NOTES

"The People" Protects the People of Puerto Rico: Giving Meaning to an Uninterpreted Part of the Tenth Amendment

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* Georgetown Law, J.D. 2024; The George Washington University, B.A. 2017. This Note greatly benefited from the thoughtful feedback of Samuel Holt and the Honorable Gustavo Gelpí of the U.S. Court of Appeals for the First Circuit. I am also deeply grateful to the dedicated editorial team at *The Georgetown Law Journal* for their careful revisions and guidance throughout the publishing process. Above all, I thank my parents for their unwavering support. This Note is a tribute to my beloved *Isla del Encanto*, a place that stays with me—in my thinking, in my writing, and in the values that guide both.

INTRODUCTION

The island of Puerto Rico is unique—not just culturally, but politically and constitutionally. In the words of the U.S. Supreme Court, Puerto Rico "occupies a relationship to the United States that has no parallel in our history."[1] Though this unparalleled relationship comes with benefits, it also comes with a cost: for more than a century, Puerto Rico has had a quasi-domestic, quasi-foreign relationship with the United States.

Puerto Rico is a U.S. territory, and Puerto Ricans are U.S. citizens.[2] In many respects, the island's government functions like those of the fifty states of the Union. Puerto Rico has a governor, a bicameral legislature, and a supreme court, and since 1952 has exercised powers of self-governance.[3] The island's powers of self-governance stem from a congressional grant of sovereignty similar to that enjoyed by the fifty states, despite a much less certain constitutional doctrine underlying that grant of sovereignty.[4] But Puerto Rico is not a state, and recent federal actions intruding upon the island's power of self-governance have renewed calls to define—or redefine—what Puerto Rico is and should be.[5]

The federal–state relationship differs greatly from the federal–territory relationship. On the one hand, the federal–state relationship comprises two separate sovereigns—the federal government and the states—and the Tenth Amendment is one of several constitutional provisions delineating the balance of power between those two sovereigns.[6] In fact, the Court has recognized the Tenth Amendment as an

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

2. *See* Raquel Reichard, *Why Isn't Puerto Rico a State?*, HISTORY (Mar. 6, 2025), https://www.history.com/news/puerto-rico-statehood [https://perma.cc/C47G-2PMP].

3. *See* Anna Price, *The Commonwealth of Puerto Rico and Its Government Structure*, LIBR. CONG.: BLOGS (Nov. 10, 2022), https://blogs.loc.gov/law/2022/11/the-commonwealth-of-puerto-rico-and-its-government-structure [https://perma.cc/FT6B-LAUP]; *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1632–33 (2017).

4. *See Developments in the Law*, *supra* note 3, at 1632–33.

5. *See, e.g.*, Nicole Acevedo, *What's Behind Calls for Puerto Rico Statehood? Here Are 4 Things to Know.*, NBC NEWS (Mar. 3, 2021, 11:16 AM), https://www.nbcnews.com/news/latino/what-s-behind-calls-puerto-rico-statehood-here-are-4-n1259300.

6. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

independent limitation on what the federal government can do vis-à-vis the states.[7] The constitutional division of authority between the federal government and the states, a concept known as "federalism," protects the states from the arbitrary exercise of federal power.[8] On the other hand, the federal–territory relationship comprises only one sovereign—the federal government—and the Territory Clause of Article IV gives Congress, an entity over which U.S. territories have little influence,[9] ample powers to "dispose of" and "make all needful Rules and Regulations" respecting those territories.[10] Consequently, the power of self-governance that Puerto Rico enjoys today exists only because Congress authorized it through federal law.[11]

This seemingly undemocratic distinction between the federal–state relationship and the federal–territory relationship has led some to conclude that Puerto Rico is a colony of the United States.[12] And though students of the Puerto Rico–U.S. relationship might agree with the colony label, unexplored legal avenues exist for Puerto Rico to claim rights typically reserved to the states. Indeed, the Tenth Amendment speaks about more than just states: it speaks about rights reserved to the "states, *or to the people*."[13] This Note argues there is another way to think about what Puerto Rico currently is—constitutionally speaking.

This Note proceeds in three Parts. Part I summarizes the political and legal relationship between Puerto Rico and the United States. Part II argues that the Tenth Amendment's restrictions on federal power protect more than just states, as evidenced by both the text itself and the Court's case law defining the term "the people" in other constitutional contexts. Part II further reasons that through the federal government's grant of U.S. citizenship to Puerto Ricans in 1917 and its subsequent state-like treatment of Puerto Rico from 1952 to 2016, Puerto Ricans became part of "the people" protected by the Tenth Amendment. Finally, Part III explains how the Court's "anti-commandeering" principle can protect Puerto Rico and why recent federal legislation affecting the island is unconstitutional under this federalist framework.

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7. *See, e.g.*, Nat'l League of Cities v. Usery, 426 U.S. 833, 842–43 (1976); New York v. United States, 505 U.S. 144, 156–57 (1992); Printz v. United States, 521 U.S. 898, 919 (1997).

8. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448–51 (1987) (discussing the development of American-style federalism).

9. Residents of U.S. territories have only non-voting representation in Congress. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION 26–27 (1997).

10. U.S. CONST. art. IV, § 3, cl. 2.

11. *See* Puerto Rico Federal Relations Act of 1950 § 1, 48 U.S.C. § 731b.

12. *See, e.g.*, Juan R. Torruella, *¿Hacia dónde vas Puerto Rico*?, 107 YALE L.J. 1503, 1519–20 (1998). *See generally* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997). A colony is "[a] dependent territorial entity subject to the sovereignty of an independent country, but considered part of that country for purposes of relations with third countries." *Colony*, BLACK'S LAW DICTIONARY (9th ed. 2009).

13. U.S. CONST. amend. X (emphasis added).

I. BACKGROUND: PUERTO RICO'S POLITICAL & LEGAL RELATIONSHIP WITH THE UNITED STATES

The source of Puerto Rico's political and legal relationship with the United States is the Territory Clause of Article IV, Section 3, Clause 2 of the U.S. Constitution. It states that Congress "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[14] In the early years of the new republic, the Territory Clause enabled Congress to expand into new lands and territories.[15]

A separate clause of the Constitution endows Congress with the power to admit new states.[16] But those states need to come from somewhere.[17] Historically, Congress "first required land from which to form them."[18] So as standard practice throughout the nineteenth century, Congress enlarged the nation's boundaries "via territorial annexation and acquisition"[19] and then turned those territories into states.[20] Before a territory's admission as a state, the responsibility to govern the territory fell to Congress.[21] And while Congress exercised ample power to govern these territories, the territory-to-statehood trajectory was inevitable and relatively quick: indeed, *all* of America's nineteenth-century territories eventually assumed the status of statehood.[22]

But Puerto Rico faced a different trajectory—a trajectory of uncertainty.

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14. U.S. CONST. art. IV, § 3, cl. 2.

15. *See* Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 293–94 (1898). Examples of initial territorial acquisitions by the United States include the Louisiana Purchase from France and Florida from Spain. *Id.* at 293.

16. *See* U.S. CONST. art. IV, § 3, cl. 1.

17. Article IV limits the ability of Congress to form new states from existing states, either by carveout or combination. *See id.*

18. *Developments in the Law*, *supra* note 3, at 1642.

19. *See id.* (citing, by way of example, the Joint Resolution for Annexing Texas to the United States, H.R.J. Res. 8, 28th Cong. (1845) and the Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539).

