

Why Congress Cannot Unilaterally Repeal Puerto Rico's Constitution

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NOTE

WHY CONGRESS CANNOT UNILATERALLY REPEAL PUERTO RICO'S CONSTITUTION

Adam W. McCall†

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INTRODUCTION

Reckoning with the constitutional status of the United States' overseas territories has been a tricky business for the Supreme Court. Saddled with anachronistic doctrines left over from the turn of the twentieth century,¹ the Court has at-

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¹ See generally *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (holding Puerto Rico a “territory of the United States—although not an organized territory in the technical sense of the word” and therefore not subject to tariff laws); *Goetze v. United States*, 182 U.S. 221, 221–22 (1901) (holding Hawaii not a foreign country and therefore not subject to tariff laws); *Dooley v. United States*, 182 U.S. 222, 236 (1901) (“[T]he authority of the President . . . to exact duties upon imports from [Puerto Rico] ceased with the ratification of the treaty of peace [between Spain and the United States.]”); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (holding duties exacted on exports from the United States to Puerto Rico improper following the ratification of the United States-Spain peace treaty of 1899); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (“[Puerto Rico] is . . . not part of the United

tempted to avoid the significant constitutional problems raised by the vestiges of colonialism. These problems are particularly acute in regard to Puerto Rico, an island of 3.4 million people² that is formally organized as a commonwealth of the United States with its own democratically elected government.³ Unsurprisingly, the Court again dodged the issue of deciding Puerto Rico's constitutional status in two cases in the October 2015 term, *Puerto Rico v. Sanchez Valle*⁴ and *Puerto Rico v. Franklin California Tax-Free Trust*.⁵ The Court's failure to clarify Puerto Rico's status in those cases⁶ has further contributed to the ongoing uncertainty caused by Puerto Rico's shaky economy.⁷ Basic questions about the nature of Puerto Rico's authority to govern itself remain unanswered.

This Note attempts to begin to answer these questions. It argues that, despite the false starts of *Sanchez Valle* and *Franklin*, the Court should recognize that the federal government and Puerto Rico have entered into a binding compact in which Puerto Ricans are entitled to popular sovereignty and self-determination. This compact requires both parties to agree to amend it; Congress may not unilaterally revoke Puerto Rico's constitution by stripping it of its semi-sovereignty.

If this answer is correct, it would have profound consequences on the economic and political future of Puerto Rico. In an attempt to resolve the Puerto Rican debt crisis, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).⁸ PROMESA allowed Puerto Rican

States within the revenue clauses of the Constitution."); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392, 394, 396 (1901) (holding vessels trading between Puerto Rico and the United States to be engaged in "coasting trade" as opposed to foreign commerce).

² *National Population Totals Tables: 2010-2016*, U.S. CENSUS BUREAU (Jan. 12, 2017) <http://www.census.gov/data/tables/2016/demo/popest/nation-total.html> [<https://perma.cc/RKQ4-QU8V>]. This makes Puerto Rico more populous than twenty-one states and the District of Columbia. *Id.*

³ *See generally* P.R. CONST. pmb1. ("We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, . . . do ordain and establish this Constitution for the commonwealth . . .").

⁴ 136 S. Ct. 1863 (2016).

⁵ 136 S. Ct. 1938 (2016).

⁶ Michael Dorf, *Constitutionally Speaking, What Is Puerto Rico?*, DORF ON LAW (June 10, 2016), <http://www.dorfonlaw.org/2016/06/constitutionally-speaking-what-is.html> [<https://perma.cc/CN47-SJT7>].

⁷ Nick Timiraos, *Puerto Rico's Drastic Population Loss Deepens Its Economic Crisis*, WALL ST. J. (June 29, 2016), <http://www.wsj.com/articles/puerto-ricos-drastic-population-loss-deepens-its-economic-crisis-1467219467> [<https://perma.cc/BZ25-7P33>].

⁸ Pub. L. No. 114-187, 130 Stat. 549 (2016). *See generally* Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the*

municipal corporations to restructure their debt obligations—but also imposed a “Fiscal Oversight and Management Board” to review duly-enacted laws of the Puerto Rican legislature.⁹ Congress cited the Territories Clause’s grant of plenary power to Congress to govern Puerto Rico in enacting PROMESA.¹⁰ This Note casts doubt on attempts by Congress to justify any law affecting Puerto Rico by citing the Territories Clause.¹¹

Despite the seemingly wide scope of the Territories Clause’s grant to Congress of “plenary power” to govern the territories, the Supreme Court should recognize Congress’s limited powers to legislate for Puerto Rico in order to give effect to both the will of Congress and the will of Puerto Ricans. Although Puerto Rico is not a state entitled to the voting rights ordinarily accorded to states, Congress chose to bind its own hands and provide Puerto Rico with quasi-sovereignty¹² functionally equal to the sovereignty retained by states. Some lower federal courts have recognized this autonomy, and so should the Supreme Court.¹³

Congress did not have to make this choice; however, by delegating Puerto Rico full self-government rights in 1952 via a compact (the 1952 Compact) as opposed to a simple statute, Congress effectively tied its own hands from unilaterally altering Puerto Rico’s status. In fact, Puerto Rico is the only current or former U.S. territory, including the District of Columbia, that has received full self-governance via an agreement be-

United States-Puerto Rico Relationship, 100 MINN. L. REV. HEADNOTES 79, 80–87 (2016) (discussing PROMESA and its potential effects on the relationship between Puerto Rico and the federal government).

⁹ §§ 101–09, 130 Stat. at 553–63.

¹⁰ *Id.* § 101(b)(2); see also U.S. CONST. art. IV, § 3, cl. 2 (the Territories Clause).

¹¹ In fact, PROMESA may be justified by the Commerce Clause or the Bankruptcy Clause. See U.S. CONST. art. I, § 8, cl. 3, 4. However, the targeted nature of PROMESA may violate the Equal Sovereignty doctrine. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2621–24 (2013). But neither the Supreme Court nor the lower courts have applied this doctrine to strike down a federal law since the doctrine was announced. Nevertheless, the constitutionality of PROMESA is beyond the scope of this Note.

¹² See Act of July 3, 1950, Pub. L. No. 81–600, 64 Stat. 319; Act of July 3, 1952, Pub. L. No. 82–447, 66 Stat. 327.

¹³ *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 595 (1976) (noting that Congress’s purpose in approving the 1952 Compact was to give Puerto Rico “the degree of autonomy and independence normally associated with States of the Union”). But see *United States v. Sanchez*, 992 F.2d 1143, 1150–53 (11th Cir. 1993) (“Puerto Rico is still constitutionally a territory, and not a separate sovereign.”).

tween the federal government and the people of the territory.¹⁴ Because of Puerto Rico's state-like sovereignty by virtue of the 1952 Compact, Congress cannot unilaterally alter Puerto Rico's status. Consequently, Congress may only legislate for Puerto Rico on the authority of its non-Territories Clause enumerated powers, subject to federalism constraints implicit in the Constitution's structure.¹⁵ The Supreme Court and the First Circuit, in dicta, have observed that the 1952 Compact abrogated Congress's plenary power to govern Puerto Rico under the Territories Clause, but no court has definitively held that Congress may not unilaterally alter Puerto Rico's status.¹⁶

Before proceeding further, it is important to understand what this Note means when it argues that the 1952 Compact conferred "sovereignty" upon Puerto Rico. While in international law sovereignty refers to the full range of powers enjoyed by nation-states, this Note uses a more limited definition. Here, sovereignty refers only to the set of powers not delegated to the federal government in the Constitution, and thus retained by the several states. As Chief Justice Marshall noted in *McCulloch v. Maryland*, "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the ob-

¹⁴ No other U.S. territory has gained similar sovereign status on the basis of a formal agreement with the federal government like Puerto Rico has. Although Congress has authorized the people of Guam and the Virgin Islands to pass their own constitutions, neither has successfully negotiated with Congress to achieve a compact like Puerto Rico's. See Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 681 (2013) (citing 48 U.S.C. §§ 1421–1424-4 (2012) (Guam); 48 U.S.C. §§ 1571–1613a (2012) (Virgin Islands)). The Northern Marianas Islands covenanted to the sovereignty of the United States and has its own constitution. However, the intent, substance, and structure of the covenant contrasts markedly against that of the Puerto Rican Compact. See Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 33–45 (2003); *infra* subpart II.B.

¹⁵ Although the Court in *Harris* said Congress can legislate for "Puerto Rico" so long as there is a rational basis, that language should not be understood to contradict this Note's argument. *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (*per curiam*). *Harris* addressed a law that purportedly violated individual Puerto Ricans' rights to equal protection, not the Puerto Rican government's rights as a semi-sovereign free associated state. See *id.* As a summary disposition in tension with not only the 1952 Compact but also the Court's and the First Circuit's own pronouncements regarding Puerto Rico's status, the Court would do well to revisit *Harris*.

¹⁶ For examples of the courts recognizing Puerto Rican autonomy, see *Examining Bd.*, 426 U.S. at 595; *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987). For a brief discussion of federalism principles' applicability to Puerto Rico, see *Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 344–45 (1st Cir. 2015).

jects committed to the other.”¹⁷ The police power is chief among the powers reserved to the states—and a power the Puerto Rican government exercises. Explicitly excluded from the meaning of sovereignty here are powers reserved to the federal government, such as the ability to conduct foreign policy.¹⁸ Because post-1952 Compact Puerto Rico has functionally equal sovereignty to the states, Puerto Rico’s status should mean that Puerto Rico’s political status may not be altered without the consent of Puerto Rico, and the Puerto Rican government should receive equivalent federalism protections to state governments.

