people and their Constitution, the "ultimate" source of prosecutorial power remains the U.S. Congress, just as back of a city's charter lies a state government. . . . Congress, in Public Law 600, authorized Puerto Rico's constitution-making process in the first instance; the people of a territory could not legally have initiated that process on their own. . . . And Congress, in later legislation, both amended the draft charter and gave it the indispensable stamp of approval; popular ratification, however meaningful, could not have turned the convention's handiwork into law. Put simply, Congress conferred the

186 *Id.* at 67 ("Truth be told, however, 'sovereignty' in this context does not bear its ordinary meaning. For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty.").

187 *Id.* at 68.

188 *Id.* at 69. As noted in *Coyle v. Smith*, 221 U.S. 559, 573 (1911): "[W]hen a new State is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original States."

189 *Sánchez Valle*, 579 U.S. at 70.

190 *Id.* at 74.

> authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors—as it is for the Federal Government's. The island's Constitution, significant though it is, does not break the chain. . . . But one power Congress does not have, just in the nature of things: It has no capacity, no magic wand or airbrush, to erase or otherwise rewrite its own foundational role in conferring political authority. Or otherwise said, the delegator cannot make itself any less so—no matter how much authority it opts to hand over. . . . Puerto Rico boasts a relationship to the United States that has no parallel in our history. And since the events of the early 1950s, 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.[191]

Puerto Rico, in other words, lacked the "inherent sovereignty" possessed by states and tribes in the United States. This view, as we saw in Part IV of this Article, negates the idea reflected by many delegates at the Constituent Convention: the new constitution was, at least partly, based on the exercise of Puerto Rican's ultimate sovereignty over the island. At the same time, the Court made sure to expressly recognize the elements of "self-rule" present in the island, and to the island's ability to determine its "future" (whether the Court was referring there to its future political status is not clear).[192] Not surprisingly, for some in Puerto Rico, the decision reaffirmed a colonial relationship that needs to be left behind; for others, it highlighted the island's self-government powers.[193] In that respect, and despite its explicit negation of the island's inherent sovereignty, the decision may have reproduced the relationship's basic structure, once again allowing seemingly inconsistent claims to co-exist.[194] Nonetheless, by explicitly embracing the view that the island's constitutional order ultimately rests on the sovereignty of Congress, and not on a

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[191] *Id.* at 75–76 (internal citations omitted).

[192] *Id.*

[193] *See* José A. Hernández Mayoral, *El Autonomismo Luego de Sánchez Valle*, EL NUEVO DÍA (June 13, 2016), https://www.pressreader.com/puerto-rico/el-nuevo-dia1/20160613/281964606997170 (arguing that, although determining that Puerto Rico never had an "inherent sovereignty," the U.S. Supreme Court recognized the island's autonomy); *see also* Carlos E. Díaz Olivo & Edwin J. Vélez Borrero, *Promesa Incumplica*, Sánchez Valle*,* Franklin Trust*: El Rol de la Rama Judicial Federal en la Relación entre Puerto Rico y los Estados Unidos*, 86 REV. JURÍDICA UPR 1, 37 (2017) (arguing that Sánchez Valle showed that "we are still marked by the problem [carimbo] of territoriality or, less euphemistically, by the disgrace of colonialism.").

[194] One has to remember that the U.S. Supreme Court did nothing but to affirm a decision of the island's Supreme Court, which like its U.S. counterpart, held that "Puerto Rico never had an original or previous sovereignty through which it delegated powers to Congress. It was the other way around." Pueblo v. Sánchez Valle, 192 D.P.R 594, 644 (2015). In deciding in this way, the Supreme Court of Puerto Rico overruled its decision in *Pueblo v. Castro García*, 120 P.R. Offic. Trans. 740, 819 (1988), where it held the island's government was a 'sovereign' for the purposes of the dual sovereignty doctrine.

decision of the Puerto Rican people to agree to its own subordination, the U.S. Supreme Court highlighted the relationship's underlying tension.

6. PROMESA

In 2016, the same day the *Sánchez Valle's* decision was released, and as a means to deal with the island's public debt crisis, the U.S. Congress adopted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).[195] PROMESA created the Financial Oversight and Management Board for Puerto Rico ("the board"), a body with extensive powers over the island's government. The board is described "as an entity within the territorial government" and not as a federal organ.[196] It consists of seven members appointed by the U.S. President,[197] plus the Governor as an ex-officio member without voting rights.[198] It can require the Governor to submit "budgets and monthly or quarterly reports regarding a covered territorial instrumentality" and approve the island's "Fiscal Plan."[199] The Fiscal Plan has the main objective of providing "a method to achieve fiscal responsibility and access to the capital markets," and it must determine if the budget "proposed" by the government is "compliant" with the relevant fiscal priorities.[200] Importantly, "if the Governor and the Legislature fail to develop and approve a Territory Budget that is a compliant budget," the board can prepare the budget itself, which is then "deemed to be approved by the Governor and the Legislature."[201]

At the same time, PROMESA requires the Governor to submit to the board any law that "the territorial government duly enacts," and if the board determines that it is "significantly inconsistent" with the Fiscal Plan, it "shall direct the territorial government to (i) correct the law or eliminate the inconsistency or (ii) provide an

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[195] Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101-2241. In regard to the adoption of a law like PROMESA (which, as we will argue below, implicitly repeals part of the Constitution of 1952), Fernós Isern stated at the congressional hearing on Public Law 600 to the effect that "the authority of the Government of the United States, the Congress, to legislate in case of emergency would always be there." *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the H. Comm. On Pub. Lands*, 81st Cong. 33 (1950). Similarly, in an English 1965 case dealing with colonial Gambia, Lord Denning maintained that "[t]he implied renunciation by the Crown [of its constituent power once it grants a colony a constitution] only applies while the legislative institutions are in existence and capable of functioning," and when these colonial institutions are incapable of doing so, the Crown can "resort to its prerogative power to amend the constitution or set up a new one." Sabally and N'Jie v. H.M. Attorney-General (1965) 1 QB 273 at 293.

[196] 48 U.S.C. § 2121(101)(c)(1).

[197] The constitutionality of these appointments under Article II, Section 2 of the U.S. Constitution was upheld in *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

[198] 48 U.S.C. § 2121(101)(e)(3).

[199] *Id.* § 2121(101)(d)(1)(B), (h)(2).

[200] *Id.* § 2141(201)(b)(1).