20. *See* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 6 (1989) (explaining that the Northwest Ordinance of 1787, which established the pattern of territorial development followed during the nineteenth century, "envisioned three stages in a territory's evolution: (1) total governmental authority in an appointed Governor; (2) continuance of an appointed Governor but with an elected legislature and local courts; and (3) Statehood").

21. Although several nineteenth-century commentators disputed a broad interpretation of the Territory Clause that would allow full control of territories acquired after the Founding, most early members of Congress read the Clause to empower Congress to govern territories regardless of when they came under U.S. control. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 168, 172–73 (2002). The Court has endorsed this reading of the Territory Clause. *See* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 542 (1828).

22. *See* Brief for *Amici Curiae* Professors Christina Duffy Ponsa and Sam Erman in Support of Respondents at 6, Puerto Rico v. Sánchez Valle, 579 U.S. 59 (2016) (No. 15-108) (noting that "every territory annexed prior to 1898 eventually gained admission into statehood and concomitant separate sovereignty after adopting a constitution that would become the state constitution").

A. EARLY HISTORY AND FEDERAL CONTROL: 1898–1950s

Puerto Rico has been a U.S. territory since 1898—when, after the Spanish–American War, Spain ceded ownership of Puerto Rico, Guam, and the Philippines to the United States per the Treaty of Paris.[23] The Treaty specified that "[t]he civil rights and political status of the native inhabitants of the territories . . . ceded to the United States shall be determined by the Congress."[24] For fifty-four years, Congress exercised control over Puerto Rico and limited Puerto Ricans' ability to manage their internal affairs.[25] Shortly after the island's acquisition by the United States, Congress passed the Foraker Act, which established a civil government within Puerto Rico that was appointed by and responsive to the federal government.[26]

The Court's earliest opportunities to consider the legal status of newly acquired Puerto Rico arose in a collection of cases known as the *Insular Cases*.[27] In these cases, the Court developed the doctrine of non-incorporation that categorized the overseas lands acquired by the United States after the Spanish–American War as "unincorporated territories."[28] These unincorporated territories were "neither states nor had the ready prospect of eventual statehood."[29] Rather, these jurisdictions were "outside the full constitutional structure of the United States, even if subject to some fundamental protections of American law."[30]

The *Insular Cases* further established that "except for . . . provisions that protect fundamental rights, the provisions of the U.S. Constitution do not apply *ex proprio vigore* [that is, by their own force][31] to unincorporated territories."[32] As an unincorporated territory, Puerto Rico was treated as a possession whose rights and powers could be granted—or withheld—at the discretion of the federal government.[33]

Crucially, the *Insular Cases* reflected the imperial and racial assumptions of their era. For example, in *Downes v. Bidwell*, the Court spoke of the newly acquired territories as being "inhabited by alien races," such that governance "according to

23. *See* Treaty of Paris, Spain-U.S., art. II–III, Dec. 10, 1898, 30 Stat. 1754.

24. *Id.* at art. IX.

25. *See* Price, *supra* note 3; *see also Developments in the Law*, *supra* note 3, at 1634.

26. *See* Foraker Act (Organic Act of 1900), Pub. L. 56-191, 31 Stat. 77, 81–83 (1900).

27. Scholars disagree as to which cases fall under the heading of "the Insular Cases." Some include only the cases decided in 1901; others contend the cases culminate with Balzac v. Porto Rico, 258 U.S. 298 (1922). *See* Christina Duffy Burnett, *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389–90 (Christina Duffy Burnett & Burke Marshall eds., 2001).

28. *Id.*

29. Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?*, 94 IND. L.J. 1, 9 (2019).

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

31. *Ex propio vigore*, BLACK'S LAW DICTIONARY (9th ed. 2009).

32. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U. L. REV. 587, 588 (2017) (definition of *ex proprio vigore* added).

33. *See* Issacharoff et al., *supra* note 29, at 9.

Anglo-Saxon principles, may for a time be impossible."[34] This framing lent judicial legitimacy to a model of colonial governance that diverged from the nineteenth-century norm, in which territories were generally expected to progress toward statehood. As Professor Samuel Issacharoff and his co-authors explain, the Court in *Downes* assumed the Constitution could no longer "sustain the assumption of the early Republic that territories would move steadily toward statehood,"[35] and that a mere "mechanical application of the constitutional conventions respecting newly-acquired territories threatened the needed 'power to acquire and hold territory as property or as appurtenant to the United States.'"[36] The Court refused to give full rights to Puerto Ricans, whom it implied were "utterly unfit for American citizenship."[37] Instead, the Court adopted a flexible approach that treated unincorporated territories like Puerto Rico as quasi-domestic and quasi-foreign jurisdictions—technically part of the United States, but not fully integrated under its laws.[38]

Professor Issacharoff and his co-authors argue that the "new imperial doctrine" that emerged from *Downes* and the other *Insular Cases* illustrated "a distinctive constitutional tolerance for particularized territorial arrangements" which enabled "fundamental ambiguity" with respect to Puerto Rico's legal status.[39] The island thus came to occupy an anomalous status—"wholly subordinate" to federal power,[40] but not fully protected by the Constitution nor offered a clear route to political equality.

Critics across the judiciary and academia have condemned the *Insular Cases* for embedding a regime of second-class constitutional status. Justice Neil Gorsuch has denounced the cases as "shameful," arguing that they "rest on a rotten foundation" and "deserve no place in our law."[41] Judge Gustavo Gelpí has decried their "judicial constitutional fiat," which still treats residents of the U.S. territories "in an anomalously separate and unequal manner."[42] Scholars agree. Professor E. Robert Statham Jr. argues that the Court "misinterpreted" the Territory Clause, relying on "imperialistic premises" and "extraconstitutional power."[43] Professor Christina D. Ponsa-Kraus notes the cases "embraced the view that the theory of political legitimacy underlying the Constitution allowed for an exception," one that was "born of practical necessity and motivated by racism . . . ."[44] Yet despite this near-universal rebuke,

34. 182 U.S. 244, 287 (1901).

35. Issacharoff et al., *supra* note 29, at 9.

36. *Id.* (quoting *Downes*, 182 U.S. at 300 (White, J., concurring)).

37. *See Downes*, 182 U.S. at 311 (White, J., concurring).

38. *See* Issacharoff et al., *supra* note 29, at 9; *see also Downes*, 182 U.S. at 341 (White, J., concurring).

39. Issacharoff et al., *supra* note 29, at 9–10.

40. *Id.*

41. United States v. Vaello Madero, 596 U.S. 159, 180, 184, 189 (2022) (Gorsuch, J. concurring).

42. Hon. Gustavo A. Gelpí, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, THE FEDERAL LAWYER, Mar./Apr. 2011, at 22, 23.

43. E. Robert Statham Jr., *U.S. Territorial Expansion: Extended Republicanism Versus Hyperextended Expansionism*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 27, at 167, 174–75.

44. Christina D. Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2455 (2022).

the *Insular Cases* remain good law. The regime they created was no temporary fix. It was, from the outset, a durable blueprint for governing the territories outside the full reach of the Constitution.

