[CERTIFIED TRANSLATION]

IN THE PUERTO RICO SUPREME COURT

The People of Puerto Rico
Respondent
v.
Luis M. Sánchez Valle
Petitioner

The People of Puerto Rico
Respondent
v.
Jaime Gómez Vázquez
Petitioner

The People of Puerto Rico
v.
René Rivero Betancourt

The People of Puerto Rico
v.
Rafael A. Delgado Rodriguez

CC-2013-0068
CC-2013-0072

Opinion of the Court issued by Associate Judge Mr. MARTÍNEZ TORRES.

In San Juan, Puerto Rico, on March 20, 2015

To decide these consolidated cases, we must review the rule that we established in *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988). For the following reasons, we hereby overrule said precedent and hold that, pursuant to the constitutional protection against double jeopardy, and because Puerto Rico is not a federal state, a person who has been acquitted, convicted or prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts.

I

A. CC-2013-0068

On September 28, 2008, the prosecution filed three charges against Mr. Luis M. Sánchez del Valle accusing him of: 1) a violation of Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, for selling a firearm without a permit; 2) a second violation of Article 5.01 of the Puerto Rico Weapons Act, *supra*, for selling ammunition without a permit; and 3) a violation of Article 5.04 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458c, for illegally carrying a firearm.

Under the same facts, a federal grand jury indicted Mr. Sánchez del Valle of illegally trafficking in weapons and ammunition in interstate commerce. Specifically, he was accused of violating 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D) and 2. In contrast to the state court, he was not changed with the offense of illegally carrying weapons. Eventually, the U.S. District Court for the District of Puerto Rico sentenced Mr. Sánchez del Valle to five

months of prison, five months of house arrest and three years of supervised release.

In light of that, Mr. Sánchez del Valle filed a motion to dismiss with the Court of First Instance, Carolina Part, alleging that, pursuant to the constitutional protection against double jeopardy, he could not be prosecuted in Puerto Rico for the same offenses for which he had been found guilty in federal court.

For its part, the prosecution argued that, according to the ruling in *Pueblo v. Castro García*, *supra*, the United States and the Commonwealth of Puerto Rico (the "Commonwealth") derive their authority from different sources and both have the power to punish offenses without infringing the constitutional safeguard against double jeopardy.

The Court of First Instance dismissed the accusations filed against Mr. Sánchez del Valle. It held that Mr. Sánchez del Valle could not be indicted twice for the same offenses and before the same sovereign entity. According to the Court of First Instance, Puerto Rico is not a different and separate jurisdiction from the United States inasmuch as the sovereignty of both arises from the same source, to wit, the United States Congress. It concluded that, given the federal court ruling, the indictments filed in state court violated the constitutional protection against double jeopardy.

Not satisfied, the prosecution turned to the Court of Appeals.

B. CC-2013-0072

On September 28, 2008, the prosecution filed three charges against Mr. Jaime Gómez Vázquez for offenses related to the previous case, accusing him of: 1) a violation of Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, for illegally selling and transferring a firearm; 2) a violation of Article 5.07 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458f, for carrying a riffle; and 3) a violation of Article 5.10 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458i, for transferring a mutilated weapon. On that same date, a finding of probable cause was made in his absence, a warrant was issued for his arrest and bail was set at $325,000.

Subsequently, before the U.S. District Court for the District of Puerto Rico, a grand jury filed five charges against Mr. Gómez Vázquez, Mr. Gómez Pastrana, Mr. Delgado Rodríguez and Mr. Rodríguez Betancourt for the same offenses for which they had been prosecuted in state court.[1] Specifically, Mr. Gómez Vázquez was accused of violating the following statutes: 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), for the illegal sale of weapons in interstate commerce. In contrast to the state court, he was not charged with illegally carrying long weapons or of weapon mutilation.

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[1] There is no question that the charges are for the same offenses. *Appendix*, at 205 and 214.

In March of 2010, Mr. Gómez Vázquez filed a plea bargain with the U.S. District Court for the District of Puerto Rico whereby he pleaded guilty of the charges filed against him. *Appendix*, at 205. On June 26, 2010, the federal court sentenced him to 18 months of prison and 3 years of supervised release.

On August 27, 2010, Mr. Gómez Vázquez filed with the Court of First Instance, Superior Court, Carolina Part, a motion to dismiss under Rule 64(e) of the Rules of Criminal Procedure, 34 P.R. Laws Ann. Ap. II. He claimed that the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and Section 11 of Article 11 of the Constitution of the Commonwealth of Puerto Rico, P.R. Laws Ann., Volume I, protected him from being prosecuted in the Puerto Rico courts after being charged for the same offenses. Essentially, Mr. Gómez Vázquez argued that the United States and Puerto Rico were the same sovereign within the meaning of said constitutional clause and, therefore, could not submit him to two separate criminal prosecutions for the same offense or behavior. In other words, he argued that the exception to the constitutional protection against double jeopardy, known as the doctrine of "dual sovereignty," did not apply to Puerto Rico.

In response, the prosecution argued that, under this Court's holding in *Pueblo v. Castro García*, *supra*, conduct constituting an offense both in federal court and in state court could be penalized separately in both jurisdictions without violating the constitutional clause against double jeopardy or

implying multiple punishments for the same conduct or behavior. The prosecution argued that the sovereignty of the United States and the sovereignty of Puerto Rico were separate and different for purposes of the referenced constitutional clause. Thus, it stated that Mr. Gómez Vázquez could be tried in the Puerto Rico courts for the same offenses for which he was sentenced in federal court.

In a June 26, 2012 decision, the trial court granted the motion to dismiss filed by Mr. Gómez Vázquez. It ruled that the sovereignty or source of power of Puerto Rico to criminally prosecute its citizens resided and emanated from the federal government through Congress and that, for that reason, the doctrine of "dual sovereignty" did not apply. It concluded that the charges filed against Mr. Gómez Vázquez violated the constitutional protection against double jeopardy provided by the Constitution of the United States and the Puerto Rico Constitution. Not satisfied, the prosecution turned to the Court of Appeals.

The Court of Appeals consolidated the cases described above and reversed the trial court's rulings. It ruled that, under current law, a person could be submitted to criminal prosecution both in federal court and in state court for the same criminal behavior without violating the constitutional safeguard against double jeopardy. Judge González Vargas issued a dissenting vote and Judge Medina Monteserín issued a concurring vote.

Not satisfied with the decision, Mr. Sánchez del Valle and Mr. Gómez Vázquez filed separate

petitions before this Court. We issued the writs of *certiorari* and, because they raise the same controversy, we consolidated them. With the benefit of the appearance of all the parties involved, we hereby decide.

II

The constitutional safeguard against double jeopardy protects every person charged with an offense by guaranteeing that he or she will not be "placed at risk of being punished twice for the same offense." P.R. Const. Art. II § 10, P.R. Laws Ann., Vol. 1. *See Pueblo v. Santos Santos*, 189 P.R. Dec. 361 (2013). Likewise, the Fifth Amendment to the Constitution of the United States establishes that "no person may be submitted to trial twice for the same offense."[2] U.S. Const. amend. V, P.R. Laws Ann., Vol. 1. *See Pueblo v. Santiago*, 160 P.R. Dec. 618 (2003); *Pueblo v. Martínez Torres*, 126 P.R. Dec. 561 (1990); *Ohio v. Johnson*, 467 U.S. 493 (1984); E.L. Chiesa Aponte, *Derecho Procesal Penal de Puerto Rico y Estados Unidos*, Colombia, Ed. Forum, 1992, Vol. II § 16.1 (B), at 354.

For the constitutional protection against double jeopardy to apply, several requirements must be met. *Pueblo v. Santos Santos, supra*, at 367. First of all, the proceedings held against the accused must be criminal in nature. *Pueblo v. Santiago, supra*, at

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[2] The original text in English reads: *"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."*

628. It is necessary, also, for a first trial to have been initiated or held under a valid indictment and in a court with jurisdiction. *Pueblo v. Martínez Torres, supra*, at 568. Lastly, the second process to which the person is being subjected must be for the same offense for which he or she has already been convicted, acquitted, or prosecuted. *Pueblo v. Santiago, supra*, at 629.

In order to assess whether it is the same offense for purposes of the double jeopardy clause, we have employed the rule adopted by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). *See Pueblo v. Rivera Cintrón*, 185 P.R. Dec. 484, 494 (2012). Under that, the same act, or transaction, constitutes a violation of two different legal provisions if each penal provision breached requires evidence of an additional fact not demanded by the other. *Pueblo v. Rivera Cintrón, supra*, at 494.

In other words, that rule "demands that the court compare [the] definitions [of the offenses] in order to make sure that each one requires, as a minimum, one element not required by the other. If that is the case, there can be punishment for more than one offense." *Id.* at 494, quoting J.P. Mañalich Raffo, *El concurso de delitos: bases para su reconstrucción en el derecho penal de Puerto Rico*, 74 Rev. Jur. UPR 1021, 1068 (2005). We emphasize, however, that "if the definition of one of the offenses incorporates all of the elements required by the definition of the other, then it is only one offense, inasmuch as the second one

constitutes a lesser included offense." *Pueblo v. Rivera Cintrón, supra*, at 495.

Upon studying the offenses involved in this case, we note that one of the offenses for which the petitioners were charged in state court constitutes a lesser offense included in one of the federal offenses.

Article 5.01 of the Puerto Rico Weapons Act, 25 P.R. Laws Ann. § 458, establishes the following:

> It shall be necessary to hold a license issued pursuant to the requirements set forth in this chapter to manufacture, import, offer, sell or have available for sale, rent or transfer any firearms or ammunition, or that portion or part of a firearm on which the manufacturer of the same places the serial number of the firearm. Any infraction of this section shall constitute a felony. *[official translation]*

For its part, the federal statute, 18 U.S.C. § 922(a) (1) (A), establishes that:

> It shall be unlawful—for any person—except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.

Notice that Article 5.01 of the Puerto Rico Weapons Act, *supra*, contains all of the elements of 18 U.S.C. § 922(a)(1)(A), to wit, that a person without a license may not import, manufacture, sell or deal in firearms or ammunition. We do not find in the state offense any element that is different from those contained in the federal offense. The only difference is that that the state offense does not require for the events to have been committed in the course of interstate or international commerce. But the truth is that upon proving the federal offense, each one of the elements of the state offense is proven as well. In other words, the state offense is a lesser offense included in the federal offense. Therefore, the constitutional clause of double jeopardy provided by the Fifth Amendment to the Constitution of the United States is triggered.