The central difficulty in situating Puerto Rico’s place in the American constitutional framework lies in the fact that Puerto Rico’s status has shifted over time. The Supreme Court contemplated that the Constitution’s applicability to Puerto Rico would change depending on the island’s political relationship with the federal government.¹⁹ Recent Supreme Court jurisprudence reaffirms this view.²⁰ Therefore, Part I explains the history of the Supreme Court’s and Congress’s early approaches to Puerto Rican governance, and Puerto Rico’s midcentury demand for a change in status. Puerto Rico’s requests led to Congress and the island striking an agreement—the 1952 Compact—to alter Puerto Rico’s constitutional status.

Part II further argues that Congress’s decision to change Puerto Rico’s status by statute binds future Congresses for three reasons. First, the 1952 Compact, by the plain meaning of its text, changed the structure of Puerto Rico’s governance. Previously, Congress established a government for Puerto Rico via an Organic Act enacted in the U.S. Code.²¹ The 1952 Compact repealed this Organic Act but did not replace it in the U.S. Code or Statutes at Large. The 1952 Compact’s effectiveness depended not only on Congress’s assent but also on multiple

¹⁷ 17 U.S. (4 Wheat.) 316, 410 (1819).

¹⁸ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–22 (1936).

¹⁹ *See Downes v. Bidwell*, 182 U.S. 244, 341–44 (1901) (White, J., concurring) (announcing the doctrine of territorial incorporation).

²⁰ *See Price*, *supra* note 14, at 688 (citing Justice Kennedy’s opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008), for the proposition that the territorial incorporation doctrine advanced a “principle of cultural accommodation” in order to facilitate the integration of former civil law jurisdictions into the U.S. common law system).

²¹ Act of Apr. 12, 1990, Pub. L. No. 56-191, 31 Stat. 77; Act of Mar. 2, 1917, Pub. L. No. 64-368, 39 Stat. 951. These Organic Acts were codified in scattered sections of Volume 48 of the U.S. Code.

Puerto Rican referenda, ultimately resulting in a constitution approved by the Puerto Rican people.²²

Second, because Puerto Rico's powers now emanate from its people, not an explicit federal mandate, Puerto Rico is the source of the island's domestic law, not the federal government.²³ Thus, Puerto Rico is not a territory within the Territories Clause's plenary power, as such power only makes sense where there is no sovereign authority. Given the presence of mutually-agreed upon sovereign authority, that authority ought to be recognized as entrenched so long as both Puerto Rico and Congress do not mutually agree to amend this status quo. Moreover, the Political Process doctrine prevents Congress from taking away political rights from minority groups once granted. Congress has never attempted to claw back any self-governance rights from U.S. territories before, and the courts should not allow that if it were to happen.²⁴ Finally, this Part recounts the legislative history and contemporary evidence for the federal government's intent to provide Puerto Rico with a real measure of self-governance.

Finally, Part III argues that the parties to the 1952 Compact intended it to confer "state-like autonomy" on Puerto Rico by means of free associated state status.²⁵ Therefore, barring any future agreement to revise the 1952 Compact, Congress must ground its actions purporting to affect the rights of Puerto Rico in Congress's enumerated powers located outside of the Territories Clause. These enumerated powers are the product of, and should be interpreted in light of, federalism concerns.

²² See P.R. CONST.

²³ *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987).

²⁴ The case of the District of Columbia is different because it is governed by the Enclave Clause, not the Territories Clause. Compare U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have Power To . . . exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may . . . become the seat of the Government of the United States."), with *id.* 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."). Moreover, the case for the District of Columbia is not as strong because Congress never claimed to give the District of Columbia full self-governance. See subpart II.B *infra*.

²⁵ *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 42 (1st Cir. 1981).

I

A BRIEF HISTORY OF PUERTO RICO'S CONSTITUTIONAL
STATUS

On December 10, 1898, the Spanish-American War concluded with the signing of the Treaty of Paris.²⁶ Among other concessions, Spain ceded Puerto Rico to the United States.²⁷ While the United States claimed plenary power over the island upon annexation, Spain had begun transferring more powers to Puerto Ricans shortly before the Spanish-American War. Prior to the war's outbreak, Puerto Ricans had representation in the Spanish Parliament and their own bicameral legislature.²⁸ Only this "Insular Parliament" could legislate for the island; the Spanish Crown, through the Royal Governor, only retained veto rights.²⁹ Hence, prior to the Treaty of Paris, Puerto Rico arguably had more self-governance than British, Dutch, or French overseas possessions such as Canada, as those colonies did not receive representation in national parliaments, and national parliaments legislated for those colonies.³⁰

That state of affairs immediately changed after annexation. Initially, the United States imposed military rule before passing Puerto Rico's first Organic Act in 1900 (the Foraker Act), which set up a civil government for the island.³¹ The Foraker Act provided for a bicameral legislature, courts, and a governor.³² The federal government appointed all officials, save members of the lower legislative house.³³ The Foraker Act did not guarantee Puerto Rico the full slate of rights guaranteed by the Constitution and immediately received challenges in the federal courts.³⁴ In *The Insular Cases*, here used to refer to the six cases heard by the Supreme Court in 1901 regarding Puerto Rico, the Court upheld the Foraker Act.³⁵ The Court distinguished between incorporated territories, those destined for

26 Treaty of Paris, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

27 *Id.* art. II.

28 JOSÉ TRIÁS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 13-14 (1997).

29 *Id.*

30 *Id.*

31 Pub. L. No. 56-191, 31 Stat. 77 (1900).

32 *Id.* at 81-86.

33 *Id.*

34 *See id.*

35 *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901).

statehood, and unincorporated territories, which were not.³⁶ In unincorporated territories only certain constitutional rights applied by default, and the federal government could choose to extend, or not, the rest.³⁷

The Foraker Act proved unpopular with Puerto Ricans. In 1914, the Puerto Rican legislature's lower house unanimously voted for independence, only to have Congress reject the independence vote as unconstitutional.³⁸ Three years later, Congress attempted to placate Puerto Ricans by passing the Jones Act. The Jones Act not only included a Puerto Rican Bill of Rights but also replaced the unelected upper legislative house with an elected Senate and gave Puerto Ricans U.S. citizenship.³⁹ While some contended the Jones Act incorporated Puerto Rico, the Supreme Court rejected that argument in *Balzac v. Porto Rico*.⁴⁰ There, the Court held that Congress's conferral of new rights on Puerto Rico did not change Puerto Rico's status.⁴¹

In the midst of worldwide decolonization following World War II, Puerto Rico demanded further political rights from the federal government.⁴² The federal government initially responded by allowing Puerto Ricans to elect the island's governor. The President, however, retained the right to appoint Puerto Rican Supreme Court Justices and certain members of the Puerto Rican executive branch.⁴³ This move failed to satiate Puerto Rican demands for self-government, not to mention "pressure from the United Nations to end colonialism."⁴⁴ In response to this pressure, the United States represented to the United Nations when signing the United Nations Charter that it "would 'develop self-government'" in its territories.⁴⁵ Thus, in

³⁶ See, e.g., *Downes*, 182 U.S. at 341–44 (upholding the Foraker Act's disuniform tariffs on Puerto Rican goods on the basis that, in 1901, Puerto Rico was not an incorporated territory).

³⁷ *Id.*

³⁸ JUAN GONZALEZ, *HARVEST OF EMPIRE* 60–63 (rev. ed. 2011).

³⁹ See Pub. L. No. 64-368, §§ 2, 5, 25, 39 Stat. 951, 951–2, 953, 958 (1917).

⁴⁰ 258 U.S. 298 (1922).

⁴¹ *Id.* at 305–08.

⁴² See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671–72 (1974) ("[P]ressures for greater autonomy led to congressional enactment of Pub. L. 600, 64 Stat. 319, which offered the people of Puerto Rico a compact whereby they might establish a government under their own constitution. Puerto Rico accepted the compact, and on July 3, 1952, Congress approved, with minor amendments, a constitution adopted by the Puerto Rican populace . . .").

⁴³ Compare Elective Governor Act of 1947, Pub. L. No. 80-362, § 3, 61 Stat. 770, 771, with §§ 13, 20, 40, 39 Stat. at 951, 955–56, 965.

⁴⁴ GONZALEZ, *supra* note 38, at 62.

⁴⁵ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1880 (2016) (Breyer, J., dissenting).

1948 the Puerto Rican government held a popular referendum on the island's future.⁴⁶ The referendum provided three options for Puerto Ricans to choose from: independence, statehood, or associated, autonomous "commonwealth" status.⁴⁷ The third option won handily.⁴⁸

The referendum's ramifications sorted themselves out over the course of four years. Congress took no action in response to the referendum until 1950 when it passed Public Law 600, authorizing the people of Puerto Rico to draft their own constitution.⁴⁹ Public Law 600 also repealed the existing federal governance framework, except for the provision that Puerto Rico had to respect nationally applicable federal laws.⁵⁰ Congress also made the repeal of the federal governance framework contingent on the Puerto Rican Constitution's ratification by both the people of Puerto Rico and Congress. In this scheme, Congress "fully recogniz[ed] the principle of government by consent" and adopted Public Law 600 "in the nature of a compact" between the federal government and the people of Puerto Rico.⁵¹ Puerto Ricans convened a constitutional convention and ratified a constitution in 1952.⁵² Pursuant to Public Law 600, Congress approved the constitution with minor changes in Public Law 447.⁵³ Puerto Rico accepted these changes in a subsequent referendum, and the constitution went into effect.⁵⁴

⁴⁶ Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1147-48 (2009).

⁴⁷ *Id.* at 1148.

⁴⁸ *Id.*

⁴⁹ Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319.

⁵⁰ *Id.* §§ 5-6, 64 Stat. at 320.

⁵¹ *Id.* § 1, 64 Stat. at 319.

⁵² See Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 REV. JURÍDICA U.P.R. 945, 947 (2011).

⁵³ Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327.