Then, in the Jones Act of 1917, Congress extended "incremental measures of autonomy" by granting U.S. citizenship to Puerto Ricans and "providing for the popular election of certain territorial officials."[45] Yet Congress "retained major elements of sovereignty," and "[i]n cases of conflict, [c]ongressional statute, not Puerto Rico law, would apply no matter how local the subject."[46] In fact, from the ratification of the Treaty of Paris in 1898 until passage of the Elective Governor Act of 1947,[47] the federal government appointed Puerto Rico's Governor and entire Executive Council (the equivalent of a state senate).[48]

This early chapter in Puerto Rico's legal history underscores the asymmetry at the heart of its relationship with the federal government. Though the island's residents became U.S. citizens and gained piecemeal political rights, they were denied the full benefits of constitutional integration.

B. MOVE TOWARD SELF-GOVERNANCE AND SOVEREIGNTY: 1950s–2000s

Puerto Rico's prospects for self-governance changed in 1950. "[P]ressures for greater autonomy"[49] prompted Congress to pass the Puerto Rico Federal Relations Act of 1950 (Public Law 600),[50] which "enabled Puerto Rico to embark on the project of constitutional self-governance."[51] Public Law 600 "affirmed the 'principle of government by consent,'" and "offered the Puerto Rican public a 'compact,' under which they could 'organize a government pursuant to a constitution of their own adoption.'"[52] As its legislative history makes clear, Public Law 600 represented "a reaffirmation by the Congress of the self-government principle."[53]

Under the terms of the compact, "Public Law 600 itself was submitted to the people of Puerto Rico, who voted to approve the law through a popular

45. Fed. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 590 U.S. 448, 483 (2020) (Sotomayor, J., concurring) (citing Puerto Rico v. Sánchez Valle, 579 U.S. 59, 63 (2016); Jones Act of 1917, Pub. L. 64-368, 39 Stat. 951).

46. Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 39 (1st Cir. 1981).

47. *See* Elective Governor Act of 1947, Pub. L. No. 80-362, 61 Stat. 770, 770–71 (1947).

48. *See* Foraker Act (Organic Act of 1900), Pub. L. No. 56-191, 31 Stat. 77, 81–82 (1900).

49. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 671 (1974).

50. Puerto Rico Federal Relations Act of 1950, Pub. L. 600, 64 Stat. 319 (1950).

51. Puerto Rico v. Sánchez Valle, 579 U.S. 59, 64 (2016).

52. *Id.* at 76 (quoting § 1, 64 Stat. 319).

53. H.R. REP. NO. 81-2275, at 6 (1950); *see also id.* at 4 ("The extent and nature of the political, economic, and social development of Puerto Rico warrants the advancement in self-government which [Public Law 600] would make possible."); S. REP. NO. 81-1779, at 2 (1950) ("[Public Law 600] is designed to complete the full measure of local self-government in the island by enabling the 2¼ million American citizens there to express their will and to create their own territorial government."). *But see* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 HARV. L. REV. F. 65, 78–84 (2018) (arguing that the preceding and subsequent history of Public Law 600 shows it was not intended to alter the legal relationship between Puerto Rico and the United States).

referendum."[54] The formal ratification of Puerto Rico's constitution followed.[55] First, Puerto Ricans elected delegates to a constitutional convention tasked with drafting a constitution.[56] Second, Puerto Ricans approved the draft constitution in a referendum.[57] Third, Congress accepted the draft constitution "with modifications," with "the caveat that it '[would] become effective' only when Puerto Rico 'declare[d] in a formal resolution its acceptance.'"[58] Lastly, Puerto Ricans approved the modified constitution in another referendum.[59] The adopted constitution formally established the *Estado Libre Asociado de Puerto Rico*—or Commonwealth of Puerto Rico—and proclaimed that the Commonwealth's power "emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States."[60] With the adoption and recognition of the Puerto Rico Constitution, "the United States and Puerto Rico . . . forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule."[61]

After the adoption of the Puerto Rico Constitution, a string of federal courts and international institutions affirmed the island's new powers of self-rule. The first federal court to interpret Puerto Rico's status described the new compact as one that made the island "sovereign over matters not ruled by the Constitution of the United States."[62] That first decision considered not only the legislative history of Public Law 600 but also the United Nations' colonial deaccession mandates that imposed requirements on the United States.[63] With Public Law 600, the United States ceased reporting on Puerto Rico to the United Nations under Article 73(e) of the U.N. Charter (which pertained to "non-self-governing territories"),[64] a change in status accepted by the U.N. General Assembly.[65] The Supreme Court in turn validated this view, recognizing in *Rodriguez v. Popular Democratic Party* that Puerto Rico "is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'"[66] Perhaps unintentionally, the Court's declaration that Puerto

54. Fed. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 590 U.S. 448, 483 (2020) (Sotomayor, J., concurring) (citing Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219, 222–23 (1967)).

55. *See* Leibowitz, *supra* note 54, at 223.

56. *See id.*

57. *See id.*

58. *Aurelius*, 590 U.S. at 484 (2020) (Sotomayor, J., concurring) (quoting H.R.J. 430, 82nd Cong. (1952)).

59. *See Developments in the Law*, *supra* note 3, at 1635.

60. Puerto Rico v. Sánchez Valle, 579 U.S. 59, 65 (2016) (quoting P.R. CONST., art. I, § 1).

61. *Id.* at 63.

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

63. *See id.* (discussing the communications from the U.S. government to the United Nations following passage of Public Law 600).

64. *See* MONGE, *supra* note 12, at 121–24.

65. *See* G.A. Res. 748 (VIII), ¶ 2 (Nov. 27, 1953). The General Assembly found that the people of Puerto Rico "ha[d] achieved a new constitutional status." *Id.*

66. 457 U.S. 1, 8 (1982) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974)).

Rico is "sovereign over matters not ruled by the Constitution" mirrored the Tenth Amendment's language reserving powers to the states.

Puerto Rico's new self-governance powers propelled it into a period of economic expansion in the decades following passage of Public Law 600. From 1950 to 1971, the Commonwealth's per capita income increased more than fourfold.[67] In the mid-1970s, a revised Federal Tax Code conferring preferential tax treatment on several industries spurred robust growth among pharmaceutical and manufacturing businesses on the island.[68] Consequently, Puerto Rico became a hub for industries that flourished under the winning "combination of a low tax structure, close proximity to the United States, and tariff-free entry into the American market."[69]

C. ECONOMIC DECLINE AND EXECUTIVE BRANCH REJECTION OF PUERTO RICO'S SOVEREIGNTY: 2000s–2015

Puerto Rico's economic prosperity began to unravel in the new millennium. Congress repealed the island's favorable tax status, after which "manufacturing growth deflated, precipitating a prolonged recession."[70] The unemployment rate rose to over 8%, forcing many Puerto Ricans to leave the island to pursue better opportunities.[71] To sustain essential services, the Commonwealth increasingly turned to capital markets, issuing public debt that eventually ballooned to over $70 billion.[72] Worse still, the federal government began to signal a retreat from its earlier commitments to Puerto Rico's self-governing status, thanks in part to efforts by the administrations of Presidents George W. Bush and Barack Obama to erode the very foundation of the compact between Puerto Rico and the United States.

Starting in 2001, the Executive Branch took the position that Public Law 600's requirement of mutual consent for modifications to Puerto Rico's compact with the United States was unconstitutional.[73] The Bush Administration expressly rejected the claim, advanced in earlier U.N. representations, that Public Law 600 had created a bilateral agreement requiring mutual consent for termination.[74] Instead, it dismissed the compact as nothing more than a policy choice by Congress—one it could revise or revoke whenever it pleased under its broad territorial powers.[75] As Professor Issacharoff and his co-authors explain,

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67. Amelia Cheatham & Diana Roy, *Puerto Rico: A U.S. Territory in Crisis*, COUNCIL ON FOREIGN RELS. (Jan. 8, 2025, 11:00 AM), https://www.cfr.org/backgrounder/puerto-rico-us-territory-crisis [https://perma.cc/MSY2-P6U5].