The rest of the offenses charged at the state level are actually different and separate offenses. Article 5.04 of the Puerto Rico Weapons Act, *supra*, typifies the offense of [illegally] carrying and transporting weapons, and the petitioners were not prosecuted at the federal level for a similar offense. The same is true of the violations of Article 5.07 of the Puerto Rico Weapons Act, *supra*, and Article 5.10 of the Puerto Rico Weapons Act, *supra*. The prosecution in federal court was limited to violations for selling weapons and ammunition without a license.

This means that the constitutional issue is limited to the indictments charging Mr. Sánchez del Valle and Mr. Gómez Vázquez with the illegal sale of weapons and ammunition.

III

It is a basic principle of law that the Constitution of the United States established a system of dual sovereignty between the states and the federal government. *Gregory v. Ashcroft*, 501 U.S. 452 (1997). Prior to the adoption of the Constitution, the states came together under the Articles of Confederation. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995). In that system, the states retained the larger part of their sovereignty as if they were independent nations united only by treaties. *Id.* Following the Constitutional Convention, the Founding Fathers adopted a plan, not to amend the Articles of Confederation, but to create a new national government with its own government branches. *Id.* In adopting this new system, they conceived a uniform national system and rejected the idea that the United States was a group of independent nations. *Id.* To the contrary, they created a system in which there was a direct link between the people of the United States and the new national government. *Id.* ("In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States."). Thus, the citizens of a state are part of the people of that sovereign state and, simultaneously, are part of the People of the United States.

That new system did not contemplate a full consolidation of the states, but rather a partial

consolidation whereby the state governments would clearly retain all of the attributes of sovereignty that they already possessed and that were not delegated exclusively to the federal government. *Id*. at 801 ("[T]he Constitutional Convention did not contemplate "[a]n entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, but that act, exclusively delegated to the United States.").

Thus, in our system of government, the states retain a substantial sovereign authority within the constitutional system. In the words of James Madison:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite …. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961) (cited in *Gregory v. Ashcroft, supra*, at 458).

Although at the time of the creation of this new system there were only 13 states, the same concepts applied to all of the states that subsequently became part of the Union. As summarized by the U.S. Supreme Court in one of the most important cases of American constitutional law, *M'Culloch v. State*, 17 U.S. 316, 410 (1819):

> In 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 objects committed to the other. **We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date**. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. (emphasis added)

This federal system was not a mere whim of the Founding Fathers, but rather a system conceived so that, through the balance of power between the

federal government and the state governments, the most basic liberties would be protected. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Additionally, this system promotes decentralized governments that are more attuned to the diverse needs of a heterogeneous society, increases opportunity for the people to get involved in the democratic process, allows for greater innovation and experimentations in the government, and makes the governments more responsive because they will have to compete for a mobile population. *See* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

The spheres of action of those two entities often create friction between what each of them can or cannot do. *Gregory v. Ashcroft, supra*, at 461. In order to address certain concerns that could arise within the criminal justice systems coexisting in the United States, the U.S. Supreme Court created the doctrine of dual sovereignty.

A. The doctrine of dual sovereignty

The doctrine of dual sovereignty is an exception to the application of the protection against double jeopardy. Under that doctrine, if two separate sovereign entities criminally prosecute a person for the same offense, the constitutional protection against double jeopardy is not triggered. Hollander, Bergman and Stephenson, *Wharton's Criminal Procedure*, 13th ed., New York, Lawyers Cooperative, 2010, Vol. 3 § 13:12 ("The Fifth Amendment's Double

Jeopardy Clause is not violated by multiple prosecutions for the same offense when those prosecutions are undertaken by separate sovereigns.").

The U.S. Supreme Court applied the doctrine of dual sovereignty for the first time in *United States v. Lanza*, 260 U.S. 377 (1922).[3] In that case, certain people were charged in federal court with manufacturing, transporting and possessing intoxicating liquors in violation of the National Prohibition Act. The defendants argued that a state court in Washington had sentenced them for the same offense for which they were being prosecuted in federal court, and they argued that this constituted double jeopardy. The federal lower court accepted the arguments and dismissed the charges. The Supreme Court eventually reversed that decision

[3] The controversy was not new; although it had not been resolved definitively, it had been recognized in previous cases. *See, e.g., Moore v. Illinois*, 55 U.S. 13, 20 (1852) ("An offence, in its legal signification, means the transgression of a law… Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both… That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."). *See also Cross v. North Carolina*, 132 U.S. 131 (1889); *United States v. Marygold*, 50 U.S. 257 (1850); *Fox v. Ohio*, 46 U.S. 410 (1850).

and declared that they were two actions by two different sovereigns:

> We have here two sovereignties, **deriving power from different sources**, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity **is exercising its own sovereignty, not that of the other**. *Id.* at 382 (emphasis added).

It concluded that an action defined as an offense at the federal and state levels is an offense against the peace and dignity of both sovereigns and can be punishable by federal court or by the state court, or by both. The defendants committed two different offenses in a single act; one against the peace and dignity of the State of Washington and another against the United States. That did not constitute double jeopardy. *Id.* at 382.[4]

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[4] The English-language text reads: "It follows that an act denounced as a crime by both national state sovereignties is an offense against the peace and dignity of both and may be punished by each …. The defendants thus committed two different offenses by the same act, and a conviction by a court of

Later, the U.S. Supreme Court reaffirmed the doctrine of dual sovereignty in two cases decided on the same day: *Bartkus v. Illinois*, 359 U.S. 121 (1959) and *Abbate v. United States*, 359 U.S. 187 (1959). In the first, it was ruled that acquittal in federal court did not prevent a second criminal prosecution for the same offenses in state court.[5] *Wharton's Criminal Procedure, op. cit.*, Sec. 13:12. On the other hand, in *Abbate v. United States, supra*, the U.S. Supreme Court faced the opposite situation and held that the doctrine of dual sovereignty allows for a person to be indicted in federal court, even if he or she has been convicted in state court. *See* LaFave, Israel, King and Kerr, *Criminal Procedure*, 3d ed., Minnesota, Ed. West Publishing Co., 2007, Vol. 3, Sec. 25.5 (a).

Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy."

[5] The court invoked the due process clause of the Fourteenth Amendment, because at that time the protection against double jeopardy provided by the Fifth Amendment did not apply to the States. *Palko v. Connecticut*, 302 U.S. 319 (1937). That is why a large part of the discussion in that case is centered on whether the alleged act infringed the due process of law ("With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar."). *Bartkus v. Illinois, supra*, at 136. In *Benton v. Maryland*, 395 U.S. 784 (1969), the protection against double jeopardy provided by the Fifth Amendment was finally applied to the states.

The Supreme Court expressly declined to overrule *United States v. Lanza, supra*, and stated the following: "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Abbate v. United States, supra*, at 671.

In *United States v. Wheeler*, 435 U.S. 313 (1978), the U.S. Supreme Court explained in detail the foundations of the doctrine of dual sovereignty. In that case, the Navajo tribe accused one of its members, in a tribal court, of disorderly conduct. The tribal court sentenced him. One year later, a federal grand jury in the State of Arizona indicted him for related acts. The defendant alleged that the prosecution in the tribal court prevented the second prosecution in federal court. The federal court dismissed the charges. The Supreme Court ruled that Native-American tribes, for purposes of the double jeopardy clause, were separate sovereigns from the United States, so that the person could also be charged in federal court.

The Supreme Court framed the dispute as follows: "the controlling question in this case is the source of this power to punish tribal offenders." *Id.* at 322. Thus, the Supreme Court assessed whether that power to punish the offenders arose from any inherent sovereignty or if it was the exercise of the

sovereignty of the federal government by delegation of Congress.[6] *Id.*

The Court held that Native-American tribes in the United States have an original inherent sovereignty that existed prior to the arrival of the Europeans to the New World. *Id.* Upon incorporation to the territory of the United States, the tribes were stripped of certain attributes of their original sovereignty, but retained others. *Id.* The authority to punish offenders was one of those attributes that the tribes did not surrender to the United States Congress. *Id.* For that reason, the Supreme Court concluded that "when the Navajo Tribe exercises this power, it does so as part of the sovereignty retained and not as an arm of the Federal Government." *Id.* at 328. *See also* D.S. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, Connecticut, Praeger Publishers, 2004, at 87.

That case shows that, for the U.S. Supreme Court, what is crucial is not whether the entity has its own government or the power to enact a criminal code or the authority to charge people for violations of its laws. Rather, the determining factor for the doctrine of dual sovereignty to apply, is the ultimate source of the power under which the indictments were undertaken ("[T]he ultimate source of the

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[6] ("Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?"). *United States v. Wheeler, supra*, at 322.

power under which the respective prosecutions were undertaken."). *United States v. Wheeler, supra*, at 320 (emphasis added). If it is a power delegated by Congress, the doctrine of dual sovereignty does not apply.

That is precisely the analysis that the U.S. Supreme Court has used repeatedly to resolve this type of case. The use of the word "sovereignty" in other contexts and for other purposes is irrelevant in solving the controversy at bar. For a more comprehensive study, *see* Z.S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657 (2013).

Likewise, in *Heath v. Alabama*, 474 U.S. 82 (1985), the U.S. Supreme Court applied the doctrine of dual sovereignty to criminal prosecutions for the same offense in two different states. *Wharton's Criminal Procedure, op. cit.* § 13:12. In that case, the Court upheld an indictment by a grand jury of the State of Alabama against a person who had been convicted in Georgia based upon the same facts. The Court reaffirmed the analysis in *United States v. Wheeler, supra*, at 320 and held that in applying the dual sovereignty doctrine, the crucial determination is whether the two entities draw their authority to punish the offender from distinct sources of power. *Heath v. Alabama, supra*, at 88 ("In applying the dual sovereignty doctrine, then, the crucial determination is whether […] **the two entities draw their authority to punish the offender from distinct sources of power."**) (emphasis

added). *See also Wharton's Criminal Procedure, op. cit.* § 13:12.

The Supreme Court held that the states are separate sovereigns from the federal government, given that their powers to undertake criminal prosecutions derive from separate and independent sources of authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. *Heath v. Alabama, supra*, at 89 ("Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.").

In *United States v. Lara*, 541 U.S. 193 (2004), the U.S. Supreme Court again addressed a controversy related to Native-American tribes. In this case, a tribe judged a Native-American that, contrary to *United States v. Wheeler, supra*, was not one of its members. Subsequently, a federal court prosecuted him for the same offense. In order to determine whether the second prosecution was in violation of the double jeopardy clause, the Supreme Court stated that the main question was whether the source of the power to punish someone who was not a member of the tribe derived from inherent tribal sovereignty or whether it was a power delegated by the federal government. *Id.* at 199 ("What is 'the source of [the] power' to punish nonmember Indian offenders, 'inherent tribal sovereignty' or delegated federal authority?") (emphasis in original).