⁵⁴ P.R. CONST. art. II, §§ 5, 20; see Johnny Smith, Note, *Commonwealth Status: A Good Deal for Puerto Rico?*, 10 HARV. LATINO L. REV. 263, 270 (2007). Nelson Denis calls into question the legitimacy of this referendum, noting limits on pro-independence activists, FBI pressure on the Governor to support commonwealth status, and low turnout. NELSON A. DENIS, WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA'S COLONY 125-31 (2015). Pro-independence advocates lodged similar complaints against the 1967 plebiscite, and later referenda yielded inconclusive results because of, among other things, the lack of clarity in the definition of Puerto Rico's current status. R. SAM GARRETT, CONG. RESEARCH SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 13-14 (2011). At the time of this writing, the Puerto Rican legislature deemed Puerto Rico's most recent referendum in 2012 "inconclusive" because of a large amount of blank ballots cast. R. SAM GARRETT, CONG. RESEARCH SERV., R42765, PUERTO RICO'S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY

Taken together, Public Law 600, Public Law 447, and the Puerto Rican Constitution ratified pursuant to both acts constitute the 1952 Compact. The 1952 Compact, in turn, governs the modern relationship between Puerto Rico and the federal government. Public Law 600 is best understood as part an agreement to agree and part the relinquishment of federal powers contingent on that agreement; the Puerto Rican Constitution transmitted to Congress as a draft proposal; and the Puerto Rican Constitution ratified by both Public Law 447 and Puerto Rico as the actual document setting forth the terms of the Compact left open by Public Law 600.

II

THE 1952 COMPACT & FEDERALISM

The 1952 Compact's content and structure should be understood to accord federalism protections to Puerto Rico. Moreover, courts have recognized that Puerto Rico is entitled to a number of constitutional protections by dint of its semi-sovereignty. The 1952 Compact is not normal-course legislation; because it is a compact granting political rights, it is entrenched in U.S. law. This outcome best reflects the purpose of the 1952 Compact and the intentions of the 1952 Compact's sponsors.

A. The Text & Effectiveness of the Compact

Congress's authorizing legislation, Public Law 600, conditionally transfers state-like sovereignty to Puerto Rico. First, the whereas clauses situate the bill within Congress having "progressively recognized the right of self-government of the people of Puerto Rico."⁵⁵ Next, noting that "an increasingly large measure of self-government has been achieved," Congress, "fully recognizing the principle of government by consent," authorized Puerto Ricans to adopt their own constitution and organize their own republican form of government.⁵⁶ This language demonstrates Congress's desire to effectuate full self-government in Puerto Rico. Accordingly, Congress made clear

QUESTIONS 8 (2013). On June 11, 2017, Puerto Rico held a nonbinding referendum on a potential change in status. While 97% of Puerto Ricans voted for statehood, the election was marred by a turnout of only 23% and the omission of the option to vote to retain free associated state status. Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us.puerto-ricans-vote-on-the-question-of-statehood.html> [<https://perma.cc/2QAK-X5KA>].

⁵⁵ § 1, 64 Stat. at 319.

⁵⁶ *Id.* §§ 1–2, 64 Stat. at 319.

that because the bill was “in the nature of a compact,” Puerto Rico needed to vote to agree with the bill’s terms, and Congress and the President would have to approve the Puerto Rican Constitution.⁵⁷ Thus, the effectiveness of the remainder of the bill’s provisions, repealing the parts of the organic acts governing Puerto Rico, was contingent on the outcome of this treaty-like negotiation between the federal government and the Puerto Rican people.

Furthermore, Congress did not contemporaneously assert its unconstrained authority to legislate for Puerto Rico. Whereas previously Congress established a government for Puerto Rico via an Organic Act enacted in the U.S. Code, afterward nothing in the U.S. Code provided for the exact form of Puerto Rican self-government.⁵⁸ The former Puerto Rican Organic Act has been reduced to the Federal Relations Act, which merely provides that “[t]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws.”⁵⁹

This necessarily raises the question whether the federal government had the power to so bind itself to an agreement with a non-U.S., non-foreign state entity. On this reading, the 1952 Compact is a farce—nothing but a revised delegation of powers to a federal agency, the Puerto Rican government, which might be revised at any time. However, the First Circuit, the circuit responsible for appeals from the Puerto Rican federal district court, has rejected this argument. In *United States v. Quiñones*, the court observed that because of the 1952 Compact:

Puerto Rico ceased being . . . subject to the plenary powers of Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.⁶⁰

Likewise, the Supreme Court in *Examining Board v. Flores de Otero* extended the abstention doctrine to Puerto Rico and

⁵⁷ *Id.* §§ 1–3, 64 Stat. at 319.

⁵⁸ Act of Apr. 12, 1900, Pub. L. No. 56-191, 31 Stat. 77; Act of Mar. 2, 1917, Pub. L. No. 64-368, 39 Stat. 951. These Organic Acts were codified in scattered sections of Volume 48 of the U.S. Code.

⁵⁹ 48 U.S.C. § 734 (2012); see also *infra* notes 64–68 and accompanying text.

⁶⁰ 758 F.2d 40, 42 (1st Cir. 1985).

cited with approval its prior case, *Calero-Toledo v. Pearson Yacht Leasing*, which espoused the notion that Puerto Rico is “sovereign over matters not ruled by the Constitution” after the 1952 Compact.⁶¹ Both courts relied on a 1953 First Circuit opinion holding that Congress’s use of the word “constitution” meant Congress had given the new government full authority over the island’s internal affairs.⁶²

B. Entrenching the Compact in Law

Unfortunately, both the First Circuit in *Quiñones* and the Supreme Court in *Examining Board* declined to flesh out *how* Congress could entrench Puerto Rican autonomy with a simple statute rather than a grant of statehood or independence. In general, Anglo-American constitutional law contemplates that last-in-time subconstitutional legislation will be applied over contradictory earlier-in-time subconstitutional legislation.⁶³ However, there are reasons to think that the case of compacts with subnational units might be different.

First, it is not clear that a compact like the agreement between Puerto Rico and the federal government is normal-course legislation. The 1952 Compact is comprised of two acts of Congress, which repeal federal laws, not enact new ones; three Puerto Rican referenda; and the Puerto Rican Constitution. Congress did not enact Puerto Rico’s constitution to replace the portions of the old Foraker and Jones Acts it had repealed, nor did it assert in the relevant acts that it retained the right to plenary power over the territory. In fact, for reasons unclear, an amendment to Congress’s act to ratify the proposed Puerto Rican Constitution reserving that right was defeated.⁶⁴ The legislative history makes no such claim either

⁶¹ 426 U.S. 572, 594 (1976); 416 U.S. 663, 673 (1974).

⁶² See *Mora v. Mejias*, 206 F.2d 377, 382–88 (1st Cir. 1953) (“Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word. It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.” (internal citations omitted)).

⁶³ See *United States v. Winstar Corp.*, 518 U.S. 839, 873–74 (1996) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)).

⁶⁴ One possibility is that the amendment might have been proper only if offered during the debate over Public Law 600 because it changed the nature of the enabling act itself, not the proposed constitution. At least one congressman objected on the basis that it would be bad faith to change the Compact’s basic terms at the ratification stage. 98 CONG. REC. 6184–85 (1952) (statement of Rep. Antonio Fernandez). But see ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 169 (1989) (observing that such an amendment “was attacked and rejected but it is not clear whether it was

(or at least not a clear claim in regards to Public Law 447), in contrast to the legislative history for the Northern Marianas Islands covenant, where nobody disputed that the federal government had reserved its plenary powers.⁶⁵ All that is left in the former Puerto Rican Organic Act in the U.S. Code is the now-renamed Federal Relations Act, which provides only that “[t]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws.”⁶⁶

Thus, the Puerto Rican government’s powers no longer have a direct basis in federal law. The Puerto Rican Constitution obtains its authority indirectly and only in part from the federal government. Notably, the Puerto Rican Constitution did not go into effect until the third referendum agreeing to revisions. Because the post-1952 scheme for governing Puerto Rico is not truly legislative, traditional entrenchment concerns may not apply. The First Circuit has recognized that the government of Puerto Rico is an independent source of laws. For example, in holding in *United States v. Lopez Andino* that Puerto Rico qualified as a separate sovereign for purposes of the Double Jeopardy Clause, the First Circuit found that “Puerto Rico’s status is not that of a state in the federal union, but, its criminal laws, like those of a state, emanate from a different source than the federal laws.”⁶⁷

While *Sanchez Valle* overruled the holding of *Lopez Andino*, its analysis is consistent with the notion of Puerto Rican popular sovereignty. The Court’s opinion focused on the source of prosecutorial, as opposed to legislative, authority.⁶⁸ This distinction matters because while who executes the laws makes a material difference in how they are enforced or interpreted,⁶⁹ the primary law-making function in Puerto Rico is executed by

opposed for technical reasons or because it was thought unnecessary. No one . . . opposed it because he said Congress was making an irrevocable delegation of its constitutional power over territories”).

⁶⁵ The statute approving the Northern Mariana Islands covenant itself includes mandatory provisions. See Keitner & Reisman, *supra* note 14, at 39–42. Also, the text of the Northern Mariana Islands constitution is reprinted in the U.S. Code. 48 U.S.C. § 1801 (2012).

⁶⁶ 48 U.S.C. § 734 (2012).

⁶⁷ 831 F.2d 1164, 1168 (1st Cir. 1987). Even before the *Sanchez Valle* decision this holding was controversial. See *United States v. Sanchez*, 992 F.2d 1143, 1150–53 (11th Cir. 1993) (“The authority with which Puerto Rico brings charges as a prosecuting entity derives from the United States as sovereign.”).

⁶⁸ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874–75 (2016).