68. *See* Issacharoff et al., *supra* note 29, at 27.

69. *Id.*

70. Fed. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 590 U.S. 448, 486 (2020) (Sotomayor, J., concurring).

71. *See id.* at 486 (Sotomayor, J., concurring); *see also* Cheatham & Roy, *supra* note 67.

72. *Aurelius*, 590 U.S. at 486 (Sotomayor, J., concurring).

73. *See* Issacharoff et al., *supra* note 29, at 13.

74. *See* REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 6 (2005) [hereinafter 2005 REPORT] ("The U.S. Constitution, however, does not allow for such [mutual consent] arrangement.").

75. *See id.* at 10 ("Although the current territorial status may continue *so long as Congress desires*, there are only two non-territorial options recognized by the U.S. Constitution . . . .") (emphasis added).

> The [Executive Branch's] argument turn[ed] on two maxims. First, the sole constitutional authority for the United States to have any relation with Puerto Rico is the Territory Clause . . . which confers on Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." Second, there may be no conferral of any binding special status on Puerto Rico because of the old truism that one Congress cannot bind another.[76]

Also in 2001, the "Department of Justice reiterated an absolutist, no-sovereignty view on Puerto Rico" to the Senate Committee on Energy and Natural Resources in a letter discussing options for the island's political status.[77] This rigid interpretation of the Territory Clause had first been explored in a 1994 Office of Legal Counsel (OLC) opinion on the constitutionality of a "mutual consent provision" in an agreement between the United States and Guam.[78] Not unlike the question surrounding Public Law 600, OLC's opinion addressed whether any changes to the United States–Guam agreement required consent from both parties.[79] Ultimately, OLC concluded that Congress has "plenary" authority over a territory until it either "becomes a State or ceases to be under United States sovereignty."[80] OLC's determination rested on the argument that such authority could not be transferred or limited, thereby ensuring that future Congresses would retain full power.[81] This reasoning in turn shaped the Department of Justice's 2001 stance vis-à-vis Puerto Rico, which emphasized that the Constitution permitted only three options for the island: "[S]overeign independence, statehood, or territorial status."[82]

This shift was not merely rhetorical. Both the Task Force on Puerto Rico's Status under President Bush and the same under President Obama rejected the notion of a bilateral agreement between the United States and Puerto Rico. The Bush Task Force stated that Puerto Rico was constitutionally "a territory,"[83] while the Obama Task Force likewise asserted that Puerto Rico was "subject to the Territory Clause."[84] As Professor Issacharoff and his co-authors note, "Both task forces relied on the maxim that one Congress cannot bind a subsequent Congress and thus 'cannot restrict a future Congress from revising a delegation to

76. Issacharoff et al., *supra* note 29, at 13–14 (footnote omitted).

77. *Id.* at 14–15.

78. *Id.* at 14.

79. *Id.*

80. *Id.* (quoting Mut. Consent Provisions in the Proposed Guam Commonwealth Act, Op. O.L.C. Supp. 1, 6 (July 28, 1994)).

81. *See id.*

82. *Id.* at 15 (quoting Letter from Robert Raben, Assistant Att'y Gen., U.S. Dep't of Justice, to Sen. Frank H. Murkowski, Chairman, Comm. on Energy and Nat. Res. 5 (Jan. 18, 2001), *in* Appendix E 2005 REPORT, *supra* note 74).

83. *See id.* (quoting 2005 REPORT, *supra* note 74, at 5).

84. *See id.* (citing REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 26 (2011) [hereinafter 2011 REPORT]).

a territory of powers of self-government.'"[85] These statements marked a formal repudiation of the compact theory that had undergirded the Commonwealth's presentation to the international community for decades. In effect, the federal government reframed Puerto Rico's constitutional status not as a product of negotiated autonomy, but as an ongoing expression of congressional grace.

D. PROMESA AND JUDICIAL BRANCH REJECTION OF PUERTO RICO'S SOVEREIGNTY: 2015–PRESENT

Puerto Rico's economic and constitutional problems worsened in 2015. The island's credit rating was downgraded to CCC-minus,[86] making borrowing practically impossible. "Without any realistic ability to set its finances on the right course," Puerto Rico declared bankruptcy in 2016.[87] Worse still, Hurricane Maria tore through the island in September 2017, "causing immense devastation and a humanitarian emergency the likes of which had not been seen in over a century."[88] Thousands died, and the island suffered an estimated ninety billion dollars in damages.[89]

Amid Puerto Rico's financial and humanitarian crisis, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)[90] to help mitigate the island's "severe economic decline."[91] PROMESA established a seven-member Financial Oversight and Management Board (Oversight Board) with broad authority over Puerto Rico's fiscal policy.[92] The Oversight Board has the power to approve or reject any fiscal plan or budget prepared by Puerto Rico's government[93] as well as represent Puerto Rico in bankruptcy proceedings before a court "designated by the Chief Justice of the United States."[94] Though PROMESA was billed as a fiscal rescue package, its deeper significance lay in what it revealed about the constitutional order governing Puerto Rico. Despite decades of claims that the Commonwealth enjoyed meaningful autonomy under a bilateral compact, Congress acted unilaterally to reassert control through a mechanism that bypassed Puerto Rico's own elected government.

As Congress debated and ultimately enacted PROMESA, the Court adopted a much more restrictive view of Puerto Rico's self-governance powers than it had in the past. Despite having previously recognized Puerto Rico as "an autonomous

85. *Id.* (quoting 2005 REPORT, *supra* note 74, at 6).

86. *S&P Cuts Puerto Rico Rating, Says Default Seems Inevitable*, REUTERS (June 30, 2015, 7:11 AM), https://www.reuters.com/article/markets/us/sp-cuts-puerto-rico-rating-says-default-seems-inevitable-idUSL3N0ZG1UQ; *see also* D. ANDREW AUSTIN, CONG. RSCH. SERV., PUERTO RICO'S CURRENT FISCAL CHALLENGES 4 (2016).

87. Fed. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 590 U.S. 448, 486 (2020) (Sotomayor, J., concurring).

88. *Id.*

89. *Id.*

90. 48 U.S.C. §§ 2101–2241.

91. *See* § 2194(m)(1).

92. *See* § 2121; Issacharoff et al., *supra* note 29, at 30–31.

93. *See* Issacharoff et al., *supra* note 29, at 30 (citing §§ 2141–2142).