The problem in that case was that the Supreme Court had ruled in *Duro v. Reina*, 495 U.S. 676, 691-92 (1990), that tribes did not possess sovereign authority to criminally prosecute Indian persons also were not members of the prosecuting tribe. Nevertheless, in reaction to the ruling in *Duro v. Reina, supra*, Congress passed new legislation recognizing and asserting the inherent power of Indian tribes to prosecute Native American people regardless of whether they belonged to the same tribe or not. *See* 25 U.S.C. § 1301 ("means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise… criminal jurisdiction over all Indians.").

The Supreme Court ruled that in allowing the aforementioned to the tribes, Congress did not delegate authority belonging to the federal government, but it rather recognized authority that the tribes possessed as sovereigns. *United States v. Lara, supra*, at 209 ("[T]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."). *See also United States v. Wheeler, supra.* In other words, Congress, through legislation, can recognize additional attributes appurtenant to an entity that already possesses prior sovereignty. *United States v. Lara, supra*, at 207 ("Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes."). This case shows that the fact that Congress may add, remove or modify said attributes is not relevant in determining what is the tribe's ultimate source of power. For that reason, the

Court applied the doctrine of dual sovereignty and found that there had been no violation of the right against double jeopardy.

B. Situations in which the doctrine of dual sovereignty has not been applied

The U.S. Supreme Court has refused to apply the doctrine of dual sovereignty in certain cases where the different entities carry out multiple prosecutions for the same offenses. In these cases, the U.S. Supreme Court has ruled that although the entities are nominally different, they derive their authority to prosecute from the same source. *Heath v. Alabaman, supra*, at 90 ("In those instances where the Court has found the dual sovereignty doctrine inapplicable, it has done so because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority.").

In *Grafton v. United States*, 206 U.S. 333 (1907), the Court found that a territory of the United States is not a sovereign for purposes of the clause against double jeopardy. It reasoned that the government of a territory owes its existence wholly to the federal government, and its tribunals exert all of their powers by authority of the United States. *Id.* at 354 ("[O]wes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States."). In other words, a territorial court and a federal court exercise the authority of the same sovereign: the United States. *Id.* at 355 ("the two tribunals that tried the accused exert all their powers under and by authority of the same government,—that of the United States."). *See*

also Rudstein, *op. cit.*, at 88. For that reason, successive prosecutions between a federal court and a court of a territory constitute double jeopardy. *See also United States v. Wheeler, supra*, at 321 ("City and State, or **Territory and Nation, are not two separate sovereigns** […] but one alone. And the "dual sovereignty" concept […] does not permit a single sovereign to impose multiple punishments for a single offense merely by the expedient of establishing multiple political subdivisions with the power to punish crimes.") (emphasis added).

Of particular importance to us, in *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), the U.S. Supreme Court applied to Puerto Rico the rule established in *Grafton v. United States, supra*. Specifically, the U.S. Supreme Court stated that Puerto Rico, being a territory of the United States, is not a sovereign for purposes of the double jeopardy clause. In that case, a Puerto Rico prosecutor accused a company of violating local antitrust laws. The defendants claimed that the local laws were null and void because Congress had preempted them with the Sherman Act. Initially, we ruled in favor of the defendants. *See Pueblo v. The Shell Co. Ltd.*, 49 P.R. Dec. 226 (1935). However, the U.S. Supreme Court reversed our ruling and concluded that the antitrust laws passed by the Puerto Rico legislature were valid.

The controversy regarding the double jeopardy clause arose from allegations by the defendant company. The company, which had not been previously prosecuted, claimed that if the Court

upheld the validity of the state antitrust law, it would be placing the defendant company at risk of being punished twice for the same offenses, that is, first in the Puerto Rico courts under local law and a second time in federal court under the federal antitrust law. The U.S. Supreme Court concluded that such risk was not present, inasmuch as the territory's power to legislate was derived from the same source as that of the United States. Thus, it stated as follows:

> It likewise is clear that the legislative duplication gives rise to no danger of a second prosecution and conviction, or of double punishment for the same offense. The risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court. *Puerto Rico v. Shell Co., supra*, at 264 (citations omitted).

The Supreme Court has also refused to extend the doctrine of dual sovereignty to municipalities. *Waller v. Florida*, 397 U.S. 387 (1970). *See also* LaFave, Israel, King and Kerr, *op. cit.*, Vol. 3, Sec. 25.5 (c). Municipalities are not sovereign entities; rather, they are subordinate entities of the government, created by the state to assist in its

government functions. *Waller v. Florida, supra*, at 392, citing *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).[7] The Court analyzed the controversy in the following way:

> [T]he apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. **The legal consequence of that relationship was settled in *Grafton v. United States*, ... [*supra*] where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court,** since both are arms of the same sovereign. *Waller v. Florida, supra*, at 393 (emphasis added).

In *Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 667 (3rd Cir. 1980), *cert. denied*, 449 U.S. 960 (1980), the Court of Appeals for the Third Circuit asserted that the Territory of the U.S. Virgin Islands and the United States Government constitute a single sovereignty for purposes of the clause against double jeopardy. *Id.* at 669. In

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[7] It is true that some have advocated for a more practical focus instead of the "sovereignty" criterion. *See, e.g., Price, supra.* But the truth is that the U.S. Supreme Court has never abandoned the ultimate source of power criterion.

keeping with that statement, the court of appeals concluded that the accused could not be declared guilty of the same offense both under the federal jurisdiction and under the jurisdiction of the Virgin Islands. *See Blockburger v. United States, supra*, at 304. Specifically, it was said that it cannot be concluded that the U.S. Virgin Islands have a sovereignty separate and independent from that of the United States Government. *See also Government of Virgin Islands v. Brathwaite*, 782 F.2d 399, 406 (3rd Cir. 1986). Note that this is nothing more that the application of the rule already established in *Grafton v. United States, supra*, and reaffirmed in *Puerto Rico v. Shell Co., supra.*

The case of the Commonwealth of the Northern Mariana Islands, although it has not been resolved definitively by a court with jurisdiction, seems to be the same. The federal law that regulates its relationship to the federal government establishes that the Mariana Islands are an unincorporated territory of the United States. *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717 (9th Cir. 1998) ("The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), ratified by Congress by joint resolution, established the Commonwealth as a unincorporated territory of the United States."). In other words, the government of the Northern Mariana Islands, in accordance with the doctrine of dual sovereignty outlined by the

Supreme Court, is not a separate sovereign from the federal government.[8] Guam's case seems to be similar. *See United States v. Carriage*, 117 F.3d 1426 (9th Cir. 1997) (No. 96-10427) (unpublished) ("The government concedes that Guam and the federal government are a single sovereign.").[9]

Regarding Washington D.C., other courts have found that, in accordance with the constitutional clause prohibiting double jeopardy, an individual cannot be punished for the same offense typified both

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[8] But see the unpublished judgment of the Court for the District of the Northern Mariana Islands, *United States ex rel. Richards v. De Leon Guerrero*, Misc. No. 92000001 ((D. N. Mar. I. 1992), *aff'd*, 4 F.3d 749 (9th Cir. 1993) ("For purposes of criminal double jeopardy, the federal courts, state [and Commonwealth of the Northern Mariana Islands] courts, and courts martial are considered courts of separate 'sovereigns'."). This unpublished judgment is not in keeping with the ruling of the U.S. Supreme Court in *Grafton v. United States, supra*, and *Puerto Rico v. Shell Co., supra.* That is why we are not persuaded by the cited dictum.

[9] *See* 48 U.S.C. § 1704 ("A judgment of conviction or acquittal on the merits under the laws of Guam, the Virgin Islands or American Samoa shall be a bar to any prosecution under the criminal laws of the United States for the same act or acts, and a judgment of conviction or acquittal on the merits under the laws of the United States shall be a bar to any prosecution under the laws of Guam, the Virgin Islands, or American Samoa for the same act or acts.") The fact that Puerto Rico is not mentioned in that law in no way means that, as a territory, the doctrine of dual sovereignty does not apply to it. The doctrine of dual sovereignty is a constitutional matter over which the pronouncements of the U.S. Supreme Court have precedence.

in a federal law and in the Penal Code of the District of Columbia, because both codes are approved by Congress. *See United States v. Sumler*, 136 F.3d 188, 191 (D.C. Cir. 1998); *United States v. Weathers*, 186 F.3d 948, 951 n.3 (D.C. Cir. 1999).

IV

A. The doctrine of dual sovereignty and the Commonwealth of Puerto Rico, according to federal courts

In *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), the First Circuit Court of Appeals faced the controversy of whether the Commonwealth of Puerto Rico was a sovereign for purposes of the doctrine of dual sovereignty. There, Mr. Luis López Andino and Mr. Israel Méndez Santiago were convicted of several offenses in the United States District Court for the District of Puerto Rico. As relevant here, the convicted defendants argued that their convictions in said federal forum were invalid because they had already been prosecuted for the same offenses under Puerto Rico law. *United States v. Lopez Andino, supra*, at 1167. For that reason, they alleged that the federal constitutional clause barring double jeopardy in criminal proceedings applied. U.S. Const. amend. V, *supra*.

The Court of Appeals for the First Circuit concluded that the Puerto Rico [Federal] Relations Act and the creation of the Constitution of the Commonwealth of Puerto Rico altered the relationship between Puerto Rico and the United States. *United States v. López Andino, supra*, at

1168. To said court, Puerto Rico became a sovereign for purposes of the dual sovereignty doctrine. *Id.*

Judge Torruella concurred in the result, believing that the offenses charged in the Puerto Rico courts **were different** than the offenses charged in the Federal District Court. *Id.* at 1172-77. That made the clause against double jeopardy inapplicable in the criminal sphere. However, Judge Torruella opined that Puerto Rico currently continues to be a territory of the United States and, therefore, the doctrine of dual sovereignty does not apply to it.

The Court of Appeals for the Eleventh Circuit faced the same controversy in *United States v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994). Contrary to the First Circuit, the Court of Appeals for the Eleventh Circuit concluded that Puerto Rico is a territory of the United States for purposes of Art. IV, Sec. 3 of the Constitution of the United States, P.R. Laws Ann. Vol. I, and not a separate sovereign. In that case, Mr. Rafael Sánchez and Mr. Luis Sánchez were prosecuted in a Federal District Court in Florida. The defendants alleged that they had already been prosecuted for the same offenses in the Puerto Rico General Court of Justice.