⁶⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607, 626–28 (1999) (“[C]riminal prosecutors are the most pow-

the Puerto Rican people's agents in their legislature.⁷⁰ One cannot analogize the Puerto Rican legislature to an independent agency to which Congress has delegated rule-making authority, either.⁷¹ A number of administrative law doctrines, for example the non-delegation doctrine⁷² or the hiring and firing doctrines under the Appointments Clause,⁷³ would surely invalidate such an arrangement. And indeed, the Court in *Sanchez Valle* recognized "the fact of self-rule" in Puerto Rico⁷⁴—it just applied a double jeopardy analysis that woefully looked to whether Puerto Rico possessed the authority to prosecute before the federal government relinquished it in the 1952 Compact.⁷⁵ This "historical" analysis⁷⁶ does not diminish the fact that "Congress in 1952 'relinquished its control over [Puerto Rico's] local affairs.'"⁷⁷ Thus, one can agree that Puerto Rico's power to enforce the laws derives from the federal government in the formalistic sense adopted by the Court in *Sanchez Valle* and still agree that Puerto Rico received a great deal of self-rule via the 1952 Compact that Congress cannot unilaterally repeal.⁷⁸

erful lawyers because, with rare exception, their offices have unchecked authority to exercise the sovereign's power on behalf of the sovereign.").

⁷⁰ See generally P.R. CONST. art. III, § 1 ("The legislative power shall be vested in a Legislative Assembly . . ."). But see PROMESA, Pub. L. No. 114-187, § 202, 130 Stat. 549, 566 (2016) ("[T]he Oversight Board shall deliver a notice to the Governor and the Legislature providing a schedule for developing, submitting, approving, and certifying Budgets for a period of fiscal years as determined by the Oversight Board in its sole discretion . . .").

⁷¹ Prior to the Elective Governor Act of 1947, Pub. L. No. 80-362, 61 Stat. 770, the government of Puerto Rico neatly checked all the boxes of a typical government agency. Moreover, the Territories Clause only confers upon Congress the ability "to dispose of and make all needful Rules and Regulations" regarding territories, much as Congress's Article I powers confer on Congress other powers. Compare U.S. CONST. art. IV, § 3 (providing for congressional rulemaking authority over territories), with *id.* art. I, § 8 (conferring various powers upon Congress with respect to, *inter alia*, states, foreign nations, and Indian tribes). Regardless of the source of Congress's authority, whenever it creates executive agencies it must abide by certain constitutional administrative law principles.

⁷² *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538-42 (1935).

⁷³ U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 120-24 (1976) (per curiam) (addressing limits on who may appoint executive officers, and how); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495-98 (2010) (addressing limits on who can fire executive officers, and how).

⁷⁴ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016).

⁷⁵ See Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327; Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319.

⁷⁶ 136 S. Ct. at 1876.

⁷⁷ *Id.* at 1874 (quoting Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976)).

⁷⁸ In that sense, many of the arguments in Justice Breyer's dissent are not quite responsive to Justice Kagan's opinion for the Court. The Court's opinion

The fact that Congress can preempt the action of the Puerto Rican legislature, as the Court recently held in *Franklin California Tax-Free Trust*, is merely further evidence of the domestic power of the Puerto Rican legislature.⁷⁹ After all, in many cases involving conflict preemption, there is no reason to conduct a preemption analysis if Congress is essentially the Puerto Rican territorial legislature by dint of its plenary powers over the island. *Franklin California Tax-Free Trust* analyzed whether the federal Bankruptcy Code preempted Puerto Rico's attempt to enact its own municipal bankruptcy law.⁸⁰ Prior to 1984, Puerto Rico had been included in the federal municipal bankruptcy regime.⁸¹ That year, Congress amended the law, without any mention of the change in any recorded legislative history.⁸² The opinions in the case avoided addressing any issues regarding Puerto Rico's constitutional status; conceivably, they might have been written the same way had a law of one of the fifty states been at issue.⁸³ Notably, the opinions in

seems to agree with Justice Breyer's arguments that the 1952 Compact empowered Puerto Rico to "enact and enforce—pursuant to its *own* powers—its own criminal laws." 136 S. Ct. at 1880 (Breyer, J., dissenting). Justice Breyer's argument is more persuasive when it contends that the standard that Justice Kagan uses to determine the historical source of prosecutorial authority would seem to require that "the Philippines, new States, and the Indian tribes" lack preexisting prosecutorial authority given the federal government's role in authorizing those entities' contemporary sovereignty. *See id.* at 1878–80.

⁷⁹ *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016).

⁸⁰ *Id.* at 1942.

⁸¹ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, sec. 421(j)(6), § 101(44), 98 Stat. 333, 368–69 (codified as amended at 11 U.S.C. § 101(52) (2012)).

⁸² Stephen J. Lubben, *Puerto Rico and the Bankruptcy Clause*, 88 AM. BANKR. L.J. 553, 573–75 (2014).

⁸³ *See generally Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1945–47 ("We hold that Puerto Rico is still a 'State' for purposes of the pre-emption provision."). While the Supreme Court did not use the occasion to decide any issues related to Puerto Rico's constitutional status, Judge Torruella argued in his concurrence in the First Circuit appeal below that the Congress's removal of Puerto Rico from the federal municipal bankruptcy regime exceeded Congress's authority to legislate for Puerto Rico. *See Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d, 322, 348 (2015) (Torruella, J., concurring) (citing *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1, 5 (1978) (per curiam)). Judge Torruella argued that the 1984 Bankruptcy Act Amendments failed a rational basis test. The problem with Judge Torruella's argument is two-fold. First, the argument confuses the difference between persons who have equal protection rights under the Fourteenth Amendment and states (or territories or free associated states) which do not. *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966).

Second, even if the municipal corporations might be able to claim personhood under the Due Process Clause, the rational basis test applied in *Harris* and *Califano* is exceedingly deferential; the Supreme Court upheld lower welfare reimbursement levels to Puerto Ricans and the inapplicability of the Supplemental

the case did not explicitly argue that the 1952 Compact had been implicitly repealed.⁸⁴

Second, even if these political acts constitute functional legislation, there is Anglo-American common law support for the notion that some legislative acts can be entrenched, despite the general principle that “one legislature may not bind the legislative authority of its successors.”⁸⁵ Supporters of the principle argue, among other things, that entrenchment functions as an end-run around Article V’s procedure for constitutional amendments and that it subverts the democratic will of future electorates.⁸⁶ Yet while those arguments may very well hold water in response to purportedly entrenched social, economic, or foreign policy legislation, they are less persuasive in response to an attempt to entrench self-government rights for the people of territories. In this case, entrenchment is a proper way for Congress to dispose of the governance of a territory pursuant to the Territories Clause, without giving up its power to preempt local law pursuant to its other enumerated powers and the Supremacy Clause. Most importantly, entrenchment here protects democracy, for it ensures that a change in policy affecting a group cannot be effected without the group’s democratic participation.

This limited acceptance of legislative entrenchment has been the norm in the United Kingdom. For example, the Acts of Union for Scotland and Ireland were de facto entrenched. While Parliament amended those laws frequently, it did so generally with the consent of members from those constituent sub-national units.⁸⁷ Moreover, in 1931, the U.K. Parliament

Social Insurance program to Puerto Ricans on the basis that Puerto Ricans do not pay income taxes. See *Harris*, 446 U.S. at 651–52; *Califano*, 435 U.S. at 5.

Perhaps one might argue that given Puerto Rico’s similar standing with states under the 1952 Compact, Puerto Rico deserves the benefits of the Equal Sovereignty doctrine applied in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Yet neither the Supreme Court nor the lower federal courts have applied that doctrine since *Shelby County*. See, e.g., *Nat’l Collegiate Athletic Ass’n v. New Jersey*, 730 F.3d 208, 238 (3d Cir. 2013), *cert. denied* 134 S. Ct. 2866 (2014).

⁸⁴ What is more, the canon against implied repeals militates against such an interpretation of the Court’s analysis in *Franklin California Tax-Free Trust* and in other cases purporting to apply a conflict preemption analysis to Puerto Rican laws. See *Morton v. Mancari*, 417 U.S. 535, 549–50 (1974).

⁸⁵ *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1673–85 (2002).

⁸⁶ Posner & Vermeule, *supra* note 85, at 1673.

⁸⁷ For the Acts of Union, see *Union with Ireland Act 1800*, 39 & 40 Geo. 3 c. 67, art. I (Ireland); *Union with England Act 1707*, 6 Ann. c. 11, art. I (Scotland). For discussion of amendments to the Acts of Union, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 21–22, 37 (Gaunt, Inc. 8th ed. 1996)

passed a law purporting to prevent itself from legislating for its dominions “unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.”⁸⁸ Puerto Rican officials used this law, the Statute of Westminster, as a model for the 1952 Compact.⁸⁹ While recognizing that “in legal theory” Parliament can reverse such a law, the U.K. courts have noted that as a matter of convention “[f]reedom once given cannot be taken away.”⁹⁰ And when Parliament devolved powers to the Scottish, Welsh, and Northern Irish legislatures, it did so after both passing legislation and receiving approval via local referenda.⁹¹

The U.K. model is instructive here. Because Puerto Rico has no voting representation in Congress, Congressional unilateral acts to alter Puerto Rico's status lack the democratic

(1885); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1030 (2011).

⁸⁸ See Statute of Westminster 1931, 22 & 23 Geo. 5.

⁸⁹ David A. Rezvani, *The Basis of Puerto Rico's Constitutional Status: Colony, Compact, or "Federacy"?*, 122 POL. SCI. Q. 115, 121 (2007).

⁹⁰ *Blackburn v. Attorney-General*, [1971] 1 WLR 1037 at 1040 (Eng.).