[201] *Id.* § 2142(202).

explanation for the inconsistency that the Oversight Board finds reasonable and appropriate."[202] If the government of Puerto Rico fails to comply with a direction given by the board with respect to a law, the board "may take such actions as it considers necessary . . . including preventing the enforcement or application of the law."[203] According to Section 209 of PROMESA, the board would cease to operate once it certifies that Puerto Rico has gained access to credit markets at reasonable interest rates, and that for "at least 4 consecutive fiscal years" it has a balanced budget.[204] There is no doubt that PROMESA limits the force of the Constitution of 1952. It changes the ways in which political power is exercised in Puerto Rico and implicitly repeals the provisions of the island's constitution regulating its law-making process.[205] For example, prior to PROMESA, the adoption of legislation regulating the retirement eligibility of the island's government employees was, according to Article III (The Legislative Power) of the Constitution of 1952, under the sole jurisdiction of the Puerto Rican legislature.[206] Now, it is not. At the time of writing, the board had just notified the Puerto Rican Senate that a bill extending retirement eligibility to most government employees was "significantly inconsistent" with the approved Fiscal Plan and that its implementation would violate PROMESA.[207]

It is not difficult to see that PROMESA is directly inconsistent with P1 and P3 because it reduces the island's degree of internal self-government without the formal consent of Puerto Ricans, and at a moment where, after the 2012 referendum, their consent to the current relationship can no longer be taken for granted. At the same time, PROMESA is inconsistent with P5. In adopting it, the U.S. Congress did

[202] *Id.* § 2144(204)(a)(4)(B).

[203] *Id.* § 2144(204)(a)(5).

[204] *Id.* § 2149(209).

[205] Unlike express repeal, "implied repeal" does not require the formal repeal of the relevant legal rule, but rather the adoption of an inconsistent provision of the same hierarchy (or of a higher hierarchy). For instance, when a newly adopted ordinary law conflicts with a previous ordinary law without expressly repealing it, we say the older law has been impliedly repealed (to the extent of the conflict) even though it will remain in the books and will become valid and enforceable again if the most recent conflicting legislation is itself repealed. The same does not happen with express repeal: The abrogation of the repealing legislation does not bring back to life the previously expressly repealed one. *See* 36 HALSBURY'S LAWS OF ENGLAND 1, 468 (Viscount Simonds ed., 3d ed. 1961) ("To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation of the general enactment or, in other words, to repeal the general enactment in relation to that case.").

[206] P.R. CONST. art. III, § 16; 48 U.S.C. §§2102-2241.

[207] Letter from Natalie Jaresko, Exec. Dir. of Fin. Oversight & Mgmt. Bd. for P.R., to Hon. Juan Zaragoza, Member of P.R. Senate (July 2, 2021), https://drive.google.com/file/d/1ecVXSDeUBUsMXE7amtJj2bYCc9Ri366j/view.

something to Puerto Rico that would be unconstitutional if done to a U.S. State.[208] In a way, the adoption of PROMESA did not only negate several principles that are part of the basic structure of territoriality, but it may have actually changed some of its fundamental legal rules. This is arguably the case of R1 (Puerto Rico has the right to organize a government pursuant to their own constitution). PROMESA, as explained above, overrode, at least temporarily, key parts of that constitution. No action originating in the United States or Puerto Rican governments have put the territorial relationship under more strain than the adoption of PROMESA in 2016.

7. The 2021 Report of the U.S. Department of Justice

The final event that we briefly examine in this Part is, by itself, relatively minor and could have even gone unnoticed. We nonetheless mention it because, not only did

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[208] *See* New York v. United States, 505 U.S. 144, 162 (1992) (noting that "[w]hile Congress has substantial powers to govern the Nation directly, including areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."); s*ee also* Territorial Federalism, *supra* note 7 at 1641 (arguing that "[w]hat Congress has done to Puerto Rico with PROMESA – and may do to other U.S. territories in the future – courts undoubtedly would not sanction if done to a sovereign state."). Moreover, PROMESA, if applied to a state, would arguably violate the Guarantee Clause of the U.S. Constitution, which requires the United States to "guarantee to every State in this Union a republican form of government." U.S. CONST. art. IV, § 4. Although the Guarantee Clause has sometimes been treated as non-justiciable (Luther v. Burden, 48 U.S. 1, 46–47 (1841)), the U.S. Supreme Court has suggested that "not all claims under the Guarantee Clause present nonjusticiable political questions." New York v. United States, 505 U.S. at 185; *see also* Reynolds v. Sims, 377 U.S. 533, 542 (1964). In her concurring opinion in *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1675, 1677–79 (2020), Justice Sotomayor came very close to suggesting that in requiring Puerto Rico to adopt a constitution establishing a republican form of government (understood as "the right of the people to choose their own officers for government administration and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves,") Congress may have become unable to validly apply a law like PROMESA to Puerto Rico. 48 U.S.C. § 731(2) (stating that Puerto Rico's "constitution shall provide a republican form of government and shall include a bill of rights."). In *Downes v. Bidwell*, 182 U.S. 244, 279 (1901), the U.S. Supreme Court noted that the U.S. Congress may establish a non-republican form of government in territories that it determines are not ready for it (which may have been Congress's view about Puerto Rico in 1901, but not after 1950). *See* Adams v. Clinton, 90 F. Supp. 2d 35, 38 (D.D.C. 2000) (rejecting an injunction request directing the District of Columbia Financial Responsibility and Management Assistance Authority to "take no further action" and "disband itself" and expressing that the Guarantee Clause did not apply to the District of Columbia). Note, however, that in its recent report on the Puerto Rico Statehood Admission Act, the U.S. Department of Justice "recommends that Congress expressly provide in H.R. 1522, or in separate legislation enacted during the transition period effected by the President's proclamation of a date for admission of Puerto Rico, for an orderly transition of the Oversight Board into an entity of the new State of Puerto Rico. Alternatively, of course, Congress may decide that the Oversight Board should terminate operations if Puerto Rico becomes a state, in which case the Department would also recommend express legislation to that effect." U.S. DEP'T OF JUST., H.R. 1522, THE PUERTO RICO STATEHOOD ADMISSION ACT 7 (2021), https://aldia.microjuris.com/wp-content/uploads/2021/06/DOJ-Analysis-of-HR-1522.pdf [hereinafter U.S. DEPARTMENT OF JUSTICE STATEHOOD ADMISSION ACT].

it not go unnoticed in Puerto Rico,[209] but it provides a key insight into the way in which the U.S. Government currently understands its relationship with the island. In June 2021, the U.S. Department of Justice made public its analysis of two status bills that (at the time of writing) are under consideration by the U.S. Congress.[210] One of those bills is the Puerto Rico Self-Determination Act,[211] which would put in place a process that involves the calling of a "Status Convention" in the island.[212] The elected delegates to the Status Convention would determine the self-determination options to be included in a referendum.[213] The self-determination option favored by the majority would then be presented to Congress.[214] In the provision defining the Status Convention, the bill states: "The legislature of Puerto Rico has the *inherent authority* to call a status convention through an Act or Concurrent Resolution. . . ."[215] The U.S. Department of Justice expressed concern with the inclusion of this language. It noted the following:

> The Department's first comment relates to the reference to the Puerto Rico legislature's having "inherent" authority to call a status convention. H.R. 2070, § 3(a). We surmise that this description of the nature of Puerto Rico's authority is intended to acknowledge the Commonwealth's significant autonomy and powers of self-government. We note, however, that the use of the word "inherent" may create confusion as to the ultimate source of the Puerto Rico government's authority. As the Supreme Court recently noted, even though "Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing Commonwealth," the "ultimate source" of Puerto Rico law is an enactment of the U.S. Congress. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1874 (2016) . . . . Describing Puerto Rico's authority as "inherent"—that is, "existing. . . as a permanent attribute or quality . . . indwelling, intrinsic," OED Online (Mar. 2021)—when in fact that authority derives from Congress, is legally inaccurate. The Department does not object to some sort of acknowledgment of Puerto Rico's self-governance, but to

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[209] *Departamento de Justicia Recomienda Cambios a los Proyectos sobre el Status Político de Puerto Rico*, EL NUEVO DÍA (June 15, 2021), https://www.elnuevodia.com/corresponsalias/washington-dc/notas/departamento-de-justicia-federal-recomienda-cambios-a-los-proyectos-sobre-el-status-politico-de-puerto-rico/.

[210] U.S. DEP'T OF JUST., H.R. 2070, THE PUERTO RICAN SELF DETERMINATION ACT OF 2021 (2021), https://aldia.microjuris.com/wp-content/uploads/2021/06/DOJ-Analysis-of-HR-2070.pdf [hereinafter U.S. DEPARTMENT OF JUSTICE SELF DETERMINATION ACT]; U.S. DEPARTMENT OF JUSTICE STATEHOOD ADMISSION ACT, *supra* note 208.

[211] U.S. DEPARTMENT OF JUSTICE STATEHOOD ADMISSION ACT, *supra* note 208; U.S. DEPARTMENT OF JUSTICE SELF DETERMINATION ACT, *supra* note 210.

[212] H.R. 2070, 117th Cong. § 3(a) (2021).

[213] *Id.* § 3(d).

[214] *Id.* § 4.

[215] *Id.* § 3(a) (emphasis added).

> avoid confusion as to the source of the Puerto Rico legislature's authority, we recommend striking the word "inherent."[216]

As in 2017, the Department of Justice also noted that the current territorial status needed to be included as one of the self-determination options, a view that contrasted to Section 3(c)(1) of the bill, which establishes that the Status Convention would develop options for Puerto Rico that are "outside the Territorial Clause of the United States Constitution."[217] According to the Department of Justice, that mode of proceeding may be interpreted as implying that "the United States has determined that the people of Puerto Rico may not decide to retain the island's current territorial status," which would be contrary to the

> Executive Branch's longstanding view that 'Puerto Ricans should determine for themselves the future status of the Island' and the federal government's responsibility is to facilitate 'the desire of the people of Puerto Rico to change status or to establish, for some period of time, that they have chosen no change in status.'[218]

In so doing, the Department of Justice, as the U.S. Supreme Court in *Sánchez Valle*, defended a view in tension with P3: Puerto Rico's current status does not find its origin in a decision of Puerto Ricans in the exercise of their inherent sovereignty. Nonetheless, it also provided a means for the reproduction of the basic structure of territoriality—the inclusion of the status quo (with its fundamental legal rules) as a legitimate "self-determination" option.

IV. CHALLENGING THE BASIC STRUCTURE OF TERRITORIALITY

The previous Part described what we have called the basic structure of territoriality and examined a series of events that brought to light its internal contradictions. Except for the adoption of PROMESA in 2016, those events left the basic structure intact. In the exercise of its legal sovereignty over the island, the U.S. Congress, through the adoption of PROMESA, unilaterally reduced the force of the Constitution of 1952. What would happen if, in the exercise of their claimed political sovereignty over the island, Puerto Ricans attempted to unilaterally replace its internal constitution, to exercise the constituent authority that they may have failed to exercise during the 1950-1952 process? And what if that replacement expressly violated the conditions established by the U.S. Congress and contained in the Constitution of 1952's eternity clause? Or, even more dramatically (and unlikely), what if the Puerto Rican legislature issues a unilateral declaration of independence? The basic structure of territoriality, after all, is not normatively neutral; it protects a relationship that, like all colonial relationships, is based on a radical negation of a basic democratic principle. That is, that a people should only be subject to norms created by themselves, either directly or through their elected representatives.

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[216] U.S. DEPARTMENT OF JUSTICE SELF DETERMINATION ACT, *supra* note 210.

[217] *Id.*

[218] *Id.*

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A. Constituent Power and Constitutional Replacement

In order to answer those questions, two key constitutional theory concepts need to be introduced: the notion of constituent power and that of constitutional replacement. Contrary to conventional thinking, constitutions do not last very long. In fact, Elkins, Ginsburg, and Melton have shown that "the median survival time (the age at which one-half of constitutions are expected to have died) is nineteen years."[219] There are various factors that influence the endurance of constitutions, such as social and environmental changes, wars, economic crises, and design features.[220] What is of interest to us at this point is not *why* constitutions are replaced but *how*. Some constitutions are created (or fundamentally transformed) in revolutionary circumstances, after a break in the previous constitutional order or during state building.[221] In such a revolutionary setting, the constitution-making body— the holder of constitution-making authority—acts without pre-existing constitution-making rules or simply ignores them.[222] This *ex nihilo* type of constitution-making has been present in many states, especially in Latin America, where formally illegal constituent assemblies have been frequently convened.[223] The formation of the U.S. Constitution itself was famously a constitutional replacement of the Articles of the Confederation rather than an amendment to them, as the Founders acted in violation of the original mandate and the required procedure.[224]

From the French Revolution onwards, the concept of constituent power (a constitution-making power) that exists outside the constitutional order and that can always reappear to replace the constitution with a new one, has been highly influential in some constitutional traditions.[225] Indeed, the replacement of an existing constitution usually presumes the exercise of an original constituent power (in a democratic context, a power held by 'the people'), unlimited by any forms or procedures. Such a power, it is said, is not bound by the constitution's basic

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219 ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 129 (2009).

220 *See generally id.*

221 Andrew Arato, *Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making*, 1 GLOB. CONSTITUTIONALISM 173, 175–76 (2012).

222 CLAUDE KLEIN & ANDRÁS SAJÓ, *Constitution-Making: Process and Substance*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 419, 421–22 (Michel Rosenfeld & András Sajó eds., 2012).

223 *Id.* at 426–31.