In an exercise of intellectual honesty, the Court of Appeals cited the ruling in *Puerto Rico v. Shell Co., supra*, approvingly, and concluded that that was the precedent that should be followed. It immediately discussed why the establishment of the Constitution of the Commonwealth of Puerto Rico did not alter the ruling in *Puerto Rico v. Shell Co., supra.* In

particular, the court held that in *United States v. Wheeler, supra*, decided 25 years after the establishment of the Commonwealth of Puerto Rico, the U.S. Supreme Court used *Puerto Rico v. Shell Co., supra*, to distinguish between the dependent status of a territory and the separate and sovereign status of the Native-American tribes. It also held that the development of the Commonwealth of Puerto Rico had not granted our courts a source of punitive authority derived from an inherent sovereignty. *United States v. Sánchez, supra*, at 1152.

After that study, the Court of Appeals for the Eleventh Circuit analyzed the offenses charged and determined that the clause barring double jeopardy prevented prosecution for one of the offenses charged (murder for hire), 18 U.S.C. § 1958, because the defendants had been prosecuted for an identical offense in the Puerto Rico courts. *United States v. Sánchez, supra*, at 1159.

B. The dual sovereignty controversy before the Puerto Rico Supreme Court

Finally, in *Pueblo v. Castro García, supra*, this Court adopted the view of the court of Appeals for the First Circuit and held that the Commonwealth of Puerto Rico was a sovereign for purposes of the double jeopardy clause. *See* J. J. Álvarez González, *Derecho Constitucional de Puerto Rico y Relaciones Constitucionales con los Estados Unidos*, Bogotá, Editorial Temis S.A., 2009, at 536-537. We specifically stated that "the power of the Commonwealth of Puerto Rico to create and enforce

offenses emanates, not only from Congress, but also from the consent of the People and, therefore, from itself, so the doctrine of dual sovereignty applies to it." *Id.* at 779-81. Associate Judge Mr. Rebollo López issued a dissenting opinion in which, in summary, he argued that Puerto Rico is not a sovereign, but rather, under the constitutional scheme of the United States, it is a territory subject to the legislative power of Congress, as established by the territorial clause of Art. IV, Sec. 3 of the United States Constitution.

This Court relied on two main premises in conclude that the doctrine of dual sovereignty applies to the Commonwealth of Puerto Rico. First, after studying all of the caselaw on the matter, the court applied a reasoning that the U.S. Supreme Court has never used. On that occasion, we reiterated once and again that the Commonwealth of Puerto Rico enjoys a degree of sovereignty equal to that of the states of the Union and, therefore, the doctrine of dual sovereignty should be applied to it. *See, e.g., Pueblo v. Castro García, supra*, at 765 ("Puerto Rico obtained a similar sovereignty to that of the states of the Union in extremely basic aspects."). *See also id.* at 769-71, 773, 775-76.

The second premise that we used in *Pueblo v. Castro García, supra*, is that after the enactment of the Constitution of the Commonwealth of Puerto Rico in 1952, "the political power of the island emanates from the consent and will of the People of Puerto Rico." *Id.* at 765. For that reason, it was concluded that, after 1952, Puerto Rico is in a legal

and political situation very different from the situation when the U.S. Supreme Court decided the case of *Puerto Rico v. Shell Co., supra*. *See Pueblo v. Castro García, supra*, at 778-79.

The petitioners in the present case ask us to overrule *Pueblo v. Castro García, supra*, and hold the doctrine of dual sovereignty inapplicable to Puerto Rico. After analyzing the controversy, we conclude that the petitioners are right. The grounds used by this Court on that occasion are wrong from a strictly legal point of view. It is now our duty to analyze whether in 1952 Puerto Rico acquired an original sovereignty or an independent sovereignty from that of Congress—a sovereignty granted, not delegated—that makes the 1937 ruling in *Puerto Rico v. Shell Co., supra*, inapplicable today.

V

A. Puerto Rico and the territorial clause of the Constitution of the United States

Contrary to Native-American tribes or to the states of the Union, Puerto Rico has never exercised an original or primary sovereignty. In order to end the Spanish-American War of 1898, through the Treaty of Paris, Spain ceded the island of Puerto Rico to the United States, as well as others that were under its sovereignty in the West Indies and the Pacific. Art. II, Treaty of Paris, P.R. Laws Ann., Vol. 1. *See also* J. Trías Monge, *Historia Constitucional de Puerto Rico,* Rio Piedras, Ed. UPR, 1980, Vol. I, at 144-48. It was specified that "the civil rights and the political status of the inhabitants of …" Puerto Rico

would be determined by the United States Congress. Art. IX of the Treaty of Paris, *supra*.

In 1900, after two years of military government, a civil government was established in Puerto Rico by means of the Organic Charter of April 12, 1900, known as the Foraker Act. P.R. Laws Ann., Vol. 1. This congressional statute provided for a governor appointed by the President of the United States, a bicameral legislature, a supreme court and other tax-related matters.

The controversy regarding the constitutional validity of the acquisition of Puerto Rico and other possessions quickly reached the United States Supreme Court. J.R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 Rev. Jur. UPR 1 (2007). On the same day, May 27, 1901, the Court decided several cases involving different controversies regarding the possession and administration of the new territories. *See The Diamond Rings*, 183 U.S. 176 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 221 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). Of these cases, which later became known as the Insular Cases, the most important one is *Downes v. Bidwell, supra*. *See* Alvarez González, *op. cit.*, at 388.

In *Downes v. Bidwell, supra*, the constitutional validity of one of the sections of the Foraker Act

establishing an excise tax barrier between United States and Puerto Rico commerce was questioned. Alvarez González, *op. cit.*, at 388. The plaintiffs alleged that the tax breached the Uniformity Clause of the Constitution. C. Duffy Burnett & A. I. Cepeda Derieux, *Los casos insulares: Doctrina desanexionista,* 78 Rev. Jur. UPR 661, 667 (2009). That clause states: "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I § 8, P.R. Laws Ann., Vol. I. The Supreme Court, without being able to come up with an opinion endorsed by a majority of the justices, ruled in favor of the validity of the tax. *Downes v. Bidwell, supra*, at 287.

The Court concluded that Puerto Rico is a territory that belongs to the United States but is not part of the phrase "United States" for purposes of Art. 1, Sec. 8 of the Constitution of the United States. *Id. See also* E. Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico*, Baltimore, American Psychological Association, 2001, at 80. According to Justice Brown, the power to acquire territories included the power to govern them, to establish the terms under which their inhabitants would be received and what their status would be. Those plenary powers over the territories would be subject to fundamental limitations in favor of personal rights. *Downes v. Bidwell, supra*, at 780.

Justice White issued a concurring opinion and outlined the theory that would later become the definitive legal rule for territories: the doctrine of

incorporation. J.R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate & Unequal*, Río Piedras, Ed. UPR, 1985, at 53. Justice White agreed that Congress has plenary powers over the territories and that those powers are subject to certain basic principles that, although not expressed in the Constitution, could not be transgressed. *Downes v. Bidwell, supra*, at 289-90.[10]

However, Justice White proposed that when a constitutional clause is invoked, the fundamental question is not whether the Constitution operates *ex proprio vigore*, but whether the invoked clause is applicable to that territory in particular.[11] *Id.* at

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[10] The original text reads: "The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion." *Id.* at 289-90. Justice White also stated: "While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended." *Id.* at 290-91.

[11] "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for

292. The applicability of the clauses would depend, then, on the particular status of the territory and its relationship with the United States.[12]

Justice White stated that in order to determine whether the uniformity clause applied to Puerto Rico, it must be determined whether Puerto Rico had been incorporated to the United States and had become an integral part of the same, as stated in the Constitution. He concluded that, based on the terms of the Treaty of Paris, Puerto Rico had not been incorporated to the United States. Therefore, only those constitutional provisions that were considered basic or fundamental applied to Puerto Rico.

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that is self-evident, but whether the provision relied on is applicable." *Id.* at 292.

[12] *See* Duffy Burnett & Cepeda Derieux, *supra*, at 667-68 ("According to Judge White, some of the territories subject to the sovereignty of the United States had been incorporated into the nation and were already, at that time, an integral part of the United States. Other territories had been annexed to the United States but had not been formally incorporated; they simply belonged to the United States or, in White's own words, were 'appurtenant thereto as possessions'. White described those territories as 'foreign to the United States in a domestic sense'. Eventually, those territories acquired the not-so-elegant title of "unincorporated territories.") However, Justice White clarified that, to all other nations, as a matter of international law, Puerto Rico is not a foreign country, but is part of the United States ("in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States."). *Downes v. Bidwell, supra*, at 341.

From 1903 to 1914, the U.S. Supreme Court decided another series of cases dealing with different matters of the territories. *See Ocampo v. United States*, 234 U.S. 91 (1914); *Ochoa v. Hernández*, 230 U.S. 139 (1913); *Dowdell v. United States*, 221 U.S. 325 (1911); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Trono v. United States*, 199 U.S. 521 (1905); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dorr v. United States*, 195 U.S. 158 (1904); *Kepner v. United States*, 195 U.S. 158 (1904); *González v. Williams*, 192 U.S. 1 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). *See* Rivera Ramos, *op. cit.* at 75. During that period, a ruling was made in *Grafton v. United States, supra*, establishing the rule that was previously discussed, stating that a territory is not a sovereign for purposes of the constitutional clause against double jeopardy ("a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States'."). *See also United States v. Wheeler, supra*, at 322.

In 1917, the United States Congress enacted a new Organic Charter known as the Jones-Shafroth Act, 1 P.R. Laws Ann. See Trías Monge, *op. cit.*, Vol. II, at 88. The most important change brought about by said law was that it granted United States citizenship to Puerto Ricans. That forced the U.S. Supreme Court to determine whether the grant of American citizenship to Puerto Ricans was the equivalent of incorporating Puerto Rico.

In *Balzac v. Porto Rico*, 258 U.S. 298 (1922), a person was sentenced to nine months in prison for

making certain comments against the governor that were considered libelous. The defendant alleged that, under the Sixth Amendment to the U.S. Constitution, he had the right to a trial by jury. The Supreme Court rejected that argument.

The Supreme Court unanimously adopted Judge White's theory of territorial incorporation and stated that the right to trial by jury did not apply to those territories that had not been incorporated into the Union.[13] The Supreme Court then proceeded to analyze whether the Jones Act finally incorporated Puerto Rico. Its answer was no.

Among other things, it concluded that if Congress had intended to incorporate the territory it would have clearly stated its intention to do so and would not have left it up to mere inference. *Balzac v. Porto Rico, supra*, at 306 ("Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference.").

Many scholars on the subject summarize the doctrine on Puerto Rico in the following way: "The

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[13] In *Pueblo v. Santana Vélez*, 177 P.R. Dec. 61 (2009), we concluded, citing Professor Alvarez González, that notwithstanding the ruling in *Balzac*, " '[s]ince *Duncan v. Louisiana*, 391 U.S. 145 (1968), determined that [the right to trial by jury] is 'basic' and, as such, applicable to the states… it seems reasonable to conclude that said right applies to Puerto Rico under the doctrine of territorial incorporation.".