⁹¹ See Cabinet Office, *Devolution of Powers to Scotland, Wales and Northern Ireland*, GOV'T U.K. (Feb. 18, 2013), <https://www.gov.uk/guidance/devolution-of-powers-to-scotland-wales-and-northern-ireland> [<https://perma.cc/ERR6-EYCZ>] (noting that although the U.K. “Parliament remains sovereign[] and retains the power to amend the devolution Acts or to legislate on anything that has been devolved. . . . [Parliament] will not normally legislate on a devolved matter without the consent of the devolved legislature”); Mark Elliott, *A “Permanent” Scottish Parliament and the Sovereignty of the UK Parliament: Four Perspectives*, UK CONST. L. ASS'N (Nov. 28, 2014), <https://ukconstitutionallaw.org/2014/11/28/mark-elliott-a-permanent-scottish-parliament-and-the-sovereignty-of-the-uk-parliament-four-perspectives/> [<https://perma.cc/BL5H-8NAV>] (“[W]hile, from an orthodox legal-constitutional perspective, guarantees as to the Scottish Parliament's permanence contained in a UK statute would not be worth the paper they were printed on, it should not be taken for granted that that perspective is the right one from which to attempt to gauge the political or legal implications of what is being proposed.”). However, while this obtains for the modern assemblies, the Parliament of Northern Ireland—which had been created without a local referendum—was abolished by the U.K. Parliament acting without the consent of the Northern Irish administration and a referendum. Northern Ireland Constitution Act 1973, 21 Eliz. 2 c. 36.

At the time of this writing, there is some risk that the failure of the unionist and republican parties in the Northern Irish assembly to reach a power-sharing arrangement may result in the reimposition of direct rule from Westminster. Henry McDonald, *General Election 2017*, GUARDIAN: POLITICS LIVE (Apr. 21, 2017, 6:15 AM), https://www.theguardian.com/politics/live/2017/apr/21/general-election-2017-campaign-brexit-corbyn-may-farron-politics-live?CMP=share_btn_tw&page=with:block-58f9da0ce4b09d9842fe0430#block-58f9da0ce4b09d9842fe0430 [<https://perma.cc/Q7WX-986K>]. However, the U.K. secretary of state for Northern Ireland is appearing to pull out all the stops in order to avoid such a step during the run-up to snap U.K. parliament elections in June 2017. *Id.*

legitimacy that Parliament had to tweak the Acts of Union.⁹² Moreover, the U.K. experience shows an understanding that when a legislature compacts with subnational units, changes to the compact require the subnational unit to agree via referendum. At the very least, this evidences a constitutional convention in the U.K. against disenfranchising local communities after granting them self-government. This convention ought to be understood as a constitutional command in the United States where it has long been recognized by courts and scholars that attempts to reduce political representation deserve heightened forms of review.⁹³

Additionally, at least one Framers of the Constitution contemplated that some legislation could entrench itself. James Madison thought legislation including stipulations have an “irrevocable” quality.⁹⁴ True, Madison construed this category narrowly—the only example he gave of such legislation was that which created public debt. Some scholars interpret Madison to be primarily concerned about protecting fundamental private property rights.⁹⁵ While the right to vote is not a fundamental property right under the Due Process Clause, it is a fundamental right under the Equal Protection Clause.⁹⁶ As the 1952 Compact recognizes Puerto Ricans’ fundamental right to vote for their local representatives and governor, it is thus appropriate to view as suspect any act purporting to alter the status relationship between Puerto Rico and the federal government without a corresponding Puerto Rican referendum or legislative act.

Furthermore, the 1952 Compact is functionally entrenched. As it stands, Puerto Rico operates with little input from Congress over its internal affairs. San Juan serves as the locus of government, not Washington. Puerto Rico acts like a state by exercising its police power to enact laws to promote

⁹² Examples of amendments to the Irish Act, such as the disestablishment of the Anglican Church, were likely supported by a majority of the Irish. See DICEY, *supra* note 87, at 21–22.

⁹³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–88 (1980). See also text accompanying notes 99–105. Rezvani further observes that U.S. courts, unlike U.K. courts, traditionally view themselves as able to enforce such constitutional conventions. See Rezvani, *supra* note 89, at 134.

⁹⁴ Chafetz, *supra* note 87, at 1032 (citing Letter from James Madison to Thomas Jefferson (Revised Text) (Feb. 4, 1790), in 13 *THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES* 22 (Charles F. Hobson & Robert A. Rutland eds., 1981)).

⁹⁵ *Id.*

⁹⁶ *Reynolds v. Sims*, 377 U.S. 533 (1964).

public health and safety.⁹⁷ The Puerto Rican government only relies on the federal government for action where the U.S. Constitution provides for the federal government to have sole authority, such as to conduct foreign affairs or regulate interstate commerce. This includes legislating bankruptcy remedies for Puerto Rico, which inevitably interfere with obligations incurred by organizations created by state legislatures. Therefore, the federal Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which imposed a fiscal oversight board with the power to alter Puerto Rico's economic policies, very well might be constitutional, notwithstanding with this understanding of the 1952 Compact. On the other hand, the extensive authority granted to the Fiscal Control Board under PROMESA far outstrips the authorities delegated to the federal courts under Chapter 11 of the federal Bankruptcy Code and thus may be vulnerable to arguments that PROMESA goes beyond what is necessary to regulate interstate commerce or restructure debts and in fact impermissibly discriminates against a sovereign.⁹⁸ All this is not to say that the Compact is unrepeatable. Congress can repeal the Compact the same way it enacted it—with the consent of Puerto Ricans.

Moreover, any congressional attempt to legislate for Puerto Rico may run into Political Process doctrine problems. Legislatures may not take away minority groups' power to legislate.⁹⁹ Interfering with Puerto Rico's governance would deprive a minority group, Puerto Ricans, of its ability to participate in self-governance. Because Puerto Ricans would have no say in Congress's act to strip this power away, such an act should be voided by the courts. Therefore, even if Congress lacked the power to compact with Puerto Rico, by giving them self-governance Congress waived the right to take that power away.

The fact that Congress has never taken away local self-governance rights from federal territories might reflect this Political Process doctrine concern. A possible exception might be the shifting balance of authority over the District of Columbia between Congress and the District's municipal government. However, the District of Columbia case can be distinguished from those of Puerto Rico and other overseas U.S. entities on at

⁹⁷ See *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500–01 (1988).

⁹⁸ See *supra* note 11 and accompanying text.

⁹⁹ Government “may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.” *Hunter v. Erickson*, 393 U.S. 385, 393 (1969).

least two grounds. First, the District of Columbia is governed by the Enclave Clause,¹⁰⁰ which is motivated by different policies than the Territories Clause.¹⁰¹ These policies include the national government's ability to ensure the capitol's safety so that the government can function.¹⁰² No such concern applies to far-off territories. Thus, there is reason to think that Congress could waive its plenary power over a territory by statute,¹⁰³ but not waive its plenary powers over the capitol enclave without a constitutional amendment.

Second, Congress never purported to waive, or implied a purpose of waiving, its right to govern the District of Columbia like Congress did with the 1952 Compact with Puerto Rico. Ever since Congress relocated to the territory on the Potomac ceded by Maryland and Virginia, Congress always maintained, at the very least, explicit veto rights over the acts of the capitol district's local government.¹⁰⁴ Therefore, because Congress never relinquished its plenary power, its governance changes just reframed the process in a non-substantive way: in every scheme inaugurated, Congress has called the shots at the end of the day.¹⁰⁵

C. Legislative History & Contemporary Evidence of Congress's Intent to Entrench

Furthermore, Puerto Rico deserves the benefits of the bargain it struck with the federal government in the contingent mish-mash of legislation, referenda, and constitutional documents comprising the 1952 Compact. Congress knew the rights Public Law 600 bestowed upon Puerto Rico. The analysis that follows examines the legislative histories of Public Laws 600 and 447. Congressional materials produced during the consideration of both acts demonstrate Congress's desire to bestow autonomy on Puerto Rico. This legislative history "is essential to understanding statutes enacted by Congress" because "the Constitution largely vests Congress with authority to determine its own" law-making procedures and "Congress

¹⁰⁰ U.S. CONST. art. I, § 8, cl. 17.

¹⁰¹ *Id.* art. IV, § 2, cl. 2.

¹⁰² THE FEDERALIST No. 43, at 220–21 (James Madison) (Ian Shapiro ed., 2009).

¹⁰³ Indeed, this is what Congress does when it allows a territory to become independent, like the Philippines, or a state, like Hawaii.

¹⁰⁴ Aaron E. Price, Comment, *A Representative Democracy*, 7 U.D.C. L. REV. 77, 83–88 (2003).

¹⁰⁵ *Schuetz v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1650–51 (2014) (Breyer, J., concurring).

intends that its work should be understood through its established institutional processes and practices.”¹⁰⁶

In the initial House Committee hearings on Public Law 600, the Governor of Puerto Rico agreed that the bill would give Puerto Rico statehood for “practical purposes” but not voting representation.¹⁰⁷ The Governor argued that Congress ought to pass the bill to fight Communist propaganda about purported U.S. imperialism in the Caribbean.¹⁰⁸ By giving Puerto Ricans the power to form their own republican government, as opposed to relying on the federal government’s haphazard devolution of powers, the United States would show its commitment to popular sovereignty.¹⁰⁹ At least one congressman on the committee agreed with this rationale.¹¹⁰

Puerto Rico’s first elected governor also supported Public Law 600 on the ground that free association would provide Puerto Rico with domestic sovereignty’s benefits without independence’s or statehood’s political drawbacks. The Governor intended to draw the committee’s attention to the bill’s provisions requiring the President to certify that the constitution complied with federal law and that Congress approve the constitution.¹¹¹ He argued that these provisions ensured Puerto Ricans received full self-governance within the United States, while not encroaching on the sensitive subjects of full statehood or independence.¹¹²

Other writers¹¹³ have argued that the Governor’s testimony—“that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again”—indicates that the bill’s sponsors did not contemplate self-government changing Puerto Rico’s status.¹¹⁴ This misunderstands the

¹⁰⁶ ROBERT A. KATZMANN, *JUDGING STATUTES* 9 (2014). *But see generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 31-37 (1997) (“But assuming, contrary to all reality, that the search for ‘legislative intent’ is a search for something that exists, that something is not likely to be found in the archives of legislative history.”).