94. *See id.* at 30–31 (citing § 2168(a)).

political entity"[95] with a "degree . . . of independence normally associated with States of the Union,"[96] the Court's rulings in *Puerto Rico v. Franklin California Tax-Free Trust* and *Puerto Rico v. Sánchez Valle*—decided within days of each other in June 2016—aligned with the anti-sovereignty stance of the Bush and Obama Administrations.[97] The Court selectively treated Puerto Rico like a state in one case but not in the other—yet in both, it stripped the island of its powers of self-governance.[98] In *Franklin Trust*, the Court ruled that Puerto Rico "*was* a state for purposes of the preemption provision in Chapter 9 of the Bankruptcy Code"; in *Sánchez Valle*, it held that "Puerto Rico—unlike a state—is not a separate sovereign for purposes of the double jeopardy clause."[99] Ultimately, these decisions served to significantly reduce Puerto Rico's autonomy, *Franklin Trust* by removing the island's ability to restructure its bankrupt public utilities and *Sánchez Valle* by weakening its authority to enforce criminal laws.[100]

To be sure, in *Sánchez Valle* the Court did "dutifully march[] through the requisite rhetoric of Puerto Rican autonomy."[101] But, as Professor Issacharoff and his co-authors explain, it treated Puerto Rico's 1952 compact with the United States as "nothing more than a data point—and sometimes an irrelevant one—in the interpretive task at hand."[102] The Court refused to "recognize the genesis of Puerto Rico's sovereignty in the constitutional transformation of the mid-twentieth century."[103] Indeed, in laying out its test for double jeopardy, the Court explained that it would not "probe whether a government possesse[d] the usual attributes, or act[ed] in the common manner, of a sovereign entity."[104] Instead, it "focused on the moment of [Puerto Rico's] incorporation to American law," treating its initial status as permanent since there had been neither a formal break nor conversion to statehood in the interim.[105] As such, the Court rebuffed a clear-cut opportunity to "recognize the capacity of a relationship between sovereign entities to be constitutionally transformed."[106]

The Court ultimately validated PROMESA in *Financial Oversight and Management Board v. Aurelius Investment, LLC*,[107] rejecting an Appointment Clause challenge to the Oversight Board's structure. Writing for the majority, Justice Breyer concluded that the Oversight Board's members were territorial

95. *Id.* at 19 (quoting Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982)).
96. *Id.* (quoting Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976)).
97. *See id.*
98. *See id.*
99. *Id.*
100. *See id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* (quoting Puerto Rico v. Sánchez Valle, 579 U.S. 59, 67 (2016)).
105. *Id.*
106. *Id.* at 20.
107. 590 U.S. 448 (2020).

officers and therefore not subject to Senate confirmation.[108] The Court framed the Oversight Board as a permissible exercise of congressional authority under Article IV, further entrenching the view that Puerto Rico's autonomy exists only at Congress's discretion.

If the post-1952 period represented a partial departure from the territorial model, PROMESA marked its return. The federal government's response to Puerto Rico's fiscal crisis demonstrated that even constitutional innovation could be reversed—or ignored—when convenient. In place of the promised evolution toward self-determination, Congress imposed a regime that revived many of the structural features of colonial rule.

* * *

Puerto Rico's political relationship and legal relationship with the United States at times seem to contradict each other. On the one hand, the island has never become a state, and the Supreme Court in the *Insular Cases* rejected a territory-to-statehood trajectory akin to that of the nineteenth-century territories. On the other hand, from 1950 until 2016, the island managed its local affairs liberally and without intrusion from the federal government.

II. PUERTO RICO'S POLITICAL & LEGAL CONUNDRUM CALLS FOR A NEW APPROACH: TENTH AMENDMENT PROTECTION FOR "THE PEOPLE" OF PUERTO RICO

The relationship between the federal government and Puerto Rico has endured (and continues to endure) a great transformation. Once considered "alien races" and "utterly unfit for American citizenship,"[109] Puerto Ricans became American citizens in 1917[110] and formed their own republican government in 1952.[111] Since 1952, Puerto Ricans have benefited from aspects of state-like sovereignty, but the federal–territory relationship continues to leave Puerto Rico at the whim of Congress's good graces.[112] Yet despite extensive criticism of the *Insular Cases*, the Court has continued to follow them.[113] This leaves Puerto Ricans without a path to seek constitutional protections through the Territory and State Admission clauses.

The Tenth Amendment offers Puerto Ricans a solution. The history of the unique relationship between the United States and Puerto Rico shows that Puerto Ricans have become part of "the people" of the United States. This inclusive conception of "the people" merits judicial recognition as a matter of Tenth Amendment doctrine. Such a reading is faithful to the text of the Tenth Amendment and Court precedent, and it would enable Puerto Ricans to claim the federalism protections that are otherwise afforded to the fifty states.

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108. *Id.* at 452–53.

109. Downes v. Bidwell, 182 U.S. 244, 287, 311 (1901).

110. *See supra* note 45 and accompanying text.

111. *See supra* Section I.B.

112. *See, e.g.*, *Developments in the Law*, *supra* note 3, at 1633.

113. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 268–69 (1990) (affirming the Court's adherence to the principles laid down in the *Insular Cases*).

A. THE TENTH AMENDMENT PROTECTS MORE THAN STATES: "THE PEOPLE"

The Tenth Amendment is among the shortest provisions in the Bill of Rights. It states simply that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[114]

For nearly two hundred years after the nation's founding, the Tenth Amendment remained largely uninterpreted and played no role in defining the limits of the federal government's power.[115] That changed in 1976, when the Court in *National League of Cities v. Usery* held that Congress's regulation of the minimum wages and maximum working hours of state employees violated the Tenth Amendment.[116] In doing so, the Court fashioned a doctrine to protect "attributes of sovereignty attaching to every state government" from interference by Congress "because the Constitution prohibits [Congress] from exercising [its] authority in that manner."[117] Under this doctrine, the Tenth Amendment shielded areas of "traditional government functions" from federal displacement.[118] But the Court overruled *National League of Cities* a few years later, declaring the "traditional government functions" test unworkable for lower courts as well as "inconsistent with established principles of federalism."[119]

Today, Tenth Amendment law follows the framework laid out by the Court in *New York v. United States*[120] and *Printz v. United States*.[121] Both cases established the anti-commandeering principle, which dictates that the federal government cannot require states to legislate according to federal standards,[122] or compel state officials to enact or administer a federal law or regulatory program.[123]

Although the Tenth Amendment now serves as an independent limit on the federal government's power vis-à-vis the states, the Court has never given meaning to the last clause of the Amendment: "or to the people." This clause is textually significant. The Tenth Amendment lists "states" and "the people" as different entities—separated by a comma and the conjunction "or." This treatment differs from that of other provisions in the Constitution that refer to the people *of* a state; for example, Article I, Section 2's mandate that the House of Representatives be chosen "by the People *of* the several States."[124] And it differs from that of other provisions in the Constitution that refer to the states and *the people thereof*; for

114. U.S. CONST. amend. X.

115. *See* Gary Lawson & Robert Schapiro, *The Tenth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-x/interpretations/129 [https://perma.cc/T9MC-EHDH] (last visited Apr. 29, 2025).

116. *See* 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

117. *Id.* at 845.

118. *Id.* at 852.

119. *See Garcia*, 469 U.S. at 531.

120. 505 U.S. 144 (1992).

121. 521 U.S. 898 (1997).

122. *See New York*, 505 U.S. at 161.

123. *Printz*, 521 U.S. at 935.

124. U.S. CONST. art. I, § 2 (emphasis added).

example, the Seventeenth's Amendment's requirement that senators from each state be elected "by *the people thereof*."[125] Thus the Tenth Amendment—in separating "states" and "people" disjunctively with a comma and the conjunction "or"—refers to *more* than just the people of the states.