Constitution applies in its entirety within the United States (if said phrase is defined to include only the states of the Union, Washington D.C., and the incorporated territories), while in the unincorporated territories only the basic provisions of the Constitution apply." Duffy Burnett & Cepeda Derieux, *supra*, at 667-668.

Despite the criticism of its disdainful and contemptuous tone towards the inhabitants of the territories, and of the obsolescence of much of the holdings of the Insular Cases, the core part of the doctrine has continued to be used. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 759 (2008) ("the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the Insular Cases, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power."). For a discussion about these last cases, *see* G.A. Gelpí, *Los casos insulares: Un estudio histórico comparativo de Puerto Rico, Hawái y las Islas Filipinas,* 45 Rev. Jur. U. Inter. P.R. 215, 223-224 (2011) ("In light of *Boumediene*, in the future, the Supreme Court will have to reexamine the doctrine of the Insular Cases with regards to its application to Puerto Rico and other territories of the U.S."); C. Saavedra Gutiérrez, *Incorporación de jure o incorporación de facto: Dos*

propuestas para erradicar fantasmas constitucionales, 80 Rev. Jur. UPR 967, 981 (2011) ("with respect to the territories, the doctrine of the insular cases has not emerged intact from the constant constitutional attacks that it suffered during the Twentieth century.").

B. The status of Puerto Rico after the enactment of the Constitution of the Commonwealth of Puerto Rico

After many years during which different sectors demanded greater autonomy for Puerto Rico over its internal affairs, on March 13, 1950, a bill was presented to Congress to enable the adoption of a constitution. Trías Monge, *op. cit.*, Vol. III, at 40. Said bill later became Public Law 600, 48 U.S.C. § 731b *et seq*. The legislative history clearly reveals that the adoption of that constitution did not represent a change in the territorial status of Puerto Rico.

During the hearings in Congress before the Committee on Public Lands of the House of Representatives, the then-Governor of Puerto Rico, Luis Muñoz Marín, stated the following:

> You know, of course, that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again. But I am confident that the Puerto Ricans will not do that, and invite congressional legislation that would take back something that was given to the people of Puerto Rico as good United

> States citizens. A. Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 Rev. Jur. U. Inter. P.R. 1, 23 (1982), citing *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the House Comm. on Public Lands*, 81st Cong., 1st & 2nd Sess. 63 (1949-1950).

Antonio Fernós Isern, then-Resident Commissioner of Puerto Rico in Washington D.C., stated, in the same line, the following:

> As already pointed out, H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. It would not commit the United States for or against any specific future form of political formula for the people of Puerto Rico. It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris. Leibowitz, *supra*, 23. *See also Pueblo v. Castro García, supra*, at 790 (Dissenting opinion of Associate Judge Mr. Rebollo López).

Mr. Fernós Isern added:

> I would like to make two comments: One, the road to the courts would always be open to anybody who found that an amendment to the constitution

> went beyond the framework laid down by Congress; and, secondly, the authority of the Government of the United States, of the Congress, to legislate in case of need would always be there. Trías Monge, *op. cit.*, Vol. III, at 45.

The report by the Secretary of the Interior also established clearly that there would be no change in the relationship between the federal government and Puerto Rico. Thus, he affirmed that:

> It is important at the outset to avoid any misunderstanding as to the nature and general scope of the proposed legislation. Let me say that enactment of S. 3336 will in no way commit the Congress to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status. The bill merely authorizes the people of Puerto Rico to adopt their own constitution and to organize a local government which, under the terms of S. 3336, would be required to be republican in form and contain the fundamental civil guaranties of a bill of rights …. The bill under consideration would not change Puerto Rico's political, social, and economic relationship to the

> United States. Leibowitz, *supra*, at 24.

Each of the reports of the U.S. House of Representatives and the U.S. Senate on the bill endorsed the views of the Department of the Interior. Thus, the reports stated the following:

> The bill under consideration would not change Puerto Rico's fundamental political, social and economic relationship to the United States …. This bill does not commit the Congress, either expressly or by implication, to the enactment o statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by Congress of Puerto Rico's ultimate political status. *Id.* at 24. *See also* Trías Monge, *op. cit.*, Vol. III, at 51-54.

Both houses of Congress approved the measure and on July 3, 1950, Public Law 600 took effect. Trías Monge, *op. cit.*, Vol. III, at 56. The statute established that the [Puerto Rico] Constitution was being enacted as a new agreement that, as we will see, did not mean that Puerto Rico would cease to be a territory of the United States. The statute repealed multiple aspects of the Organic Jones-Shafroth Act of 1917 and provided for those provisions that were still in force to be cited as the Puerto Rico Federal Relations Act. Trías Monge, *op. cit.*, Vol. III, at 38. In fact, the statute kept Art. 1 of the Organic Jones-Shafroth Act of 1917 in force,

which establishes that its provisions "will apply to the Island of Puerto Rico and the adjacent islands belonging to the United States, and to the waters of said islands." Federal Relations Act, Sec. 1, 1 P.R. Laws Ann., 48 U.S.C. § 731.

Public Law 600 had to be approved by a majority of the Puerto Rico voters, which happened. Trías Monge, *op. cit.*, Vol. III, at 62. The Constitutional Convention met from September 17 to February 6, 1952. *Id.* at 78. A majority of the delegates approved the draft of the Constitution on March 3, 1952 and it was submitted for approval by Congress. *Id.* at 270-73.

The report on the ratification of the Constitution by the Commission on the Interior and Insular Affairs of the House of Representatives again repeated that the new constitution did not alter the fundamental political, social and economic relationships between the United States and Puerto Rico. Trías Monge, *op. cit.*, Vol. III, at 278-79. The report by the Senate, although it did not include such a categorical provision, also alluded to the fact that the exercise of federal authority in Puerto Rico was not affected by the Puerto Rico Constitution. *Id.* at 300.[14]

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[14] The English-language text reads: "The enforcement of the Puerto Rican Federal Relations Act and the exercise of Federal Authority in Puerto Rico under its provisions are in no way impaired by the Constitution of Puerto Rico, and may not be affected by future amendments to that constitution, or by any law of Puerto Rico adopted under its constitution."

Congress approved the [Puerto Rico] Constitution, but required the removal of Section 20 of Art. II, which established certain economic rights, and requested clarification of another provision that required attendance to public elementary schools to the extent allowed by the possibilities of the State. *Id.* Additionally, it demanded the inclusion of a section that specified that any amendment to the Constitution should be in keeping with the federal Constitution, the Puerto Rico Federal Relations Act and Public Law 600. *Id.* President Truman signed the resolution whereby the Constitution was approved. Then, the Constitutional Convention did its part. *Id.* The Constitution of the Commonwealth of Puerto Rico took force and effect on July 25, 1952. *Id.*

C. Judicial interpretation of the relationship between the Commonwealth of Puerto Rico and the federal government

The legal analysis of the relationship between the United States and Puerto Rico after the creation of the Commonwealth did not reach the U.S. Supreme Court immediately. Álvarez González, *op. cit.*, at 473. It was not until 1970 that the Court expressed itself. *Id.* Since then, the Court has tried the matter several times. *See, e.g., Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). An analysis of these opinions confirms that, to the United States Supreme Court, the [Puerto Rico] Constitution did

not represent a change in the fundamental basis of the constitutional relations between Puerto Rico and the United States. The Supreme Court continued to treat Puerto Rico as a political entity subject to the territorial clause of the Constitution of the United States.

The first case that reached the U.S. Supreme Court was *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970). In that case, the U.S. Court of Appeals for the First Circuit concluded that a law enacted by the Puerto Rico legislature violated the Constitution of the United States, without specifying whether it violated the Fourteenth or the Fifth Amendments. The Supreme Court reversed and decided to remand the case to the Puerto Rico courts because there were no clear precedents by which to solve the dispute.

In *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, a person questioned the constitutional validity of a seizure made by the Puerto Rico Police without notice. Although the Court ruled on the merits in favor of the validity of the seizure, it did not specify whether the constitutional provision applicable to Puerto Rico was the Fifth Amendment or the Fourteenth Amendment to the federal Constitution.[15] *Id.* at 669 n. 5.

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[15] "Regarding the Fifth Amendment, the problem consisted in that the requirements of the due process of law apply to the states by means of the Fourteenth Amendment, while applying to the federal government and its agencies, as well as to territories and possession, by means of the Fifth Amendment."

Most of the expressions regarding the status of Puerto Rico had to do with the jurisdiction of the Supreme Court to entertain the case. The controversy was whether Puerto Rico could be considered a state for purposes of a statute that created a three-judge court (Three-Judge Court Act), 28 U.S.C. § 2281. The Court concluded that, although it had not become a state of the Union, Puerto Rico could be considered a state for purposes of that law. *Id.* at 672, citing *Mora v. Mejías*, 206 F.2d 377 (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."). To reach that conclusion, the Court made reference, among other things, to one of the articles of Public Law 600 that states that "this Law is approved, as an agreement or compact, so that the People of Puerto Rico may organize a government based on a constitution adopted by them." *Id.* at 672 (citing *Mora v. Mejías, supra*) ("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.").

On certain occasions, an extremely broad scope has been given to that phrase that mentions a pact or covenant. *See, e.g., Ramírez de Ferrer v. Mari Brás*, 144 P.R. Dec. 141, 154-69 (1997). See, also, R. Hernández Colón, *Hacia la meta final: el nuevo*

J. Trías Monge, *El Estado Libre Asociado ante los tribunales, 1952-1954,* 64 Rev. Jur. UPR 1 (1995).

pacto-un paso adelante (J. Hernández Mayoral, P. Hernández Rivera, eds.), San Juan, Ed. Calle Sol, 2011, at 8. However, it is clear today that the only thing covered by that pact or covenant to which Public Law 600 referred was that if Puerto Ricans continued the process provided therein and approved the statute, it would take effect and Congress would approve a constitution for Puerto Rico drafted by the inhabitants of the territory. Congress so clarified when it followed a similar process for the establishment of the Commonwealth of the Northern Mariana Islands. *See* S. Rep. No. 94-596, at 1 (1976) ("The essential difference between the Covenant and the usual territorial relationship… is the provision in the Covenant that the Marianas constitution and government structure will be a product of a Marianas constitutional convention, as was the case with Puerto Rico, rather than through an organic act of the United States Congress.").