224 Richard S. Kay, *The Illegality of The Constitution,* 4 CONST. COMMENT. 57, 67–68 (1987). On the concept of constituent power in American thinking, see Jason Frank, *"Unauthorized Propositions:" The Federalist Papers and Constituent Power*, 37 DIACRITICS, no. 2-3, 2007, at 103, 103-04; William Partlett, *The American Tradition of Constituent Power*, 15 INT'L J. CONST. L. 955, 965–67 (2017).

225 *See* LUCIA RUBINELLI, CONSTITUENT POWER: A HISTORY 1–3 (2020). On the various theoretical approaches to constituent power, see, for example, MIKAEL SPÅNG, CONSTITUENT POWER AND CONSTITUTIONAL ORDER: ABOVE, WITHIN AND BESIDE THE CONSTITUTION (2014).

structure.[226] This original constituent power, which is said to rest in a legally unlimited people, is distinguished from the legally regulated amendment authority, which can aspire to no more than being a *derived* constituent power.[227] But not all constitutions are created *ex nihilo - de la nada*, or out of nothing. Constitution-making processes, as the experience in South Africa demonstrates, may take place within certain pre-determined procedural and substantive rules.[228] Others may be regulated by rules imposed by foreign, external, or occupying forces, as in the cases of Japan, Germany, or Iraq.[229] Moreover, some constitutions (like the Chilean one after the 2019 amendments) contain rules for their own replacement, aiming to regulate the future exercise of the constituent authority.[230] It would be difficult to argue that, in the previously mentioned countries (i.e., South Africa, Japan, etc.), old constitutions were not replaced with new ones *just* because there was not a breach in legal continuity.

That is to say, constitutional replacement does not always need to involve what Hans Kelsen famously called a change in the *Grundnorm* or a "revolution in the legal sense,"[231] or what, more recently, Gabriel Negretto has called a "disruption of

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226 The ability of constituent power to act outside of positive law goes in one line of thought from Sieyès to Schmitt. *See* EMMANUEL JOSEPH SIEYÈS, *What is the Third Estate?, in* POLITICAL WRITINGS 136 (Michael Sonenscher ed., 2003); CARL SCHMITT, CONSTITUTIONAL THEORY 132 (Jeffrey Seitzer ed., trans. 2008).

227 For a discussion of the distinction between the original and the derived constituent power, see JOEL COLÓN-RÍOS, CONSTITUENT POWER AND THE LAW 8–17 (2020).

228 For elaboration on this idea and its implication on the nature of constituent power, see ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY *in* OXFORD CONSTITUTIONAL THEORY 126 (Martin Loughlin et al. eds., 2016).

229 *See, e.g.*, ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 1–3 (2009); RICHARD ALBERT ET AL., THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS 1–3 (2019).

230 *See, e.g.*, David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 880 (2015); GABRIEL L. NEGRETTO, REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES: THEORETICAL AND COMPARATIVE PERSPECTIVES 1–2 (2020).

231 Kelsen states:

> It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act,

constitutional legality."[232] The rules contained in a constitution for the exercise of the amending authority (or the derived constituent power) can be strictly followed, but in order to adopt changes that repudiate the constitution's essential features, destroys its foundations, and transforms its identity (i.e., its basic structure).[233] These are the types of changes captured by the "substitution doctrine" adopted by the Colombian Constitutional Court in its famous 2003 judgment,[234] and by what Richard Albert has more recently termed "constitutional dismemberment:" constitutional amendments that are "self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations."[235] Rather than being relatively minor adjustments seeking to better realize the purpose of the existing constitution, they "dismantle [its] basic structure."[236] Constitutional replacement, then, occurs when the basic structure of the established constitution is altered (e.g., through the adoption of a new constitution or the radical alteration of the existing one) either legally or illegally.[237]

B. The U.S. Congress as Constituent Authority

At the very bottom of a colonial relationship, the negation of democracy is expressed in the identity of the constituent subject, in the fact that constituent power is not held by the people to which the constitutional order applies.[238] This is why it is

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> as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.

See HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 118 (1945).

232 GABRIEL L. NEGRETTO, MAKING CONSTITUTIONS: PRESIDENTS, PARTIES, AND INSTITUTIONAL CHOICE IN LATIN AMERICA 19 (2013) [hereinafter NEGRETTO, MAKING CONSTITUTIONS]; *see also* Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 LAW & SOC'Y REV. 749, 758 (2012) [hereinafter Negretto, Replacing and Amending Constitutions].

233 NEGRETTO, MAKING CONSTITUTIONS, *supra* note 232, at 15–16.

234 Corte Constitucional [C.C.] [Constitutional Court], La Sala Plena Julio 9, 2003, Sentencia C-551/03 (Colom.).

235 Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L. L. 1, 2–3 (2018).

236 *Id.* at 3.

237 In a similar vein, it has recently been argued that the formal notion behind "legal revolutions" should be abandoned in favor of a substantive one that focuses not on the process of the constitutional change but on its substance, and to inquire whether it resulted in a paradigm shift in the way by which constitutionalism is experienced in that given polity, regardless of how the change has occurred. Consider, for example the Hungarian transformation from communism to a liberal democracy by use of the formal amendment procedure. Surely even without a break in legal continuity, one can understand that the constitutional order has been revolutionized and effectively replaced with a new one. GARY J. JACOBSOHN & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION 59–65 (2020).

238 For a discussion of these different doctrines, see Joel I. Colón-Ríos, *Five Conceptions of Constituent Power*, 130 LAW Q. REV. 306, 306 (2014).

not surprising that the British Empire gave rise to new ideas about the nature of constituent authority in its overseas colonies and dominions.[239] For example, in 1929, Arthur Berriedale Keith referred to colonial legislatures' "inability to exercise the unfettered constituent power which belongs to the Parliament of the United Kingdom."[240] To the extent that some colonial legislatures were authorized to alter some aspects of the constitution given by the Imperial Parliament, they were seen as possessing a degree of constituent power.[241] Such power, however, was equivalent to the power of amending a constitution (not of replacing the existing one), and its scope could be limited by the ultimate constituent authority, that is, the imperial legislature.[242] According to Keith, colonial legislatures sometimes had "a mere scintilla of constituent power," as their power of constitutional change frequently extended only to some provisions of the colonial constitution (and not to the most important ones).[243]

In 1900 and 1917 and, arguably, in 1950-1952, the U.S. Congress exercised in Puerto Rico the "unfettered constituent power" that Keith attributed to the Westminster Parliament.[244] By adopting the Foraker Act in 1900 and the Jones Act in 1917, the U.S. Congress assumed the role of a constituent assembly. It gave Puerto Rico its two first written constitutions under United States rule (the *Spanish Cortes* had given Puerto Rico its very first constitution in 1897).[245] In 1950 the situation was different. The U.S. Congress did not act as a constituent assembly; that is, did not engage itself in the activity of drafting a constitution, but rather authorized the convocation of a constitution-making body in Puerto Rico. The question is whether, in so doing, it abdicated its constituent authority over the island in favor of the Puerto Rican people or if, on the contrary, it retained its original constituent power and simply used the Puerto Rican Constituent Convention as a sort of drafting committee (or, at most, as a derived constituent power). [246] If the latter, the Constituent Convention would have been a means for the exercise of the constituent power of the U.S. Congress, not of that of the Puerto Rican people.