¹⁰⁷ *Hearings Before the H. Comm. on Public Lands on H.R. 7674 and S. 3336 to Provide for the Organization of a Constitutional Government by the People of Puerto Rico*, 81st Cong. 23 (1950) (statement of Luis Muñoz-Marín, Governor, Puerto Rico) [hereinafter *House Hearings*].

¹⁰⁸ *Id.* at 27.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (Rep. Frank A. Barrett).

¹¹¹ *Id.* at 23.

¹¹² *Id.*

¹¹³ JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 149 (1985); Lawson & Sloane, *supra* note 46, at 1147-48.

¹¹⁴ *See House Hearings, supra* note 107, at 33.

Governor's statement's context, responding to a question about Puerto Rico amending its constitution in a manner in which Congress disapproved.¹¹⁵ In such a case, Puerto Rico—not the federal government—would have breached the terms of the 1952 Compact by acting unilaterally. Thus, Public Law 600's sponsors envisioned a cooperative relationship between Puerto Rico and the federal government. And, as the Governor contemplated, Congress conditionally approved the draft Puerto Rican Constitution, subject to certain changes it desired.¹¹⁶ The Governor's letter to President Eisenhower after the Compact took effect in 1953 is far more instructive on this point. He noted that "[t]he laws enacted by the Government of the Commonwealth pursuant to the compact cannot be repealed or modified by external authority Our status and the terms of our association with the United States cannot be changed without our full consent."¹¹⁷

Critics have also pointed to the Resident Commissioner's assertion at the hearing that Congress may legislate for Puerto Rico "in case of need."¹¹⁸ But this, in practice, is no different than Congress's ability to pass local emergency relief bills, regulate the conduct of state elections differently, or legalize gambling in some places but not others. Congress's ability to pass laws that affect states differently may be circumscribed by the (both nascent and historically dubious) Equal Sovereignty doctrine, but even that theory would not strike down laws passed in response to a pressing need.¹¹⁹

Moreover, the House heard testimony from Puerto Rico's representative in Congress that the reason for using the term "compact" was to follow the Northwest Ordinance's precedent.¹²⁰ The term "compact" has a long and storied usage in American constitutional history, beginning with the 1620 Mayflower Compact, which established a majoritarian self-government in the Plymouth Colony.¹²¹ Thomas Jefferson in the

¹¹⁵ *Id.*

¹¹⁶ Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327.

¹¹⁷ Letter from Luis Muñoz Marin, Governor of P.R., to the President of the United States (Jan. 17, 1953), in 28 DEP'T ST. BULL. 588, 589 (1953).

¹¹⁸ TORRUELLA, *supra* note 113, at 149 (emphasis omitted).

¹¹⁹ See generally *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*, 8 HARV. L. & POL'Y REV. 39 (2014).

¹²⁰ *House Hearings*, *supra* note 107, at 63 (statement of Antonio Fernós-Isern, Resident Commissioner, Puerto Rico).

¹²¹ Avalon Project, *Mayflower Compact: 1620*, YALE L. SCH. (2008), http://avalon.law.yale.edu/17th_century/mayflower.asp [<https://perma.cc/AHG7-V33N>].

Kentucky and Virginia Resolutions argued that the Constitution functioned as a compact between the states that the states could withdraw from at any time.¹²² While some Southerners relied on this theory as grounds for secession, the Supreme Court has consistently found that the Constitution is not a compact among states, but a delegation of power to the national government from the American people.¹²³ The Court has cited the Constitution's text, which states that "We the *People* of the United States . . . do ordain and establish this Constitution," not "We the *States*."¹²⁴ Thus, the Supreme Court declared after the Civil War that the Constitution is "something more than a compact" that might be so easily dissolved.¹²⁵

In contrast, parts of the Northwest Ordinance and the 1952 Compact are explicitly styled as compacts between the federal government and the people of territories. The original thirteen states and the people of the Northwest Territories agreed to six compacts in the Northwest Ordinance.¹²⁶ Those compacts set out, among other things, requirements for republican forms of government for the territories, protections of "fundamental" rights for territorial residents, and the process by which the Northwest Territories would enter the federal

¹²² Avalon Project, *Kentucky Resolution*, YALE L. SCH. (2008), http://avalon.law.yale.edu/18th_century/kenres.asp [<https://perma.cc/B5CY-3KZ2>]; Avalon Project, *Virginia Resolution*, YALE L. SCH. (2008), http://avalon.law.yale.edu/18th_century/virres.asp [<https://perma.cc/49TP-R4BG>].

¹²³ See, e.g., *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) (noting that "under the Constitution . . . all powers not delegated to the United States . . . are reserved to the States respectively] or to the people," and that a state is defined by its people); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324–25 (1816) ("The [C]onstitution of the United States was ordained and established, not by states in their sovereign capacities, but emphatically . . . by the people of the United States." (internal quotations omitted)); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) ("Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves By this great compact however, many prerogatives were transferred to the national Government").

¹²⁴ U.S. CONST. pmbl (emphasis added).

¹²⁵ *White*, 74 U.S. (7 Wall.) at 726.

¹²⁶ See Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment*, 120 YALE L.J. 1820, 1824 (2011); see also Act of Aug. 7, 1783, ch. 8, 1 Stat. 50–53 (re-endorsing the Northwest Ordinance by the First Congress after the Constitutional Convention). Unlike the 1952 Compact, much of the governance provisions of the Northwest Ordinances are presented as legislation. *Id.* at 51–52. These substantive-rights guarantees and some further republican-government guarantees, however, are set out over six compacts following the prefatory acts. *Id.* at 52–53. The Northwest Ordinance's compacts should be analyzed separately from the portions of it that serve as organic acts creating the governments of the territories.

union as states.¹²⁷ Notably, the compacts' rights provisions "promise[d]" that those privileges and immunities conferred upon residents of the Northwest Territories would not be abrogated.¹²⁸ Chief among these rights included a ban on slavery¹²⁹—which caused the bindingness of these compacts to be a source of great controversy in the antebellum Supreme Court.¹³⁰ Some Justices, such as Chief Justice John Marshall and Justice Henry Baldwin, claimed the Northwest Ordinance amounted to constitutional provisions that states and the federal government could not repeal by mere statutes.¹³¹ No Justice publicly doubted the Northwest Ordinance's constitutional effectiveness as applied to territories; the controversy only existed as to whether the Northwest Ordinance's substantive rights provisions continued to bind territories after statehood.¹³² Congress intended a like result here: a binding agreement conferring rights upon Puerto Rico that could not be changed without consent of the governed.¹³³

Some point out, however, that Public Law 600 was not explicitly styled as a compact but instead was "adopted in the nature of a compact."¹³⁴ In the Senate committee hearings for the ratification bill, the committee's legal counsel suggested that Congress retained the ability to unilaterally change Puerto

¹²⁷ Hegreness, *supra* note 126, at 1825–27.

¹²⁸ *Id.* at 1825.

¹²⁹ *Id.* at 1842.

¹³⁰ *See id.* at 1861–73.

¹³¹ *Id.* at 1835 n.40 (citing *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492, 526 (1829) (Marshall, J.) ("If any part of [a state act] be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States or of the state or to the [Northwest Ordinance]."); *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 417 (1840) (Baldwin, J., concurring) (declaring that the Northwest Ordinance "has become a part of the Constitution").

¹³² Hegreness, *supra* note 126, at 1862, 1872–73 (citing *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 438 (1857) (observing that although Chief Justice Taney declared the Northwest Ordinance did not bind newly admitted states, Congress had the authority to enact the Northwest Ordinance), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

¹³³ Some Puerto Ricans opposed Public Law 600 on the ground that the word "compact" would take Puerto Rico off the road to statehood. *See, e.g.*, Letter from Celestino Iriarte, Chairman, Republican Party of Puerto Rico, to Hon. J. Hardin Peterson, Chairman, House Committee on Public Lands (June 5, 1950), in *House Hearings*, *supra* note 107, at 138–39. They claimed that only sovereign states can "compact" and that once Congress approved the Puerto Rican Constitution per the Compact, Congress's plenary power would be extinguished. *Id.* They viewed the proposed 1952 Compact as an ineffective intermediary step that fell short of full self-determination as Puerto Rico would still lack voting rights in federal elections.

¹³⁴ Act of July 3, 1950, Pub. L. No. 600, § 1, 64 Stat. 319, 319; TORRUELLA, *supra* note 113, at 148.

Rico's status. The Committee Chairman emphasized that Public Law 600 was not a compact, but instead a statute "in the nature of a compact," in response to concerns from some senators that Congress would be giving up all power to legislate for Puerto Rico.¹³⁵ But the Chairman never clarified exactly that difference in the hearing transcript and one Senator observed that attempting to make such a distinction "could only lead to complete misunderstanding."¹³⁶ The Chairman additionally noted in Public Law 600 that Congress reserved several areas in the Puerto Rico Federal Relations Act and that ratifying the Puerto Rican Constitution would only allow for republican self-government by Public Law 600's terms.¹³⁷ His statements—and the committee counsel's advice—ought to be understood as giving committee members assurance that ratification would not give the new Puerto Rican government the authority to ignore all acts of Congress. Given the contemporary renaissance in federalism principles, it would not seem like a senator would need a tutorial in the authority of state and local governments. But in the immediate aftermath of the New Deal, Senator Malone evinced some confusion, stating "I guess we still talk about a State being able to handle its own affairs, too, but most of it is handled right here in Washington Suppose these internal matters become a question of great interest Do we have any right to go in at all?" The Chairman and an Interior Department official, James Davis, clarified that, just as with states, Congress would retain the power to legislate for the "general" welfare and that the federal courts would be able to enforce federal law in Puerto Rico.¹³⁸

The House debate on Public Law 600 included an argument over whether the bill gave Puerto Rico sovereignty. At least one proponent said it gave Puerto Rico partial sovereignty, while the bill's sole opponent claimed that it gave Puerto Rico no actual sovereignty, and that Congress lacked the authority to give partial sovereignty.¹³⁹ House Majority Leader John McCormack disagreed and noted that no state has full sovereignty within the union.¹⁴⁰ McCormack and others argued that passage would give Puerto Rico the same sovereignty over local

¹³⁵ *Hearings Before the S. Comm. on Interior and Insular Affairs on S.J. Res. 151*, 82d Cong. 45–46 (1952).