That process, additionally, is similar to the process that Congress has used with other territories since the early years of the Union.[16] E. Biber, *The*

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[16] Biber, *supra*, at 125-129 ("Admission of a territory to statehood requires at least one Act of Congress (or an equivalent thereof, such as a joint resolution). The process usually begins with Congress passing an enabling act which establishes a process by which a territory can hold a constitutional convention to draft a state constitution and elections for the first state officers and Congressional representatives. An enabling act can be prompted by petitions from the territory or by Congress's own initiative. The enabling act is important because it is usually the bill which spells out the conditions that Congress expects the new state to meet

Price of Admission: Causes, Effects, and Patterns of Condition Imposed on States Entering the Union, 46 Am. J. Legal Hist. 119, 125-129 (2004). *See also* Ohio Enabling Act § 1, 4-5, 2 Stat. 173 (1802); Louisiana Enabling Act § 1-4, 2 Stat. 641 (1811); Illinois Enabling Act § 1, 3-4, 3 Stat. 429 (1818); Omnibus Enabling Act, 25 Stat. 676 (1889). Congress, through enabling acts, authorizes the territory to hold a constitutional convention and draft a constitution. Biber, *supra*, at 127. If the territory follows the established process, it may remit that constitution to Congress for its approval. *Id.* at 128. Congress can approve the constitution, reject it, modify it, or condition it. *Id.* It is at that point that Congress decides whether it will accept the territory as a federal state or not. If it does not accept the territory as a state of the Union, it will remain a territory. *See National Bank v. County of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.") That stage of acceptance as a federal state has not taken place with Puerto Rico; it was not contemplated as part of the process established by Congress in Public Law 600.

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before (and after) admission; these conditions are often required to be drafted into the new state constitution itself and/or to be part of an "irrevocable" ordinance passed by the state constitutional convention.").

For its part, Sec. 2 of Art. I of the Constitution of the Commonwealth of Puerto Rico, which establishes that "[t]he government of the Commonwealth of Puerto Rico and its Legislative, Executive and Judicial Powers … will be equally subordinated to the sovereignty of the people of Puerto Rico," does not mean that Puerto Rico has been invested with its own sovereignty or that Congress has lost its own. It only means that Congress delegated to Puerto Ricans the power to manage the government of the Island and its own internal affairs, subject to the will of the people.[17] In that sense, the People of Puerto Rico is a sovereign only for purposes of local matters that are not governed by the Constitution of the United States. *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, at 673. Nevertheless, that does not mean that Puerto Rico ceased to be, as a matter of constitutional law, a territory of the United States; there was never a transfer of sovereignty, only a

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[17] On November 25, 1953, the General Assembly of the United Nations (UN) decided that the United States could stop sending information about Puerto Rico, according to the scheme of international law that prevailed at that time. Subsequently, the UN adopted specific criteria to determine when a member State has the obligation to transmit information about a non-autonomous territory. Res. 1541 (XV) of 1960. This does not affect the effectiveness of the actions taken prior to the approval of said criteria. About this matter, Trías Monge himself has stated that "Congress would not give any weight in the coming years to what the United Nations has done." IV Trías Monge, *op. cit.*, at 57. What is relevant here is that the efforts at the UN did not alter the status of Puerto Rico within the constitutional scheme of the United States.

delegation of powers. That would be made clear in the cases that would follow.

In *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, supra*, the validity of a Puerto Rico law requiring American citizenship in order to obtain an engineering license was questioned. The U.S. Supreme Court invalidated it again without specifying pursuant to which provision of the U.S. Constitution it was acting, whether the equal protection clause of the Fourteenth Amendment or the due process clause of the Fifth Amendment. However, the Court recognized the application and validity of the insular cases and approvingly cited *Downes v. Bidwell, supra*, and *Balzac v. Porto Rico, supra*. It went further and stated that what it did in *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, was reassert the doctrine of the insular cases.[18] In other words,

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[18] The U.S. Supreme Court stated the following: "It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico. The Court recognized the applicability of these guarantees as long ago as its decisions in *Downes v. Bidwell*, 182 U.S. 244, 283-284, 21 S. Ct. 770, 785, 45 L. Ed. 1088 (1901), and *Balzac v. Porto Rico*, 258 U.S. 298, 312-313, 42 S.Ct. 343, 348, 66 L.Ed. 627 (1922). The principle was reaffirmed and strengthened in *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L.Ed.2d 1148 (1957), and then again in *Calero-Toledo*, 426 U.S. 663, 94 S. Ct. 2080, 40 L.Ed.2d 452 (1974), where we held that inhabitants of Puerto Rico are protected, under either the Fifth Amendment or the Fourteenth Amendment, from the official taking of property without due

by determining whether certain provisions of the U.S. Constitution applied to Puerto Rico, the Supreme Court continued to treat Puerto Rico as a territory.

But it was not until *Torres v. Puerto Rico*, 442 U.S. 465 (1979), that the Supreme Court was straightforward in its use of the doctrine of the insular cases to see if one of the clauses of the Constitution of the United States applied to Puerto Rico. That case had to do with the validity of a search conducted by a state police officer on a person at the Isla Verde airport. The Court concluded that the search had been unreasonable. In order to decide whether the protection of the Fourth Amendment against unreasonable searches and seizures applied to Puerto Rico, the Court studied the entire doctrine of the insular cases and subsequently applied it:

> Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling… Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico… However, because **the limitation on the application of the Constitution in unincorporated territories is based in part on the need to**

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process of law." *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, supra*, at 600.

> **preserve Congress' ability to govern such possessions**, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight. (emphasis added) *Id.* at 470.

The Supreme Court then concluded that the intent of Congress, as evidenced by the Jones-Shafroth Act (now known as the Federal Relations Act) and by Public Law 600, was for the protections of the Fourth Amendment to apply to Puerto Rico. *Id.* at 470 ("Both Congress' implicit determinations in this respect and long experience establish that the Fourth Amendment's restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness.").[19]

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[19] "From 1917 until 1952, Congress by statute afforded equivalent personal rights to the residents of Puerto Rico. Act of Mr. 2, 1917, § 2, cl. 13-14, 39 Stat. 952, repealed, Act of July 3, 1950, § 5(1), 64 Stat. 320 (effective July 25, 1952). When Congress authorized the people of Puerto Rico to adopt a constitution, its only express substantive requirements were that the document should provide for a republican form of government and "include a bill of rights." Act of July 3, 1950, § 2, 64 Stat. 319, 48 U.S.C., § 731c. A constitution containing the language of the Fourth Amendment, as well as additional language reflecting this Court's exegesis thereof, P.R. Const., Art. II, § 10, was adopted by the people of Puerto Rico and approved by Congress. See Act of July 3, 1952, 66 Stat. 327. That constitutional provision remains in effect." *Torres v. Puerto Rico, supra*, at 270.

It is unquestionable that in *Torres v. Puerto Rico, supra*, the Court treated Puerto Rico as a territory.[20] *See* Alvarez González, *op. cit.*, at 510.

In another line of cases questioning the validity of certain federal rules related to Puerto Rico, it also arises clearly that Puerto Rico continued to be a territory. Alvarez González, *op. cit.*, at 510. In *Califano v. Torres*, 435 U.S. 1 (1978), a federal aid program that excluded the residents of Puerto Rico was challenged and the Supreme Court upheld its validity.

In *Harris v. Rosario*, 446 U.S. 651-52 (1980), which presented a similar controversy, the Supreme Court clarified the grounds for said unequal treatment of Puerto Rico:

> Congress, which is empowered under the Territory Clause of the Constitution, to "make all needful Rules and Regulations respecting the Territory … belonging to the United States," may treat Puerto Rico differently from States so long as there

[20] The difference between an incorporated territory and an unincorporated territory is inconsequential for the analysis that must be done in this case. The caselaw of the U.S. Supreme Court, by concluding that territories derive their authority from the same sovereign as the United States, does not make that distinction.

> is a rational basis for its actions. (Citations omitted.)[21]

What is clear from these cases is that the U.S. Supreme Court continued to treat Puerto Rico as a territory subject to the territorial clause and, therefore, to the powers of Congress. In exercising its power over the territory, Congress provided that the effectiveness of Public Law 600 would be contingent, inasmuch as it would take effect only if the People of Puerto Rico agreed to it, which in effect happened. That is why that authority is exercised today within the parameters of Public Law 600 and the Constitution approved by Congress pursuant to its plenary power over the territory. As Judge Breyer, now an Associate Justice of the U.S. Supreme Court, pointed out in *Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 41 (1st Cir. 1981), after the creation of the Commonwealth, relations between the United States and Puerto Rico ceased to be subject only to the territorial clause, and new legal restrictions, self-imposed by Congress, were added ("the federal government's relations with Puerto Rico changed from being bounded merely by the

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[21] The Supreme Court concluded that, as in *Califano*, there are three reasons that justify the action by Congress: "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Harris v. Rosario, supra*, at 652. For a critique of these cases *see*, J. Trías Monge, *El Estado Libre Asociado ante los tribunales, 1952-1994,* Rev. Jur. UPR 1 (1995).

territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.").

Nevertheless, far from representing an irrevocable renunciation of its power over the territory, those legal limitations approved by Congress are part of the exercise of said legislative power. Thus, in the same way that relations between the District of Columbia ceased to be subject merely to the will of Congress authorized by Art. I, § 8, Cl. 17 of the Constitution upon the approval of legislation giving the District an elective municipal government, relations between Puerto Rico and the federal government are governed not only by Art. I, § 8, of the Constitution, but also by the legislation approved by Congress. *See* District of Columbia Home Rule Act, D.C. Code §§ 1-201.01-1-207.71 (2001); *Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299 (D.C. 2012).

That delegation of power does not constitute an irrevocable renunciation nor a termination of the power of Congress. The People of the United States granted Congress, through the Constitution, ample power to manage the territories. For this reason, Congress cannot irrevocably renounce a power that was conferred on it by the People of the United States. *See Clinton v. City of New York*, 524 U.S. 417, 452 (1998) ("The Constitution is a compact enduring for more than our time, and one Congress

cannot yield up its own powers, much less those of other Congresses to follow."). *See also* R.S. Mariani, *Sovereignty At Issue, Supreme Court's Ambiguity and the Circuits' Conflict on the Application of the Dual Sovereignty Doctrine to Puerto Rico*, 63 Rev. Jur. UPR 807 (1993); E. Rivera Pérez, *Puerto Rico: Tres caminos hacia un futuro*, Publicaciones Puertorriqueñas, San Juan, 1991, at 25-26.[22] That is why the alternate proposal of some authors is not persuasive. *See* D.M. Helfeld, *Understanding United States-Puerto Rico Constitutional and Statutory Relations Through Multidimensional Analysis*, 82 Rev. Jur. UPR 841, 874-875 (2013);[23] Hernández Colón, *op. cit*.