The U.S. Supreme Court's decision in *Sánchez Valle* is not of great help here for a simple reason: the identity of the constituent subject can change.[247] The fact that the

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239 *Id.* at 6.

240 ARTHUR BERRIEDALE KEITH, THE SOVEREIGNTY OF THE BRITISH DOMINIONS 197 (1929).

241 *Id.* at 197–98.

242 *Id.* at 198.

243 *Id.* at 199.

244 *Id.* at 197.

245 For a discussion, see Colón-Ríos, *supra* note 25, 16–21.

246 *See* Gordon K. Lewis, *Puerto Rico: A New Constitution in American Government*, 15 J. POL. 42, 44 (1953) (expressing that "[t]he constituent-power created by the Congressional grant, however, was restricted by certain requirements contained in Public Law 600.").

247 This is not to confuse with the identity of the constitutional subject, that can also change. *See, e.g.*, MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 209 (2010). The identity of the constituent subject can

Puerto Rican legal system has its legal origins in an act of the U.S. Congress does not *necessarily* mean that the U.S. Congress is, today (or will be tomorrow), the island's constituent subject. After all, the *Spanish Cortes* once exercised constituent authority over the island and, in 1898, such authority arguably laid with the President as Commander in Chief of the U.S. military and not in the federal legislature.[248] A change in the identity of a constituent subject would almost always entail the *illegal* alteration of a constitutional order's basic structure (i.e., one of the modalities constitutional replacement discussed above), a revolution in the legal sense, or a change in the *Grundnorm*. The classic example, given by Kelsen,[249] would be that of a popular revolution that results in the illegal replacement or a monarchical constitution with a republican one.

It is nonetheless clear that there was no legal revolution and no break in the chain of legal continuity in Puerto Rico in 1950-1952. The process for altering the existing constitution (i.e., the Jones Act) was followed by the U.S. Congress (i.e., the ordinary law-making process) and the Puerto Rican authorities complied, at every single step, with the procedures and conditions contained in Public Law 600. If, for example, the Constituent Convention had refused to comply with the U.S. Congress' requirement to alter the draft constitution and had been able to impose its will, the identity of Puerto Rico's constituent power (at that moment in time) would at least have been up for debate.[250] That, however, did not happen. Moreover, even if there was a plausible argument that in 1950-1952, the Puerto Rican people exercised *their* constituent authority,[251] the adoption of PROMESA in 2016 would nonetheless suggest that the

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change, for example, from a divine authority of the emperor to a popular sovereignty of the people, as in Japan. *See* CHAIHARK HAHM & SUNG HO KIM, MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA 7 (2015).

[248] A similar point is made by Issacharoff et al., *supra* note 6, at 21.

[249] KELSEN, *supra* note 231, at 118.

[250] When these conditions were considered at the Constituent Convention, Muñoz Marín expressed (with respect to the U.S. Congress' refusal to accept the inclusion of social and economic rights into the bill of rights) that given that those provisions were not legally enforceable, their removal was not a problem. But he added (to the applause of his colleagues) that if the Constituent Convention's intention had been to make them legally enforceable, "we would not accept to eliminate Section 20 even if that meant that the constitution would not enter into effect." DIARIO, *supra* note 30, at 3129.

[251] Issacharoff et al. think they did:

> The authority to make that choice [to decide on a constitutional order] is an attribute of sovereignty reserved to the constituent power, in this case the critical decisions by the citizens of Puerto Rico to enter into this new relationship by overwhelmingly endorsing their new constitutional arrangements in 1952. The constituent power of the new commonwealth arrangement was exercised in the decision of the people of Puerto Rico to take the first affirmative steps of adopting the formal relationship with the United States. The Court in *Sánchez Valle* offered no account of why sovereign status could not emerge during the reformulation of political relations as part of the process of decolonization.

Issacharoff et al., *supra* note 6, at 24.

identity of the constituent power had reverted to the U.S. Congress. PROMESA is, at least in one sense, "revolutionary" with respect to the Constitution of 1952 because it altered the jurisdiction of constitutionally regulated authorities (e.g., it severely limited both the authority of the island's Governor and legislature) without following the amending process contained in it.

Nonetheless, note that we said that PROMESA was revolutionary at least in one sense. If one understands the Constitution of 1952 as a based act of the U.S. Congress (Public Law 600), then the adoption of PROMESA was entirely consistent with it. That is to say, just as any ordinary federal law, Public Law 600 could be repealed by a subsequent federal law (which would mean the Constitution of 1952 would arguably cease to exist).[252] Moreover, a federal law inconsistent with Public Law 600, or with the constitution it authorizes, would implicitly repeal any conflicting provisions. Under this approach, the U.S. Congress would find itself, with respect to Puerto Rico, as at once "a legislative and a constituent assembly."[253] This does not seem to be very far from the truth: while the eternity clause contained in Article VII of the U.S. Constitution would render illegal any attempt by Puerto Rico to change its political status unilaterally, the same would not seem to be the case, for example, of a federal law granting full independence to the island. Such a law would probably be seen as a legally valid exercise of congressional authority under the Territorial Clause, that is, an exercise of the power "to dispose" of territory.[254]

This view is also exemplified in the debate about whether the U.S. Congress could legally repeal the Constitution of 1952. That debate began in the Constituent Convention itself, when some delegates argued that, even if, morally speaking, the U.S. Congress should not be able to unilaterally change or repeal the constitution the Convention was drafting, there were no legal obstacles preventing it from doing so.[255] David M. Helfeld, a leading Puerto Rican law scholar, expressed a similar approach in an early article on the new constitution: "[c]onstitutionally, Congress may repeal Public Law 600, [and] annul the Constitution of Puerto Rico . . . . From the perspective of [c]onstitutional law the compact between Puerto Rico and Congress may be unilaterally altered by the Congress."[256] In fact, a suggestion that the U.S. Congress would not be able to unilaterally alter the constitution adopted under Public Law 600 and that the authorization to draft a new constitution amounted to an "irrevocable

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[252] Compare *Figueroa v. Puerto Rico*, where a U.S. court of appeals expressed that "the constitution of the Commonwealth is not just another Organic Act of Congress," even if "congressional approval was necessary to launch it forth." 232 F.2d 615, 620 (1st Cir. 1956).