What constitutes "the people," then? Fortunately, the Court has spoken on this question in the context of other constitutional provisions. In *United States v. Verdugo-Urquidez*, which addressed whether the Fourth Amendment protects undocumented immigrants outside the territory of the United States, the Court turned to the meaning of "the people."[126] Chief Justice Rehnquist, writing for the Court, highlighted all the constitutional provisions containing the phrase "the people"; namely, the First, Second, Fourth, Ninth, and Tenth Amendments, as well as the Preamble and Article I.[127] He reasoned that the proliferation of the phrase

> suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[128]

This is known as the "sufficient connection" test.[129] In *Verdugo-Urquidez*, the Court did not decide whether Fourth Amendment rights attached to undocumented immigrants within the United States because the defendant there was outside the country.[130] On that basis, the Court concluded that the defendant "had no voluntary connection" with the United States that "might place him among 'the people' of the United States."[131]

The Court has adopted the sufficient connection test in contexts beyond the Fourth Amendment. Take *District of Columbia v. Heller*, which recognized an individual's right to bear arms under the Second Amendment.[132] Justice Scalia, writing for the Court, cited *Verdugo-Urquidez* when explaining that "in all . . . provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset."[133] Justice Scalia's reference to the definition of "the people" in *Verdugo-Urquidez*,

125. U.S. CONST. amend. XVII (emphasis added).

126. 494 U.S. 259, 261, 265–66 (1990).

127. *Id.* at 265; *see* U.S. CONST. amend. I (referring to the "right of the people peaceably to assemble"); U.S. CONST. amend. II (referring to the "right of the people to keep and bear Arms"); U.S. CONST. amend. IV (referring to the "right of the people to be secure in their persons"); U.S. CONST. amend. IX (referring to the rights "retained by the people"); U.S. CONST. amend. X (referring to the rights "reserved to the States respectively, or to the people"); U.S. CONST. pmbl. (referring to "the People of the United States"); U.S. CONST. art. I, § 2 (referring to the "People of the several States").

128. *See Verdugo-Urquidez*, 494 U.S. at 265.

129. *See id.* at 282 (Brennan, J., dissenting).

130. *See id.* at 272.

131. *Id.* at 273.

132. 554 U.S. 570, 595 (2008).

133. *Id.* at 580.

a Fourth Amendment case, and in *Heller*, a Second Amendment case, suggests that the Court reads "the people" consistently across various constitutional provisions. Thus, in attempting to define what "the people" means for purposes of the Tenth Amendment, the sufficient connection test should control.

B. "THE PEOPLE" OF PUERTO RICO DEVELOPED AND NOW HAVE A "SUFFICIENT CONNECTION" WITH THE UNITED STATES

Puerto Ricans are part of "the people" of the United States, as that term is defined in *Verdugo-Urquidez* and *Heller*. The history between the United States and Puerto Rico, including the federal government's grant of U.S. citizenship to Puerto Ricans and the island's state-like behavior after the enactment of Public Law 600, shows that Puerto Ricans satisfy the sufficient connection test.

1. With the Jones Act of 1917, Puerto Rico Became Part of the Political Community of the United States

Before 1917, the "inhabitants" of Puerto Rico were not citizens of the United States, but rather citizens of Puerto Rico and "nationals" of the United States—meaning they were "owed protection by the United States in exchange for their fealty and allegiance."[134] In these early years, Puerto Ricans had not yet developed a "sufficient connection" to be part of "the people" of the United States.

But history shows that the federal government's treatment of Puerto Rico evolved. In passing the Jones Act of 1917,[135] Congress transformed Puerto Ricans' legal status dramatically. Section 5 of the Jones Act states that "all citizens of Porto Rico . . . and all natives of Porto Rico who were temporarily absent from that island . . . and have since returned and are permanently residing in that island . . . shall be deemed and held to be, citizens of the United States."[136]

Under the sufficient connection test, Congress's grant of U.S. citizenship in and of itself suffices to deem Puerto Ricans part of "the people" of the United States. Few acts more clearly illustrate a group becoming "part of a national community" than the granting of citizenship. Indeed, because Puerto Ricans have U.S. citizenship, they can live and work in the United States permanently, they are protected from immigration detention and deportation, and they can travel internationally with a U.S. passport and reenter the United States at will.[137] Puerto Ricans can also run for federal public office, hold government jobs, and receive federal government benefits.[138] Thus, Congress's act of granting citizenship was constitutionally significant. It meant that, as a class, Puerto Ricans became part of the "political community" of the United States.

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134. Torruella, *supra* note 53, at 70–71. *See also* Section I.A (discussing the *Insular Cases*).

135. Pub. L. 64-368, 39 Stat. 951.

136. *Id.* § 5. The revised version of the Jones Act, codified at 8 U.S.C. § 1402, holds that "[a]ll persons *born* in Puerto Rico on or after April 11, 1899 . . . are declared to be citizens of the United States as of January 13, 1941" and further that "[a]ll persons born in Puerto Rico on or after January 13, 1941 . . . are citizens of the United States *at birth*." 8 U.S.C. § 1402 (emphasis added).

137. *See* Alison Moodie, *Is U.S. Citizenship Right for You?*, BOUNDLESS (Feb. 11, 2025), https://www.boundless.com/immigration-resources/benefits-of-us-citizenship.

138. *Id.*

To be sure, even after the Jones Act, Congress retained full control over Puerto Rico under the Territory Clause—at least until 1952.[139] Nonetheless, the question of whether the federal government retains control over Puerto Rico is irrelevant for purposes of the Tenth Amendment given the Court's definition of "the people" in *Verdugo-Urquidez* and *Heller*. The sufficient connection test focuses on a group's connection to the United States—not whether the group necessarily enjoys sovereign powers.[140]

2. Passage of Public Law 600 in 1952 Affirmed Puerto Rico's "Sufficient Connection" with the United States

If U.S. citizenship were not enough, Puerto Rico's behavior as a state-like entity following the enactment of Public Law 600—and the federal government's treatment of Puerto Rico like a state—bolsters the argument that Puerto Ricans developed a sufficient connection with the United States to be considered part of "the people" of the United States.

The Court in *Sánchez Valle* recognized that Puerto Rico has held the status of a "self-governing Commonwealth" since passage of Public Law 600.[141] Justice Kagan, writing for the Court, explained that the ratification of the Constitution of the Commonwealth of Puerto Rico in 1952 meant that the island possessed and could exercise "wide-ranging self-rule"[142] that would "br[ing] mutual benefit to the Puerto Rican people and the entire United States."[143] Puerto Rico "became a new kind of political entity" in 1952, one "governed in accordance with, and exercising self-rule through, a popularly ratified constitution"[144]—much like a state. The Court explicitly recognized that Congress's purpose in enacting Public Law 600 was "to accord to Puerto Rico the degree of autonomy and independence *normally associated with States of the Union*."[145]

The Court's explicit recognition of Puerto Rico's powers of self-rule in *Sánchez Valle* did not happen in a vacuum. Indeed, the Court had repeatedly noted since 1952 that "Congress relinquished its control over [Puerto Rico's] local affairs . . . and granted Puerto Rico a measure of autonomy comparable to that possessed by the States."[146] It was precisely the island's "demand[] for greater autonomy" that led Congress to pass Public Law 600 and Puerto Rico to enact its own Constitution.[147]

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139. *See supra* Section I.B.

140. *See supra* Section II.A.

141. Puerto Rico v. Sánchez Valle, 579 U.S. 59, 73 (2016).

142. *See id*. at 78.

143. *Id*. at 74.

144. *Id*. at 73.

145. *Id.* (quoting Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976)) (emphasis added).

146. *Examining Bd*., 426 U.S. at 597; *see also, e.g*., Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the [U.S.] Constitution.'" (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974))).