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[22] The case with the Northern Mariana Islands is a clear example of how Congress can grant certain attributes to a territory and later suppress them at will. The Mariana Islands used to manage their own immigration system, even after becoming the Commonwealth of the Northern Mariana Islands. However, in 2008, Congress, by means of the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754-876, stripped it of all power to manage its own immigration system. *See* R. J. Misulich, *A Lesser-Known Immigration Crisis: Federal Immigration Law in the Commonwealth of the Northern Mariana Islands*, 20 Pac. Rim L. & Pol'y J. 211 (2011).

[23] *But see* D. M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 & the Constitution of the Commonwealth of Puerto Ric*o, 21 Rev. Jur. UPR 255, 307 (1952) ("Though the formal title has changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico

It is true, as well, that some U.S. Supreme Court Justices have stated that the doctrine of the insular cases must be revised. *See Harris v. Rosario, supra*, at 653 (Dissenting opinion of Associate Justice Marshall) ("While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico,… the present validity of those decisions is questionable."); *Torres v. Puerto Rico, supra*, at 475 (Concurring opinion of Associate Justice Brennan) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or of any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."). However, it has not been stated that Puerto Rico has ceased to be a territory subject to the plenary powers of Congress.

D. Position of the U.S. Executive Branch

The Executive Branch of the federal government has also confirmed that Puerto Rico continues to be a territory of the United States, which leaves unaltered the sovereign authority exercised by Congress. In 2000, the President of the United States, Bill Clinton, established by decree the Presidential Task Force on the Status of Puerto Rico, with the purpose of studying a future status for

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and veto insular legislation which it deems unwise or improper.").

Puerto Rico.[24] The Presidents who followed, George W. Bush and Barack Obama, renewed the task force during their respective administrations. These groups completed several reports on Puerto Rico. Their findings confirm that Puerto Rico continues to be a territory of the United States.

Specifically, the Task Force Reports of December 2007, at 19-20, and of March 2011, at 3, acknowledge that the Constitution approved by Puerto Rico was subject to conditions by Congress. Both the 2007 and the 2011 Reports explain that current relations between Puerto Rico and the United States are still defined by the Constitution of the United States and the Federal Relations Act. Presidential Task Force Report of March 2011, at 20; Presidential Task Force Report of December 2007, at 5. That statement clearly shows that the Commonwealth of Puerto Rico does not have any authority to change its relationship with the United States. The legal status of Puerto Rico is that of a territory subject to the plenary power of Congress. Presidential Task Force Report of December 2007, at 5. Its official name (Commonwealth of Puerto Rico) does not define or change its territorial status.

When discussing Puerto Rico's current political status, the Report of March 2011, at 28, affirms that the Commonwealth of Puerto Rico is governed by the Territorial Clause of the Constitution of the United

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[24] *http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Report_Espanol.pdf* (last visit, March 20, 2015).

States. Consequently, it is subject to the plenary powers of Congress. It is also asserted in the document that it is impossible to establish a relationship between the territory and the federal government that may only be altered by mutual consent. *Id.* *See also* Presidential Task Force Report of December 2007, at 6. This relationship cannot be put into practice "because a future Congress could decide to modify the relationship unilaterally." *Id.*

That means that Congress can allow for the Commonwealth to remain as a political system indefinitely and, on the other hand, it has the constitutional authority to amend or revoke the powers exercised by the Government of Puerto Rico to manage its internal affairs. Presidential Task Force Report of December 2007, at 6. In other words, Puerto Rico's internal government system is entirely subject to the political will and legal authority of Congress. *Id.* That explains why, by mandate of federal law, federal service of process is still made to the "United States of America, SS the President of the United States." Federal Relations Act, § 10, P.R. Laws Ann., Vol. I, 48 U.S.C. § 874.

All of the above leads us to conclude that the approval of a constitution for Puerto Rico did not represent a change in the basis of its relationship with the United States and, therefore, Puerto Rico continues to be a territory subject to the territorial clause of the Constitution of the United States. The legislative history of Public Law 600 and its subsequent interpretation by the U.S. Supreme Court so reveal. It is also thusly interpreted by the

federal Executive Branch. In short, there is unanimity among the three branches regarding this matter.

VI

The Commonwealth of Puerto Rico has a unique relationship, unparalleled in the history of the United States,[25] as the first territory the inhabitants of which have drafted their own constitution to manage their local affairs. However, based on all of the foregoing, we must conclude that the power that Puerto Rico undoubtedly exercises in prosecuting crime really emanates from the sovereignty of the United States and not from an original sovereignty. *Grafton v. United States, supra*; *Puerto Rico v. Shell Co., supra*. Nevertheless, the Court of Appeals concluded that the doctrine of dual sovereignty applies to Puerto Rico and it determined that Mr. Sánchez del Valle and Mr. Gómez Vázquez could be prosecuted in the Puerto Rico courts, even after they had been indicted in federal court for the same offense. Those conclusions are wrong.

It is true that the U.S. Supreme Court has stated repeatedly that Puerto Rico enjoys a degree of autonomy and independence normally associated with the states of the Union. *See, e.g., Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, supra*, at 595 ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto

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[25] *See Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, supra*, at 596.

Rico the degree of autonomy and independence normally associated with States of the Union."). We have also stated the same. *See E.L.A. v. Northwestern Selecta*, 185 P.R. Dec. 40 (2012).

Other cases in which the Supreme Court treated the Commonwealth of Puerto Rico as if it were a state of the Union are: *El Vocero de Puerto Rico (Caribbean Intern. News Corp.) v. Puerto Rico*, 508 U.S. 147 (1993) (First Amendment); *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (Eleventh Amendment immunity); *P.R. Dept. of Consumer Affairs v. Isla Petroleum*, 485 U.S. 495 (1988) (preemption); *Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (extradition); *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (commercial expression pursuant to the First Amendment); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (*parens patriae* power over migrant workers); *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (equal protection of the law); *Chardón v. Fernández*, 454 U.S. 6 (1981) (statute of limitations); *Torres v. Puerto Rico, supra*, (Fourth Amendment); *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, (allowing the appeal of a controversy involving the validity of a Puerto Rico law as if it were the law of a state).

In fact, prior to the creation of the Commonwealth, the U.S. Supreme Court had already held that "[t]he objective of the Foraker Act and of the Organic [Jones] Act was to give Puerto Rico the full power of local self-determination, with an autonomy similar to that of the states and

incorporated territories." *Puerto Rico v. Shell Co., supra*, at 261-262 *[translation ours]. See also* in the same sense, in effect Jones-Shafroth Act, *Bacardi Corp. of America v. Domenech*, 311 U.S. 150 (1940). The same was said while the Foraker Act was in force: *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913); *Gromer v. Standard Dredging Co.*, 224 U.S. 362 (1912). That shows that, by 1952, that language was not new.

The allegation of the Solicitor General is also correct, in the sense that Puerto Rico has the capacity to adopt and enact its own civil and criminal laws. *See Calero-Toledo v. Pearson Yacht Leasing Co., supra*, at 671, citing A. Leibowitz, *The applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 Geo. L. J. 219, 221 (1967) ("Pursuant to that constitution, the Commonwealth now 'elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code'.").

However, the analysis that must be performed to determine whether there are two different sovereigns under the constitutional double jeopardy clause is not whether the entity is similar to, acts like or has certain attributes of a true sovereign. The fundamental question, according to the U.S. Supreme Court, is whether the two entities derive their authority from the same ultimate source of power. *United States v. Wheeler, supra; Waller v. Florida, supra.* In other words, the question is not

whether the entity can exercise a given power, but rather under whose authorization does it ultimately exercise that power.

After an objective analysis of the history and immense juridical literature on the subject, we must conclude that, with the adoption of a constitution, Puerto Rico did not cease to be a territory of the United States subject to the powers of Congress, as provided in the territorial clause of the federal Constitution (Art. IV, § 3).

Puerto Rico's authority to prosecute individuals is derived from its delegation by United States Congress and not by virtue of its own sovereignty. As we have seen, and contrary to the Native-American tribes or the states of the Union, **Puerto Rico never had original or prior sovereignty under which it delegated powers to Congress. <u>It is the other way around.</u>** Spain's sovereignty over Puerto Rico was formally transferred to the United States in 1899 with the Treaty of Paris. Since then, the United States has managed Puerto Rico through legislation passed pursuant to the territorial clause of the federal Constitution. The adoption of a constitution, by delegation of Congress, to organize a local government, replacing a large part of the organic act in effect at that time, did not represent a transfer of sovereignty to Puerto Rico. To the contrary, Puerto Rico did not cease to be a territory of the United States. Therefore, the rule established in *Grafton v. United States, supra*, and reaffirmed in *Puerto Rico v. Shell Co., supra*, applies to it.

In conclusion, the Commonwealth of Puerto Rico is not a sovereign entity inasmuch as, being a territory, its ultimate source of power to prosecute offenses is derived from the United States Congress. *See United States v. Lara, supra*, at 226 (Dissenting opinion of Associate Justice Thomas) (citations omitted) ("[T]he Court has held that the Territories are the United States for double jeopardy purposes… It is for this reason as well that the degree of autonomy of Puerto Rico is beside the point"). It exercises its power as part of a **delegation** of powers and not based on a **transfer** of sovereignty by the United States Congress.

Therefore, the grounds used in *Pueblo v. Castro García, supra*, and the result reached therein, are not based on federal constitutional law. We have acknowledged the importance of precedents in the development of our caselaw (*stare decisis*). However, that general principle cannot lead us to wrongfully perpetuate doctrinal mistakes. Our decisions do not have "the scope of a dogma that must be blindly followed even when the court is subsequently convinced [that] its prior decision is wrong." *Am. Railroad Co. v. Comisión Industrial*, 61 P.R. Dec. 314, 326 (1943). For that reason, we have identified three circumstances that, as exceptions, justify setting a precedent aside: "(1) if the previous decision was clearly wrong; (2) if it has adverse effects on the rest of the laws, and (3) if the number of persons who relied upon the decision is limited." *Pueblo v. Camacho Delgado*, 175 P.R. Dec. 1, 20 n. 4 (2008). *See also Fraguada Bonilla v. Hosp. Aux. Mutuo*, 186 P.R. Dec. 365, 391 (2012); *E.L.A. v. Crespo Torres*,

180 P.R. Dec. 776, 796-797 (2011); *Pueblo v. Díaz de León*, 176 P.R. Dec. 913, 920 (2009); *San Miguel, etc. & Cía v. Guevara*, 64 P.R. Dec. 966, 974 (1945).

The first of these principles solves the matter at hand. Applying it, we overrule *Pueblo v. Castro García, supra*, and conclude that a person who was prosecuted in federal court cannot be prosecuted for the same offense in the Puerto Rico courts because that would constitute a violation of the constitutional protection against double jeopardy, as provided in the Fifth Amendment to the Constitution of the United States. The arguments raised by the Government necessarily entail rejecting the application of a clear and precise constitutional right, such as the prohibition of double jeopardy in penal cases.