[253] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 74 (1956).

[254] This seems to be a natural implication of the Territorial Clause itself, and was recognized by the PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS, REPORT: LEGAL ANALYSIS OF OPTIONS FOR PUERTO RICO'S STATUS 6 (2005). "The Federal Government may relinquish United States sovereignty by granting independence or ceding the territory to another nation; or it may, as the Constitution provides, admit a territory as a State, thus making the Territory Clause inapplicable." *Id.*

[255] Diario, *supra* note 30, at 460, 543.

[256] David Helfeld, *Congressional Intent and Attitude Towards Public Law 600, and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U.P.R. 255, 307 (1952).

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delegation of [the U.S. Congress'] constitutional authority," led to the federal legislature's decision to require the addition of the previously mentioned eternity clause to the Constitution of 1952.[257]

More recently, a Presidential Task Force report on Puerto Rico's status noted that "as long as Puerto Rico remains a territory, its system is subject to revision by Congress" and that this view reflects "the general rule that one legislature cannot bind a subsequent one."[258] The Supreme Court of Puerto Rico agreed with that approach in 2015, noting that "Congress may allow the Commonwealth to remain as a political system indefinitely," or it could "amend or repeal the internal administrative powers that the Government of Puerto Rico currently exercises."[259] The contrary view has nonetheless been defended.[260] For example, in 1954, the U.S. delegation informed the U.N. that the compact with Puerto Rico was only changeable "by common consent."[261] Prior to the previously quoted decision, Puerto Rican courts had expressed that the island's governmental powers emanate from its people and are not merely delegated by the U.S. Congress.[262] More recently, in a dissenting opinion, Justice Sotomayor expressed that "there is a legitimate question whether Congress could validly repeal any element of its earlier compact with Puerto Rico on its own

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257 Torruella, *supra* note 1, at 82–84.

258 REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 5–6 (2007). This view is sometimes challenged using the recognition of Philippine independence as an example. *See, e.g.*, Issacharoff et al., *supra* note 6, at 14; s*ee also* Puerto Rico v. Sánchez Valle, 579 U.S. 59, 80 (2016) (Breyer J., dissenting). That is to say, if it is true that the U.S. Congress cannot bind itself, how come it cannot now legislate for the Philippines? Regardless of what may be the answer to the general question about whether the U.S. Congress can bind itself, the recognition of the independence of the Philippines is not a good example. In that case, a legal revolution (i.e., a change in Grundnorm or a break in the chain of legal continuity) took place, so any analogy with the U.S. Congress' legislative power over an entity that remains it territory, fails. For a general discussion of the question, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665–66 (2002). More generally, see JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 118–22 (2010).

259 Pueblo v. Sánchez Valle, 192 P.R. Dec. 594, 641 (2015); *see also* United States v. Sánchez, 992 F.2d 1143, 1152–53 (11th Cir. 1993) ("Congress may unilaterally repeal the Puerto Rican Constitution…and replace [it] with any rules or regulations of its choice.").

260 For a recent academic argument about the U.S. Congress's inability to repeal the Constitution of 1952, see Adam W. McCall, *Why Congress Cannot Unilaterally Repeal Puerto Rico's Constitution*, 102 CORNELL L. REV. 1367, 1368 (2017).

261 H. COMM. ON FOREIGN AFFAIRS, 83D CONG., EIGHT SESSION OF THE GENERAL ASSEMBLY OF THE U.N. 241 (Comm. Print 1954) (written by Reps. Frances P. Bolton and James P. Richards)). Interestingly, in the early case of *Fletcher v. Peck*, 10 U.S. 87, 135 (1810), it was noted: "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest [sic] those rights."

262 Ramírez de Ferrer v. Mari Brás, 144 P.R. Dec. 141, 156–58 (1997); Pueblo v. Figueroa, 77 P.R. Dec. 188, 196–97 (1954).

initiative."[263] Even if that is a legitimate question, at least for now, it seems the official answer is that it can. As such, there is little doubt that it is in the federal legislature where the island's constituent power is located, a situation entirely consistent with the previously described basic structure of territoriality.

C. Reclaiming Constituent Power

The identity of Puerto Rico's constituent subject, then, is to be currently found in Washington D.C., and not in the island. The events of 1950-1952 did not change that reality. That does not mean, however, that that reality cannot change. Imagine, for example, that the Puerto Rican legislature passes a resolution convening a new Constituent Convention, and that the convention decides to alter the Constitution of 1952 in the following way. First, it proposes the removal of the eternity clause required by the U.S. Congress which, among other things, prohibits the reinsertion into the constitutional text of the social and economic rights provisions originally included as Section 20 of the Bill of Rights. Second, that if the removal of the eternity clause is approved by the electorate in a referendum, Section 20 would once again become part of the constitution. Would that action be constitutionally valid? There are at least three main argumentative lines that could be developed in response to that question. The first one is the weakest of the three: that because the eternity clause is contained in Section 3, Article VII is not self-entrenched (i.e., it does not protect itself against the amending power) and there is nothing preventing a Constituent Convention from removing it and then proceeding to make the desired (and previously prohibited) change.

According to this argument, if an eternity clause is not self-entrenched, the protected principles or provisions may simply be amended in a double amendment maneuver by, firstly, repealing the provision prohibiting certain amendments, and, secondly, amending the previously "eternal" principle or provision, which would no longer be protected from amendments.[264] One may even argue that two-stages are not required and the repeal can be made in a single act.[265] This kind of argument has been considered in the American,[266] as well as in French[267] and Norwegian[268] academic literature about potential limits to constitutional amendments. It has also been put in practice. For example, in 1989, against the backdrop of the collapse of communism

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263 Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., L.L.C., 140 S. Ct. 1649, 1677 (2020).

264 Virgílio Afonso Da Silva, *A Fossilised Constitution?*, 17 RATIO JURIS. 454, 456–58 (2004).

265 Douglas Linder, *What in the Constitution Cannot Be Amended*?, 23 ARIZ. L. REV. 717, 729 (1981) (claiming that "only a hidebound formalist would contend that the difference [between one and two amendments] is significant.").

266 See discussion in LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 111–114 (3d ed. 2000); LESTER B. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 83–85 (1942).