147. *Examining Bd*., 426 U.S. at 592–94; *see also Calero-Toledo*, 416 U.S. at 671.

Over time, Puerto Ricans added teeth to their state-like sovereignty. For instance, the island banned the death penalty in its constitution,[148] designated both English and Spanish as official languages,[149] and made Election Day a holiday.[150] At the same time, while the federal government differentiated between Puerto Rico and the states for some purposes—for example, in the allocation of federal funding, because residents of Puerto Rico do not pay federal income tax[151]—Congress by and large treated Puerto Rico as but another state of the Union.[152] The transformation of Puerto Rico's federal court is a telling case in point. In 1966, Congress converted the island's territorial court into an Article III court,[153] making the District Court of Puerto Rico the only federal court in any U.S. territory with judges that enjoy the Constitution's full guarantees of life tenure and salary protections.[154] Since then, the District Court of Puerto Rico has functioned indistinguishably from its counterparts in the states. As the Supreme Court itself acknowledged in *Examining Board v. Flores de Otero*, the District Court of Puerto Rico's "jurisdiction, powers, and responsibilities [are] the same as the U.S. district courts in the . . . states."[155] Ironically, no state has ever received an Article III court prior to achieving statehood.[156] Yet Puerto Rico, with a federal court identical to that of the states, remains a territory.

In short, certain "developments and tendencies" in the exercise of federal power over Puerto Rico came to "form part of an understanding which [was] transformed into the equivalent of a constitutional tradition whose effectuation and continued strengthening [became] highly predictable."[157] These developments and tendencies made Puerto Ricans more "connected" to the United States. Such connectivity carries constitutional weight and gives Puerto Ricans the right to claim protections under the Tenth Amendment.

A related question with additional constitutional implications is whether the federal government retained full control over Puerto Rico under the Territory Clause after passage of Public Law 600. This question has polarized legal and

148. P.R. CONST. art. II, § 7.

149. P.R. LAWS ANN. tit. 1, § 59.

150. P.R. LAWS ANN. tit. 16, § 4143 (2011).

151. *See, e.g.*, Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam) (holding that Congress could provide less federal funding to Puerto Rico than the states under the Aid to Families with Dependent Children program); Califano v. Torres, 435 U.S. 1, 5 & n.7 (1978) (per curiam) (holding the same with respect to the Supplemental Security Income program).

152. *See, e.g.*, 48 U.S.C. § 734 (providing that laws "not locally inapplicable, except as . . . otherwise provided, shall have the same force and effect in Puerto Rico as in the United States").

153. Gelpí, *supra* note 42, at 23.

154. *See id.*

155. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 n. 26 (1976).

156. Gelpí, *supra* note 42, at 23.

157. David M. Helfeld, How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?, Address Before the 1985 Judicial Conference of the First Circuit (November 4–6, 1985), *in Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, 110 F.R.D. 449, 470.

political minds alike.[158] One view sees Public Law 600 as merely a delegation of governing authority under the Territory Clause—one that Congress can revoke "at any time."[159] As discussed above, the Bush and Obama Administrations adopted this interpretation,[160] which echoes the anachronistic and often-criticized logic of the *Insular Cases*[161] and the principle that one Congress cannot bind another.[162] The opposing view emphasizes that Public Law 600 was "adopted in the nature of a compact,"[163] and the federal government has treated it as such.[164] In 1953, for example, the federal government told the United Nations that the compact could only be modified with Puerto Rico's consent.[165] Beyond these legal positions, serious historical questions exist about Congress's power (or lack thereof) to use the Territory Clause to hold territories in perpetuity.[166] Some argue that, in enacting Public Law 600, Congress exercised its plenary authority under the Territory Clause to recognize an inherent and irreversible sovereignty in a "people."[167]

But whether Congress retains control over Puerto Rico under the Territory Clause does not necessitate whether Puerto Ricans may claim protections under the Tenth Amendment. If anything, Puerto Ricans' invocation of Tenth Amendment protections would likely force the Court to finally address what Puerto Rico is and how the Territory Clause interacts with the Tenth Amendment, just as it has addressed how other federal powers interact with the Tenth Amendment.[168] Moving forward, Puerto Ricans should challenge any federal action that arguably interferes with their state-like sovereignty with the following argument: the federal government's grant of U.S. citizenship to Puerto Ricans in 1917, combined with the island's state-like history after 1952, places the people of Puerto Rico squarely within the protections that the Tenth Amendment affords to "the people" of the United States.

III. FEDERALISM IMPLICATIONS FOR "THE PEOPLE" OF PUERTO RICO

Judicial recognition of Puerto Ricans as part of "the people" protected by the Tenth Amendment would offer a meaningful and workable restriction on Congress's ability to interfere with local democratic institutions. Tenth Amendment protection for Puerto Rico would lead to a renewed relationship with the federal government. This

158. *See id*. at 452.

159. *See* Issacharoff et al., *supra* note 29, at 13.

160. *See supra* Section I.C.

161. *See Developments in the Law*, *supra* note 3, at 1646–47.

162. *See* 2005 REPORT, *supra* note 74, at 6; 2011 REPORT, *supra* note 84, at 26.

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

164. *See* Puerto Rico v. Sánchez Valle, 579 U.S. 59, 88–89 (2016) (Breyer, J., dissenting).

165. *See* Issacharoff et al., *supra* note 29, at 13 & n.75.

166. As noted in Part I, *all* of America's nineteenth-century territories eventually assumed the status of statehood, in contrast to Puerto Rico and other post-Spanish–American War territories, which remain territories to this day. *See supra* note 22 and accompanying text.

167. *See* Hernández Colón, *supr*a note 32, at 591, 605. Hernández Colón, who served as Governor of Puerto Rico for three terms, has argued that Puerto Rico's sovereignty cannot be unilaterally disturbed after Public Law 600. *See id*. at 587, 603, 617 n.176.

168. *See supra* note 7 and accompanying text; Section II.A.

new relationship would have federalism at its core, thereby ensuring that Puerto Ricans' individual liberties are protected from the arbitrary exercise of federal power.[169]

A. THE ANTI-COMMANDEERING PRINCIPLE SHOULD PROTECT PUERTO RICO

The anti-commandeering principle derived from *New York* and *Printz* defines the Tenth Amendment limits on the federal government's ability to intrude on Puerto Rico's local affairs. In *New York*, the Court held that Congress could not compel states, through a take-title provision, to adopt programs to dispose of their own radioactive waste to comply with the federal Low-Level Radioactive Waste Policy Amendments Act of 1985.[170] Justice O'Connor, writing for the Court, explained that although Congress had the power under the Supremacy Clause to preempt state radioactive-waste regulation, it could not compel states to regulate in that field.[171] Such compulsion violated the Tenth Amendment.[172] Indeed, "[r]ather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste . . . Congress . . . impermissibly directed the States to regulate in this field."[173]

In so holding, the Court acknowledged the difficulty of balancing the constitutional powers delegated to the federal government with the powers reserved to the states (or the people) under the Tenth Amendment.[174] Justice O'Connor described this balance as creating mutually exclusive spheres of governmental powers, such that a power attributed to the states "is necessarily a power the Constitution has not conferred on Congress."[175] Justice O'Connor went on to explain that the Tenth Amendment "restrains the power of Congress" through a limit "not derived from the text of the Tenth Amendment itself" but rather through structural limits "that may, in a given instance, reserve power to the States."[176] Although the take-title provision in *New York* impermissibly commandeered the states to regulate in the radioactive-waste policy sphere, Justice O'Connor identified two methods of congressional urging that are permissible. First, under the Spending Clause, "Congress may attach conditions on the receipt of federal funds."[177] And second, under the Commerce Clause, Congress may "offer States the choice of regulating

169. *See* Amar, *supra* note 8 at 1448–51 (discussing the development of American-style federalism). As the Court has recognized, federalism shields individual liberty by preventing any one government from holding unchecked power over "all . . . concerns of public life." Bond v. United States, 564 U.S. 211, 222 (2011). Federalism thus guards against governmental tyranny by blocking the concentration of power and ensuring a balance among competing authorities. *Developments in the Law*, *supra* note 3, at 1650 (quoting Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 7 (1994)).