¹³⁶ *Id.* at 49.

¹³⁷ *Id.* at 48–49.

¹³⁸ *Id.* at 44–46.

¹³⁹ 96 CONG. REC. 9600–01 (1950) (statement of Rep. Vito Marcantonio).

¹⁴⁰ *Id.* at 9601.

affairs states have.¹⁴¹ If true, this implicitly abrogates Congress's plenary powers over the island as powers cannot be said to be plenary if another entity has the power to determine policy.¹⁴²

An alternative reading of the legislative history would emphasize the testimony that Public Law 600's sponsors did not intend to change the "political" or "legal" status of Puerto Rico.¹⁴³ The problem is that this argument relies on an overbroad reading of these terms. Clearly, the authors did want to change the political and legal status of Puerto Rico by allowing for a popularly drafted constitution. This calls for a constrained understanding of what the sponsors meant by political and legal matters.

Political matters in this context relates to full statehood and corresponding federal political representation. When explaining why the bill provided for no change in political status, Puerto Rico's Resident Commissioner stated, "This is not statehood. Puerto Rico will continue to be represented in Congress by its Resident Commissioner."¹⁴⁴ The legislation's proponents argued that Public Law 600 would make Puerto Rican self-government over local issues a reality—continuing a trend of federal relinquishment of control.¹⁴⁵ Legal matters here refers to the applicability of federal law in Puerto Rico. As noted above, opponents of Public Law 600 were concerned that the Compact would result in independence. Assertions that the island's legal status remained unchanged just reflected the notion that laws passed according to Congress's enumerated powers remained applicable in Puerto Rico.¹⁴⁶

Some also object to finding Congress gave Puerto Rico autonomy by noting that certain Truman Administration officials argued the federal government retained plenary power over Pu-

¹⁴¹ *Id.*

¹⁴² Nelson Denis argues that the use of the phrase "Puerto Rico and adjacent islands *belonging* to the United States" in the Puerto Rico Federal Relations Act indicates that it is implausible that the United States viewed Puerto Rico as equal bargaining partners. Nelson A. Denis, *The Curious Constitution of Puerto Rico*, 5 HARV. POL. REV. 19, 21 (1977), reprinted in DENIS, *supra* note 54, app. at 356, 359. But this language does not appear in the text of Public Law 600 and is instead a holdover from the prior codifications of Puerto Rico's organic acts. TORRUELLA, *supra* note 113, at 151.

¹⁴³ Lawson & Sloane, *supra* note 46, at 1156–57.

¹⁴⁴ 96 CONG. REC. 9585 (1950) (statement of Antonio Fernós-Isern, Resident Commissioner, Puerto Rico).

¹⁴⁵ See 96 CONG. REC. 9594 (1950) (statement of Rep. Walter A. Lynch).

¹⁴⁶ See *House Hearings*, *supra* note 107, at 35 (statement of Luis Muñoz-Marin, Governor, Puerto Rico).

erto Rico.¹⁴⁷ Yet the administration officials made these arguments when encouraging Congress to pass Public Law 447 ratifying the Puerto Rican Constitution and not in regards to Public Law 600. Their statements are only relevant insofar as they speak to how some administration representatives viewed the Compact, not as to what the Compact's original sponsors thought the Compact did.¹⁴⁸ In fact, the Senate Committee on Interior and Insular Affairs could not come to a consensus as to the Compact's constitutional effect.¹⁴⁹ Given those senators' confusion, the best and clearest guidance comes from the Compact's text and Public Law 600's authors.

President Truman's own message to Congress transmitting the Puerto Rican Constitution to Congress for ratification contradicts this theory. President Truman's words imply that the White House interpreted the legislation to give Puerto Rico sovereignty. While recounting the Puerto Rican Constitution's benefits, Truman noted that with the constitution's approval:

[F]ull authority and responsibility for local self-government will be vested in the people of Puerto Rico. The Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed. No government can be invested with a higher dignity and greater worth than one based upon the principle of consent.¹⁵⁰

President Truman's words most accurately reflect the 1952 Compact's purposes: to allow the people of Puerto Rico sovereignty over their own internal affairs. This is essentially the same sovereignty states have, nothing more and nothing less. As Justice Breyer points out in his dissent in *Sanchez Valle*, the timing of this agreement further lends itself to this interpretation: the United Nations and the international community had been pressuring the United States to provide its territories with self-governance since 1945.¹⁵¹ Justice Breyer further notes that Justice Abraham Fortas believed that the 1952 Compact caused Puerto Rico to become "self-ruling, . . . although the federal government retained the same power it

¹⁴⁷ See Lawson & Sloane, *supra* note 46, at 1156–57.

¹⁴⁸ *Hearings Before the S. Comm. on Interior and Insular Affairs on S.J. Res. 151*, 82d Cong. 43–50 (1952) (colloquy between an Interior Department official and senators disputing whether Congress would retain plenary power post-ratification).

¹⁴⁹ *Id.* at 49.

¹⁵⁰ 98 CONG. REC. 4229 (1952).

¹⁵¹ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1880 (2016) (Breyer, J., dissenting).

would have over states in a union.”¹⁵² Moreover, the 1966 U.S.-Puerto Rico Commission on the Status of Puerto Rico confirmed the 1952 Compact’s drafters’ understanding that commonwealth/free associated state status is constitutionally “valid and confer[s] . . . equal dignity” as statehood on the people of Puerto Rico.¹⁵³ The U.N. General Assembly agreed that Puerto Rico had “achieved a new political status . . . of self-government.”¹⁵⁴

III

FREE ASSOCIATED STATEHOOD & THE FEDERAL CONSTITUTION

The Supreme Court has previously hinted that it agreed with this approach. In dicta in *Examining Board v. Flores de Otero*, the Court found that “the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.”¹⁵⁵ In order to fully realize this autonomy, federalism principles must constrain Congress in legislating for Puerto Rico just as they do when Congress legislates for the states. In other words, Congress cannot unilaterally repeal Puerto Rico’s constitution and impose policy merely by citing the Territories Clause.

Recognizing that Puerto Rico deserves the structural protection of federalism would be consistent with court decisions giving Puerto Rico the benefit of other constitutional principles intended for states. For example, courts have held that Puerto Rico is a state for the purposes of the Dormant Commerce Clause and the Eleventh Amendment.¹⁵⁶ While not making a precise analogy between free associated state status and full statehood, the First Circuit decided that at the very least “Puerto Rico today certainly has sufficient actual autonomy to justify treating it as a public entity distinct from Congress and subject to the dormant Commerce Clause doctrine.”¹⁵⁷ Furthermore, then-Judge Breyer found in *Ezratty v. Puerto Rico*, “[t]he principles of the Eleventh Amendment . . . are fully appli-

¹⁵² *Id.* (quoting LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 170–71 (1990)).

¹⁵³ Leibowitz, *supra* note 64, at 47.

¹⁵⁴ *Sanchez Valle*, 136 S. Ct. 1883 (Breyer, J., dissenting) (quoting Resolution 748 VIII, in A. FERNÓS-ISERN, ORIGINAL INTENT IN THE CONSTITUTION OF PUERTO RICO 142 (2d. ed. 2002)).

¹⁵⁵ 426 U.S. 572, 594 (1976).

¹⁵⁶ See *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981).

¹⁵⁷ *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 8 (1st Cir. 1992).

cable to the Commonwealth of Puerto Rico” because the Amendment’s principles seek to protect sovereigns.¹⁵⁸ Other circuits have observed that “Puerto Rican sovereignty is of an extent and character similar to that of the States.”¹⁵⁹ Because Puerto Rico is a state-like sovereign, it should have all the legal protections the Constitution guarantees to the states.¹⁶⁰ Federalism, too, is such a protection and it would be overly formalistic to deny Puerto Rico that protection while granting it other constitutional rights on the basis of its functional place in American constitutional government.

Moreover, applying federalism limits would be beneficial to Puerto Rico’s relationship with the federal government. First, doing so would emphasize the principle of government by consent at the 1952 Compact’s core. Second, federalism protections lessen the democracy gap caused by Puerto Rico’s lack of voting rights in federal elections. For example, Congress could not legislate for commerce occurring wholly inside Puerto Rico that lacked substantial interstate effects.¹⁶¹ And seemingly under the recently-announced Equal Sovereignty doctrine, federal courts can invalidate enactments targeted at Puerto Rico that fail to be related to solving Puerto Rican or national problems.¹⁶²

If Congress is cognizant of this check, the input of Puerto Rico’s nonvoting representative might be amplified because Congress would seek to avoid passing laws for Puerto Rico destined for invalidation upon judicial review by consulting with the representative. As the Supreme Court has observed, “federalism secures to citizens the liberties that derive from the

¹⁵⁸ *Ezratty*, 648 F.2d at 776 n.7.

¹⁵⁹ *United States v. Laboy-Torres*, 553 F.3d 715, 723 (3d Cir. 2009) (opinion authored by Retired Associate Justice Sandra Day O’Connor sitting by designation).

¹⁶⁰ This comes with the notable caveat of voting for federal offices, but that is a political, not legal, protection of states. This Note contends that legal doctrines intended to protect states are equally applicable to Puerto Rico and its residents.

¹⁶¹ U.S. CONST. art. I, § 8, cl. 3; *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005); see *United States v. Cintron-Aponte*, No. 15-401, 2016 WL 3080558, at *3 (D.P.R. Apr. 6, 2016) (reviewing constitutionality of a statute in Puerto Rico under *Gonzales v. Raich*).