267 GEORGE A. BERMANN & ETIENNE PICARD, INTRODUCTION TO FRENCH LAW 13 (2008).

268 Eivind Smith, *Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway*, 44 ISR. L. REV. 369, 375 (2011).

and in order to comply with the European Community's norms, the eternity clause in the Portuguese Constitution of 1976 (Art. 288)—which is not self-entrenched—was itself amended, and the principle of "collective ownership of the means of production" was removed.[269] Although the removal "shocked" constitutional scholars, as it undermined the idea behind eternity clauses,[270] the Portuguese court was never asked to review its constitutionality.[271]

In the case of the Constitution of 1952, it is even less likely for that argument to be successful. First, unlike in most contexts, the part of the eternity clause that prohibits the reinsertion of Section 20 was required by the U.S. Congress acting as the ultimate constituent authority.[272] Thus, one could not argue that (1) eternity clauses only bind the ordinary power of constitutional reform, and not the original constituent power; (2) therefore, the removal of the relevant clause of Article VII and the subsequent reinsertion of Section 20 in the Bill of Rights by a Constitutional Convention (the usual means to exercise the original constituent power) would not present a problem. Second, and relatedly, part of the content protected by the eternity clause (e.g. Public Law 600, Public Law 447*,* the PRFRA) did not originate in Puerto Rico.[273] That is to say, unlike in most scenarios, it would not be possible to argue that because the protected content was created by the very same type of entity now tasked with the *revision* of the constitution (i.e. a Constituent Convention), it must be changeable it (i.e., "the very mouth that proscribed also permitted").[274] In short, the "lack of self-entrenchment" argument is doomed to fail.

The second argumentative line would negate, from a strictly legal perspective, the constitutional validity of a potential reinsertion of Section 20. Section 3 of Article VII is extremely clear in this respect. The relevant content is protected not only against amendments but against *revisions*, that is, the type of constitutional change that the Constitution of 1952 authorizes a Constituent Convention to engage in. Going beyond that eternity clause, from this perspective, would be ultra vires Article VII of the constitution and involve what we earlier called a constitutional replacement.

This is where the third argument would come into play. It is the most controversial argument of the three, as it rests on the notion that Puerto Rico's claims to political sovereignty can lead to a change in the identity of the constituent subject. The main idea here is that the identity of the constituent subject is not determined by law. Rather,

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[269] *See* VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 207–08, n. 39 (2009).

[270] Paulo Ferreira Da Cunha, *Constitutional Sociology and Politics: Theories and Memories,* 5 SILESIAN J. LEG. STUD. 11, 25 (2013).

[271] European Commission for Democracy Through Law (Venice Commission), *Report on Constitutional Amendment, Adopted by the Venice Commission at its 81st Plenary Session*, at 42, CDL-AD(2010)001 (Dec. 11-12, 2009).

[272] Torruella, *supra* note 1, at 81–85.

[273] *See generally* Helfeld, *supra* note 256.

[274] Babylonian Talmud, Ketubot, 22a. Usually, this approach would not deprive the eternity clause of any effects, as it would still be enforceable against the ordinary amendment process (under the Constitution of 1952, a two-thirds legislative majority plus a referendum).

it is ultimately about who is able to *effectively* engage in an act of constitutional replacement; in the abandonment of the basic structure of the constitutional order or, in this case, of the basic structure of territoriality.

Under this view, to argue in favor or against the legality of the reinsertion of Section 20 to the Bill of Rights is to misunderstand the question being asked, which requires one to inquire into whether the institutions that would be in a position to declare the change invalid would in fact do so. One could imagine that if the Constituent Convention's proposal is subject to a judicial challenge (and any obstacles regarding legal standing are overcome), courts may decide that the exercise of the power of constitutional reform is not subject to judicial review,[275] or that, if it is, that given Section 20 is not judicially enforceable, its validity is in the end is a political and not a legal question to be answered by judges.[276] The board created under PROMESA would also be in a position to prevent the adoption of this hypothetical change, but, once again, the non-enforceable nature of Section 20 would give the board good reasons to allow it (probably noting that all future ordinary laws seeking to realize social and economic rights would need to comply with the approved Fiscal Plan). If any of those things happened, and the Constituent Convention was able to revise the constitution despite the limits on its power of constitutional reform, the identity of the island's constituent subject could, arguably, have reverted to Puerto Ricans.

If such a situation were to eventuate, the Constituent Convention would have unilaterally replaced the basic structure of territoriality: it would not have only gone well beyond P2, but violated (and arguably abrogated) two of the fundamental legal rules that comprise the relationship's basic structure—R5 ("The power to reform the constitution of Puerto Rico, even when exercised by a Constituent Convention, is permanently subject to a series of material limits contained in the resolution approving the draft constitution and in Public Law 600*"*) and R7 ("The power to reform the constitution cannot be used to change any of the fundamental legal rules that regulate the relationship between the United States and Puerto Rico"). Even though, by itself, Section 20 would not have a direct effect in the nature of the relationship between Puerto Rico and the United States (e.g., U.S. laws would continue to apply in the island), its adoption would signal an important change in the basic structure of territoriality, resulting in a rebalancing of the underlying tension between legal and

[275] On the objection of courts to review constitutional reforms, see Richard Albert et al., *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639, 642 (2019) (analyzing the jurisprudence of three jurisdictions—France, Georgia and Turkey—and showing how and why courts and constitution-designers there expressly rejected the doctrine of unconstitutional constitutional amendment on formal grounds).

[276] For example, as a comparison note, the U.S. Supreme Court has understood constitutional amendment processes to only raise "political questions." See *Coleman v. Miller*, 307 U.S. 433, 459 (1939), in which the majority deemed the amendment process a political question not subject to judicial review. As Judge Black wrote: "Article V . . . grants power over the amending of the Constitution to Congress alone . . . . [T]he process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." *See generally* Walter F. Dodd, *Judicially Non-Enforcible Provisions of Constitutions*, 80 U. PA. L. REV. 54, 89–90 (1931); Marty Haddad, *Substantive Content of Constitutional Amendments: Political Question of Justiciable Concern?*, 42 WAYNE L. REV. 1685, 1685 (1996).

political sovereignty. From then on, Puerto Rican claims to political sovereignty (and potential unilateral exercises of political power based on those claims) would have a much stronger basis.

Consider now a more dramatic, and at the moment rather unlikely, example: a unilateral declaration of independence (UDI) by the Puerto Rican legislature. Unlike in the Section 20 example, the issue here would be that any challenge against that action (an action that is clearly illegal from the perspective of the basic structure of territoriality, violating all of its rules and principles), would be confronted not only with Puerto Rican claims to an ultimate political sovereignty over the island, but with the right to self-determination under international law.[277] This is why, despite its clearly illegal nature (even more so than the reinsertion of Section 20 into the Bill of Rights), it is not unthinkable that it might succeed. But whether it would succeed or not would arguably be determined not by the application of the relevant domestic legal rules, but it would instead depend on whether the United States is willing to negate the island's international right to become an independent nation, as well as on the reaction of the broader international community. If, as a result of a UDI, Puerto Rico does become an independent country, the debate about the identity of its constituent subject would be over. In fact, independence would probably be followed by a new constituent process and a new constitution.