170. *See* 505 U.S. 144, 149, 177 (1992).

171. *See id*. at 168–69.

172. *See id*. at 177.

173. *Id*. at 160.

174. *See id*. at 156–57, 181–83.

175. *Id*. at 156.

176. *Id*. at 156–57.

177. *Id*. at 167 (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).

that [same] activity according to federal standards or having state law pre-empted by federal regulation."[178]

Printz in turn applied *New York*'s anti-commandeering principle to the compulsion of state and local officials to perform tasks in compliance with a federally enacted regulatory scheme.[179] The Court held that Congress could not require chief law enforcement officers of local jurisdictions to undertake background checks in accordance with the federal Brady Handgun Violence Prevention Act.[180] Justice Scalia, writing for the Court, stressed that even a power delegated to the federal government—such as the commerce power—may nevertheless be extinguished if its invocation "violates the principle of state sovereignty reflected in . . . various constitutional provisions."[181]

In short, the Court in *Printz* and *New York* recognized that the Tenth Amendment is not a hollow promise swallowed up by the federal government's ever-increasing power. Rather, the Tenth Amendment is a substantive guarantee of a certain level of sovereignty and independence.

B. THE ANTI-COMMANDEERING PRINCIPLE APPLIED: TWO KEY PROVISIONS OF PROMESA ARE UNCONSTITUTIONAL

Because Puerto Ricans are part of "the people" referenced in the Tenth Amendment, the anti-commandeering principle derived from *New York* and *Printz* necessarily protects Puerto Rico as well.

The effect of extending the Tenth Amendment in this way is straightforward: any congressional action that attempts to either compel the Puerto Rico Legislature to legislate to comply with federal law (under *New York*)[182] or force Puerto Rican local officials to perform tasks to comply with federal regulations (under *Printz*)[183] would likely violate the anti-commandeering principle. In this regard, Puerto Rico's Tenth Amendment protections should be identical to those of any state. And even if Congress's powers under the Territory Clause clash with Puerto Rico's protections under the Tenth Amendment, the Court in *New York* indicated that conflicts between the Tenth Amendment and another constitutional provision does not eliminate federalism's protections.[184] Notably, *New York* involved a clash between New York's protections under the Tenth Amendment and Congress' powers under the Supremacy Clause—and the Court still applied the protections in the Tenth Amendment.[185] Puerto Rico should be similarly protected by the principles of federalism embodied in the Tenth Amendment even when they clash with the Territory Clause.

Applying the anti-commandeering principle to Puerto Rico makes two key provisions of PROMESA—the federal law imposing an Oversight Board to manage

178. *Id.* (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).
179. *See* 521 U.S. 898, 904, 933 (1997).
180. *Id.* at 902, 933.
181. *See id.* at 923–24.
182. *See supra* notes 170–73 and accompanying text.
183. *See supra* notes 179–81 and accompanying text.
184. *See* New York v. United States, 505 U.S. 144, 168–69 (1992).
185. *See id.*

the island's finances and restructure its debts[186]—likely unconstitutional. Section 2142(c)(1) requires that "[t]he Governor [of Puerto Rico] . . . submit to the Oversight Board proposed Budgets" and that "the Oversight Board . . . determine in its sole discretion whether each proposed Budget is compliant with the applicable Fiscal Plan."[187] If the Oversight Board determines that the budget is not compliant, PROMESA directs the Oversight Board to give the Governor "an opportunity to correct the violation" and submit a revised proposed budget.[188] Similarly, Section 2142(d)(1) requires that "[t]he Legislature [of Puerto Rico] . . . submit to the Oversight Board the Territory Budget adopted by the Legislature" and that "[t]he Oversight Board . . . determine whether the adopted Territory Budget is a compliant budget."[189] And likewise, if the Oversight Board determines that the budget is not compliant, PROMESA directs the Oversight Board to give the Legislature "an opportunity to correct the violation" and submit a revised territory budget.[190]

Sections 2142(c)(1) and 2142(d)(1) commandeer Puerto Rican officials in three ways. First, both sections require the Governor and the Legislature to submit a budget to the Oversight Board, which presumably involves several distinct official acts—including conducting meetings and hearings, exchanging proposals, and drafting the budget.[191] Second, in requiring a legislative budget, Section 2142(d)(1) expects and demands that the Puerto Rico Legislature *legislate* a budget,[192] which is precisely the kind of action expressly barred by the Court's holding in *New York*.[193] Third, both sections require the Governor and the Legislature to revise and resubmit budgets if they are deemed noncompliant by the Oversight Board,[194] which involve the kinds of actions declared compulsive and coercive in both *New York* and *Printz*.[195]

Because these two provisions of PROMESA coerce local officials to perform tasks that comply with federal law as well as compel local legislation that complies with federal law, they violate the anti-commandeering principle derived from *New York* and *Printz*. Having determined that Puerto Ricans are part of "the people" referenced in the Tenth Amendment, that Amendment—as manifested through the anti-commandeering principle—affords to "the people" of Puerto Rico protections that the federal government cannot usurp.

186. 48 U.S.C. §§ 2101–2241.
187. § 2142(c)(1).
188. *See id.*
189. § 2142(d)(1).
190. *See id.*
191. *See* § 2142(c)–(d).
192. *See* § 2142(d)(1).
193. *See* New York v. United States, 505 U.S. 144, 168–69 (1992).
194. § 2142(c)(2), (d)(2).
195. *See New York*, 505 U.S. at 160, 177; Printz v. United States, 521 U.S. 898, 935 (1997).

CONCLUSION

Reconsideration of the federal government's treatment of its territories is long overdue. The classification of Puerto Rico as an unincorporated territory following the imperialistic and arguably racist narratives of the *Insular Cases* led to decades of uncertainty concerning the island's future and an unstable quasi-domestic, quasi-foreign relationship with the United States.

Some might argue that the easiest solution to this dilemma is to grant either statehood or independence to Puerto Rico. Those options remain on the table. Still, the uncertainty surrounding the island's current political status should not prevent Puerto Ricans from pursuing other legal avenues—even those that have yet to be explored—which may ensure that their rights and protections as American citizens are respected and constitutionally recognized.

This Note has sought to examine one of those unexplored avenues. Judicial recognition of Puerto Ricans as "the people" under the Tenth Amendment follows how the Court has defined "the people" in other constitutional contexts. More importantly, it would provide Puerto Ricans with a tool to stop the federal government from doing whatever it wants with the island—thereby continuing the constitutional tradition of protecting American citizens from governmental intrusion. Extending Tenth Amendment protections to Puerto Ricans is jurisprudentially sound and fits with the United States' foundational commitments to sovereignty and federalism.