¹⁶² *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2622 (2013). Aside from PROMESA, the Equal Sovereignty doctrine (assuming a court will ever apply it outside of the voting-rights context) may also invalidate the Merchant Marine provisions of the Jones Act that penalize noncontiguous parts of the United States. See 46 U.S.C. §§ 50101–13 (2012); N.Y. FED. RESERVE BANK, REPORT ON THE COMPETITIVENESS OF PUERTO RICO’S ECONOMY 12–13 (2012), <https://www.newyorkfed.org/medialibrary/media/regional/PuertoRico/report.pdf> [<https://perma.cc/P6CC-KHTX>].

diffusion of sovereign power.”¹⁶³ The 1952 Compact diffuses sovereignty between Puerto Rico and the federal government, as does the Constitution to the states; Puerto Rico’s citizens should benefit from corresponding federalism protections. Furthermore, other federalism constraints on Congress’s ability to legislate for Puerto Rico would help protect Puerto Ricans’ fundamental freedoms.¹⁶⁴

Essentially, Puerto Rico’s status as a free associated state gives it all of the rights and protections of states, except for political representation at the federal level.¹⁶⁵ That the Constitution does not explicitly contemplate this status should be of no great import. Congress’s Territories Clause plenary powers should be read as a sort of default rule, one that Congress and subnational entities can contract—or compact—around. One can view the 1952 Compact as an acceptable way for Congress to “dispose of and make all needful Rules and Regulations” for Puerto Rico.¹⁶⁶ Joseph Story explained that the Framers included the Territories Clause to give Congress latitude in setting up territorial governments.¹⁶⁷ Moreover, the clause was uncontroversial at the Constitutional Convention because all assumed it to merely state the obvious: that the Congress would have sovereignty over territory newly acquired.¹⁶⁸ Chief Justice Marshall observed that “[t]he right to govern[] may be the inevitable consequence of the right to acquire territory.”¹⁶⁹

If the Framers’ intent was to give Congress expansive authority, it does not follow that they would want to prevent Congress from bargaining away self-government rights to the

¹⁶³ *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

¹⁶⁴ For examples of such liberties, see *Bond v. United States*, 564 U.S. 211, 221–22 (2011). For a discussion of how decentralization facilitates policy experimentation and social movements, see Heather K. Gerken, Lecture, *Windsor’s Mad Genius*, 95 B.U. L. REV. 587, 592–600 (2015).

¹⁶⁵ Rezvani refers to Puerto Rico as a “federacy” but I prefer the term “free associated state” as it encapsulates the terms of Puerto Rico’s relationship and implies state-like limits on federal authority over the island and its residents. Rezvani observes that while Puerto Rico may be unique in the U.S. federal system, it has a similar political relationship to that of the Aland Islands to Finland and Greenland to Denmark. See Rezvani, *supra* note 89, at 139. Puerto Rico’s status poses particular problems for the U.S. constitutional system, however, because unlike Rezvani’s examples, the U.S. system has a stronger tradition of limits on central government authority (not to mention the socioeconomic and cultural differences between the mainland United States and Puerto Rico).

¹⁶⁶ U.S. CONST. art. IV, § 3, cl. 2.

¹⁶⁷ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1317–19, at 193–96 (Boston, Hilliard, Gray & Co. 1833).

¹⁶⁸ *Id.* § 1318, at 193–95.

¹⁶⁹ *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 543 (1828).

people of the territories. What differentiates Puerto Rico from otherwise similar entities within the constitutional framework such as Guam or the Virgin Islands is that Puerto Rico alone has obtained such a bargain with the federal government. The Supreme Court has implicitly countenanced this possibility. While upholding Congress's authority to amend laws passed by the Dakota territorial legislature, the Court found that the plenary power to legislate for territories exists until Congress grants "sovereignty" away.¹⁷⁰ The Court did not say that this power is retained until Congress confers the full political rights of statehood or independence upon a territory, ergo the virtual sovereignty enjoyed by Puerto Rico should suffice as a grant of sovereignty.¹⁷¹

Even if one finds the Territories Clause unavailing, functional reasons justify free associated statehood as an acceptable constitutional condition. Beyond the arguments from popular sovereignty made throughout this Part, Puerto Rico's size and cultural differences make free associated statehood appropriate. Puerto Rico has the largest population of the remaining U.S. overseas entities and a larger population than twenty-two states.¹⁷² Moreover, while English predominates in the fifty states, Spanish still dominates in Puerto Rico and the island's population is 99% Hispanic/Latino.¹⁷³ Puerto Rico has a distinct identity, as evidenced by the island's participation apart from the United States in international sporting competitions, such as the World Baseball Classic and the Olympics.¹⁷⁴ As a matter of fact, Puerto Rican representation in the Olympics began in 1948—the same time that the movement that culminated in the 1952 Compact got started—even

¹⁷⁰ Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879).

¹⁷¹ *Id.*

¹⁷² U.S. CENSUS BUREAU, POPULATION DIVISION, NST-EST2014-01, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2014 (Dec. 2014), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bk mk> [<https://perma.cc/FX23-6CM5>]; Press Release, U.S. Census Bureau, Census Bureau Report Examines Population Changes in U.S. Island Areas Over Last Decade (Apr. 8, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-65.html> [<https://perma.cc/ET4U-PD2W>].

¹⁷³ U.S. CENSUS BUREAU, S1601, LANGUAGE SPOKEN AT HOME (2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_S1601&prodType=table [<https://perma.cc/4K5T-WFZP>]; U.S. CENSUS BUREAU, C2010BR-04, THE HISPANIC POPULATION: 2010 (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> [<https://perma.cc/C5XJ-PEYX>].

¹⁷⁴ *Puerto Rico*, WORLD BASEBALL CLASSIC (2017), <https://www.worldbaseballclassic.com/teams/pur> [<https://perma.cc/AMW2-6NBH>]; *Puerto Rico*, OLYMPICS (2015), <http://www.olympic.org/puerto-rico> [<https://perma.cc/G3JX-XJTA>].

though residents of the then-territories of Alaska and Hawaii participated only as part of the United States team.¹⁷⁵ Moreover, the political distinctness of Puerto Rico from the United States has allowed it to maintain separate squads, a status that the International Olympic Committee has said would end if Puerto Rico received full statehood.¹⁷⁶

All this is not to say the 1952 Compact's arrangement is the best or even the second-best solution for Puerto Rico. It is merely to say that this arrangement is currently the law—and that potentially better options such as independence and statehood are not off the table. In fact, Congress constituted the Philippines as a commonwealth for a ten-year period before granting the Philippines full independence.¹⁷⁷ Under the Philippine Commonwealth, the Philippine people received autonomy over local affairs, while Congress retained power to legislate in extraordinary situations and control over trade and foreign policy.¹⁷⁸ Gaining full independence is no trickier for Puerto Rico than it might have been before 1952 because revising the Compact takes an act of Congress, which was also necessary in the Philippine case. If Puerto Ricans choose full statehood, the constitutional process for obtaining it involves the mutual assent of Congress and the prospective state and thus can be understood as mutual revision of the 1952 Compact.¹⁷⁹

Moreover, the parties to the 1952 Compact can mutually agree to revise the Compact's terms of free associated statehood as well. For example, Puerto Rico one day may want more control over its foreign policy but not the expense of having to maintain a military. It might also want to continue reaping the benefits of U.S. nationality for migration and travel purposes. Changing the terms of free associated statehood would accommodate these and other potential policy changes in a way that full statehood or complete independence would not.

¹⁷⁵ Gene Demby, *How Monica Puig's Gold Medal Complicates the Argument for Puerto Rico's Statehood*, NPR: CODE SWITCH (Aug. 21, 2016), <http://www.npr.org/sections/codeswitch/2016/08/21/490670613/monica-puig-puerto-rico-united-states-statehood> [<https://perma.cc/JJ49-ZEE2>].

¹⁷⁶ *Id.*

¹⁷⁷ See *The Commonwealth of the Philippines*, OFFICIAL GAZETTE, <http://www.gov.ph/the-commonwealth-of-the-philippines/> [<https://perma.cc/S5MK-Q3MJ>].

¹⁷⁸ Philippines Independence Act of 1934, Pub. L. No. 73-127, 48 Stat. 456.

¹⁷⁹ U.S. CONST. art. IV, § 3.

CONCLUSION

The 1952 Compact fundamentally changed Puerto Rico's legal status from that of an unincorporated territory subject to unfettered, direct Congressional rule to a free associated state that could legislate for itself in the domain traditionally reserved to states. While the Constitution does not explicitly contemplate this novel status, neither does the Constitution contemplate long-term U.S. possessions that may never become states. Congress attempted to fill this constitutional gap through legislation that implemented a compact between the federal government and the Puerto Rican people.

Yet the solution would be no real solution at all if Congress could not entrench the rights granted to Puerto Rico and Puerto Ricans. Entrenchment is appropriate here, as it is the only means of assuring democratic participation in any change in status. Hence, the courts should enforce the plain terms of the 1952 Compact. The current approach, to say the 1952 Compact worked a change in status but to refuse to say explicitly what changed, muddles Puerto Rico's internal debate over whether a change in status is desirable. Since the 1952 Compact, the federal government has often sought to dodge its implications and has adopted policy counter to its spirit, such as the 1984 Bankruptcy Act Amendments and disparate funding for Puerto Rican welfare services.¹⁸⁰ For the courts to also undermine the 1952 Compact would impede what Felix Frankfurter referred to as "inventive statesmanship" with regards to Federal-Puerto Rican relations.¹⁸¹ The 1952 Compact may not be perfect, but the courts should defend the steps it took towards providing Puerto Ricans with true self-government.

¹⁸⁰ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 421(j)(6), § 101(44), 98 Stat. 333, 368-39 (codified as amended at 11 U.S.C. § 101(52) (2012)); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016); *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1, 5 (1978) (per curiam).

¹⁸¹ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016).