Consider now an intermediate possibility, one falling somewhere between the reinsertion of Section 20 into the constitutional text and a UDI. Imagine that a Constituent Convention called under Article VII revises the Constitution of 1952 in order to limit the applicability of U.S. laws in the island. For example, it proposes to the electorate a provision stating: "Notwithstanding Article VII of this constitution and Section 9 of the PRFRA, Puerto Ricans will only be subject to laws adopted by the Puerto Rican legislature. A U.S. law will only apply in Puerto Rico if its legislature issues a resolution consenting to its application." This change would not only violate the eternity clause of Article VII, but also (R3) ("With the exception of internal revenue laws, U.S. federal laws, unless locally inapplicable, apply in Puerto Rico") as well as R5, R7, and while taking the principle of consent to a new level, it would radically abandon the principle of subordination. In short, such a change would amount to a clear replacement of the basic structure of territoriality and, much more than the mere reinsertion of Section 20, it would make clear that the island's constitutional order is based on a decision of a Puerto Rican constituent subject.

Not surprisingly, it is very difficult to imagine that this would survive a judicial challenge. On the one hand, the options available to a court in the case of Section 20 (i.e., treating it as a political question) seem irrelevant. Moreover, one of the effects of the change would be to repudiate the very application of PROMESA to the island. From a legal perspective, then, such a proposal seems to be a non-starter. Nonetheless, as we have been stressing since the beginning of this Article, at the very basis of the relationship between the island and the United States, there is a tension between legal and political sovereignty. A proposal like this not only brings that tension to the surface but, like a UDI, would require its solution one way or another. If it is solved in favor of U.S. legal sovereignty, the solution would be straightforward—the

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[277] *See, e.g.*, Ruben Berrios Martinez, *Self-Determination and Independence: The Case of Puerto Rico*, 67 AM. SOC'Y INT'L L. PROC. 11, 16–17 (1973) (claiming that "[i]n the case of Puerto Rico, this means that it cannot achieve self-determination until it attains independence.").

proposed change is illegal. If it is solved in favor of Puerto Rican political sovereignty, the proposed change would replace the existing relationship with a new, arguably non-territorial political status. This latter solution is extremely unlikely, and many would argue (with good reasons) that such a relationship (the conditioned application of U.S. laws to the island's consent) is not possible under U.S. constitutional law.[278]

One could nonetheless ask the following: if a UDI has some actual chance of resulting in valid law (i.e., in the creation of an independent constitutional order), would a constitutional change as the one considered in the previous example not trigger the same kind of debate (a debate informed by the right to self-determination)? And if that is the case, and regardless of its immediate outcome in a court of law, would it be really unthinkable for it to not end in a replacement in the basic structure of territoriality, in a recognition of the Puerto Rican people's constituent power? This is, in the end, the nature of a relationship that, built on a tension that is meant to remain hidden but that every now and then resurfaces, is accompanied by the always present possibility of instability. It cannot, and should not, be any other way. From a normative perspective, the last thing one may wish for is a colonial status that promises to permanently and successfully reproduce itself. At least in the near future, it is highly unlikely that any of the examples discussed above would materialize. They nonetheless allow us to look more closely at the nature and limits of the territorial relationship.

V. CONCLUSION

We have provided an analysis of the relationship between Puerto Rico and the United States that, unlike most of the existing literature, goes beyond discussions of the existing jurisprudence on the island's political status and avoids providing merely descriptive or justificatory accounts. Using the tools of constitutional theory, we sought to describe the nature of what we called the "basic structure of territoriality," the way it reproduces itself, and the possibility of its replacement. That basic structure, we argued, is comprised by the following fundamental legal rules:

> (R1) Puerto Rico has the right to organize (and reorganize) a government pursuant to their own constitution
>
> (R2) The Puerto Rican government must be republican in form and be subject to a constitutional bill of rights
>
> (R3) With the exception of internal revenue laws, U.S. federal laws, unless locally inapplicable, apply in Puerto Rico
>
> (R4) Individuals born in the island are U.S. citizens
>
> (R5) The power to reform the Constitution of 1952, even when exercised by a Constituent Convention, is permanently subject to a series of material limits contained in the resolution approving the draft constitution and in Public Law 600
>
> (R6) The content of the Constitution of 1952 must always be consistent with that of the U.S. Constitution

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[278] *See supra* note 70.

(R7) The power to reform the constitution cannot be used to change any of the fundamental legal rules that regulate the relationship between the U.S. and Puerto Rico

(R8) The U.S. Congress is not always required to treat Puerto Rico as a state

(R9) In virtue of the doctrine of preemption, laws adopted by the Puerto Rican legislature will be invalid when in conflict with federal laws

(R10) Puerto Ricans living in the island lack full political rights in the U.S. political system

Implicit in these rules, and in the manner in which they have been applied throughout the history of the territorial relationship, we find five principles:

(P1) principle of autonomy

(P2) principle of subordination

(P3) principle of consent

(P4) principle of passive U.S. citizenship

(P5) principle of progressive equalization

Although these principles are not legally enforceable, at least not in the same way the previously listed fundamental legal rules are, they inform in important ways the relationship between Puerto Rico and the United States. Whenever the island or the U.S. Government take any action that contradicts them, a tension underlying the basic structure of territoriality is brought to the surface—the tension between U.S. legal sovereignty over the island and Puerto Rican historical claims of political sovereignty. We concluded the Article with a series of thought experiments that allowed us to address the question of the identity of Puerto Rico's constituent subject. We argued that, at least at the moment, there is little doubt that the island's constitutional order is based on the constituent power of the U.S. Congress. The adoption of Public Law 600 in 1950 did not change that reality, as the U.S. Congress has the legal authority of unilaterally altering the terms of the relationship, and the Puerto Rican Constituent Convention always acted under the limits established by the federal legislature.

The examples considered in the final Part of this Article suggested that, regardless of the legal significance of the eternity clause contained in Article VII of the Constitution of 1952 and of the legal limits created by the basic structure of territoriality, the question of constituent power is ultimately a political and factual question. In other words, the identity of the constituent subject cannot be prescribed by law. In a Puerto Rican-U.S. context, it does not depend on what the fundamental legal rules of the relationship are but, rather, on who is able to effectively (and unilaterally) replace the basic structure of territoriality. As of now, it seems that that entity is the U.S. Congress, whose power under the Territorial Clause of the U.S. Constitution would even allow it to "dispose" of the territory without the consent (and even with the objection) of Puerto Rico. That does not mean, however, that such a situation will (or should) continue indefinitely.