Prohibiting the prosecution of a defendant in both jurisdictions is limited to charges for the same offense. That limitation does not arise as a consequence of our decision, but rather from the territorial status of Puerto Rico. That being said, this does not mean that the government of Puerto Rico and the federal government cannot work together and reach collaborative agreements to fight crime.

We agree that if Puerto Rico were a state of the Union, the dual sovereignty rule would apply and the local government would be able to move forward with the criminal case against petitioners. However, declaring statehood is not one of our constitutional powers. As a territory, Puerto Rico does not have an original

sovereignty separate from that of the federal government. Therefore, the doctrine of dual sovereignty does not provide an exemption from the application, in cases such as this one, of the constitutional guarantee against double jeopardy. It was thus held in *Puerto Rico v. Shell Co., supra*, and *Grafton v. United States, supra*. The delegation of congressional power with the creation of the government of the Commonwealth of Puerto Rico did not alter that objective legal reality.

That is the current state of law. We cannot reverse a decision of the United States Supreme Court or refuse to abide by it, especially if just for mere convenience. "'Convenience and efficiency,' […] 'are not the primary objectives' of our constitutional framework." *N.L.R.B. v. Noel Canning*, 573 U.S. __, __, 134 S. Ct. 2550, 2598 (2014) (Concurring opinion of Associate Justice Scalia). Furthermore, as stated by Associate Judge Rebollo López:

> Even when in our personal character we have the absolute constitutional right to create and think according to our particular view of life and the world in which we live, as members of this Court we cannot afford to decide the matters before our consideration based on those personal beliefs or desires, with complete abstraction from the legal reality that surrounds us. *Pueblo v. Castro García, supra*, at 790 (Dissenting opinion of Associate Judge Mr. Rebollo López).

The precedents of the U.S. Supreme Court are binding on us and the Government has not presented a convincing argument that renders them inapplicable. It is our precedent that is clearly erroneous and fails to recognize petitioners' constitutional right. That is why it cannot prevail. Thus, Mr. Sánchez del Valle and Mr. Gómez Vázquez cannot be prosecuted in the Puerto Rico courts for the same offense (or for a lesser included offense) for which they have already been sentenced by the U.S. District Court for the District of Puerto Rico.

VII

Based on all of the foregoing, we hereby reverse the decision of the Court of Appeals and order the dismissal of the claims filed pursuant to Article 5.01 of the Puerto Rico Weapons Act, *supra*, against Mr. Sánchez del Valle and Mr. Gómez Vázquez.

Judgment will be entered accordingly.

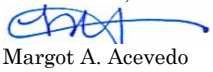
[signed: *Rafael L. Martínez Torres*]
RAFAEL L. MARTÍNEZ TORRES
Associate Judge

[CERTIFIED TRANSLATION]

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 29, 2015.



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[CERTIFIED TRANSLATION]

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico
Respondent
v.
Luis M. Sánchez Valle
Petitioner

The People of Puerto Rico
Respondent
v.
Jaime Gómez Vázquez
Petitioner

CC-2013-68
cons. with
CC-2013-72

Certiorari

Concurring Opinion issued by Chief Justice FIOL MATTA and joined by Associate Justice ORONOZ RODRÍGUEZ

In San Juan, Puerto Rico, on March 20, 2015.

I concur with the majority opinion of this Court in the sense that a person should not be prosecuted in our courts for the same offense for which he has already been prosecuted in federal court. I base my opinion not on the protection against double jeopardy of the Fifth Amendment of the United States Constitution, but on the fundamental protection

against double jeopardy recognized in the Constitution of the Commonwealth of Puerto Rico. What I find unsustainable is the reasoning on which the Opinion is based—a completely out-of-context interpretation, not only of our own constitutional history, but also of the fundamentals of the dual sovereignty doctrine in federal jurisprudence.

The majority reasons that Puerto Rico lacks authority to prosecute the two petitioners because "it does not have original sovereignty separate from that of the federal government" and because "the creation of the government of the Commonwealth did not change this objective legal reality." [1] According to their analysis, in order to avoid this, we would have had to be like the Indian tribes of Norte America or a federal state. The opinion is wrong in its analysis of our constitutional history and current relationship with the United States. Our history demonstrates that Puerto Rico has sufficient sovereignty to prosecute the petitioners again under our local criminal laws.

Our history also reveals that when the People of Puerto Rico claimed and assumed the power to create and punish crimes by adopting the Constitution of the Commonwealth of Puerto Rico, they decided to exercise this power responsibly, within the boundaries of the principle on which our entire legal code, and particularly our fundamental

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[1] Majority Opinion, at 67.

rights, are based—respect for human dignity.[2] In its haste to undermine the spirit of our Constitution and our efforts to affirm ourselves as a nation, the majority has ignored the actual controversy involved in this case: the fundamental inconsistency between the possibility of prosecuting an individual twice for the same criminal acts and the crucial guiding principle of Puerto Rico's Constitution, the inviolability of human dignity.

Consequently, today I concur with the outcome of the majority opinion, not because Puerto Rico lacks sovereignty to prosecute the petitioners, but because under the circumstances of this case, doing so would violate the protection against double jeopardy that our Constitution[3] guarantees them.

I

The majority opinion adequately describes the procedural history of the appeals in this case. We point out, however, that in both cases the Court of First Instance dismissed *all* of the criminal complaints against the petitioners on the grounds that, despite the holding of this Court in *Pueblo v. Castro García*, Puerto Rico does not possess sovereignty of its own, separate from the federal government, because they both derive their power to

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[2] P.R. Const., Art. II, Section 1.

[3] P.R. Const., Art. II, Section 11.

prosecute citizens from the same source: the United States Congress.[4]

Therefore, the lower court concluded that submitting the petitioners to a criminal trial for the same acts already adjudicated in the United States District Court would violate the constitutional protection against double jeopardy.

The prosecution sought review of both dismissals in the Court of Appeals. The Court of Appeals consolidated the two appeals and reversed the dismissal of the criminal complaints on the grounds that under the current status of the law in Puerto Rico, pursuant to *Pueblo v. Castro García*, the Commonwealth of Puerto Rico and the federal government constitute separate and distinct sovereigns and have independent authority to proscribe and punish the criminal conduct of their citizens.[5]

Unsatisfied, both Mr. Sánchez Valle and Mr. Gómez Vázquez filed petitions for writs of certiorari with this Court. We issued both writs and consolidated them as they dealt with the same controversy.

II

Protection from double jeopardy is a basic principle of our legal code, because the Bill of Rights

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[4] *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988).

[5] *Id.*

in the Commonwealth of Puerto Rico's Constitution prohibits punishing a citizen twice for the same offense.[6] This provision stems from the similar protection set forth in the Fifth Amendment of the United States Constitution, which establishes the minimum content that our constitutional protection must provide.[7]

The constitutional protection against double jeopardy embodies deeply-rooted principles in the history of western civilization.[8] Roman Law, as well as Greek Law and Canon Law, protects individuals from multiple proceedings and punishments for one same offense or infraction.[9] Although the precise origins of the common law protection against double jeopardy are unknown, by the mid-Thirteenth Century a certain type of protection against double

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[6] PR Const. Art. II, Section 11. *Pueblo v. Rivera Cintrón*, 185 P.R. Dec. 484, 493 (2012); *Pueblo v. Santiago*, 160 P.R. Dec. 618, 626 (2003).

[7] For a comparison between the clause in the U.S. Constitution and the protection of our Constitution, *see* Ernesto L. Chiesa, II *Derecho Procesal Penal de Puerto Rico y Estados Unidos* [*Criminal Procedural Law of Puerto Rico and the United States*], Section 16.1, at 349 (1995).

[8] David S. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution* 1 (2004).

[9] Rudstein, *op. cit.*, at 2-3. *See also* Erin M. Cranman, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right*, 14 Emory Int'l L. Rev. 1641, 1644 (2000).

jeopardy was already recognized.[10] English jurisprudence developed this concept in two defenses, *autrefois acquit* (prior acquittal) and *autrefois convict* (prior conviction). By the Eighteenth Century, Blackstone opined that the principle that no one shall be placed in jeopardy more than once for the same offense constituted a "universal maxim of common law."[11]

In the United States, the principles that eventually influenced the drafting of the Fifth Amendment were present in the colonies since the Sixteenth Century, when several of them statutorily recognized the protection against double jeopardy.[12] In 1784, New Hampshire was the first state to include the protection against double jeopardy in its constitution, even before the United States Constitution was adopted in 1789 and the Fifth Amendment of the U.S. Constitution was ratified in 1791.[13]

That is the historical background of the protection provided by Section 11 of our Bill of Rights. The protection granted by our Constitution is something we inherited from common law or

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[10] Rudstein, *op. cit.*, at 1, 4.

[11] *Id*. at 4, citing 4 *Blackstone Commentaries* 335. (Our translation).

[12] *Id*. at 11-12.

[13] *Id*. at 15.

Anglo-American law and later incorporated into Puerto Rican law as a result of our relationship with the United States. Therefore, it is particularly important as a source to interpret its scope.[14]

A

The constitutional protection against double jeopardy is based on several considerations of public policy. It is intended to prevent the government from having a second opportunity to prosecute an individual with the benefit of the strategic and substantive knowledge that it may have acquired about the defendant's defense during the first proceedings. It also prevents the individual from being submitted to multiple prosecutions, protecting him from being harassed by the state and living with the anxiety of not knowing whether he will be found guilty at some point even if he is innocent or was acquitted from responsibility. Allowing the State to use all of its resources and powers against a person who is allegedly the perpetrator of a crime,

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[14] *Pueblo v. Santiago*, *supra*, at 627, n. 8. We are referring to common law in the sense of Anglo-American law, acknowledging that the term has a different meaning in Spanish Civil Law. In countries that have a civil law system, and in international criminal law, the principles of the protection against double jeopardy are found in the rule called *non bis in idem* (not twice for the same). This maxim is in turn derived from Roman Law which established that "*nemo debet bis vexari pro una et eadam causa*" (a man should not be punished or prosecuted twice for the same cause). See Gerard Conway, *Ne bis in idem in International Law*, 3 Int. Crim. L. Rev. 217, 221-22 (2003).

repeatedly, and without restriction whatsoever, would constitute an abuse of power. [15] In short, this provision protects individuals because it limits the exercise of the State's vast punitive power.

The constitutional guarantee against double jeopardy provides four types of protection: protection from a second prosecution after acquittal for the same offense; protection from a second prosecution after conviction for the same offense; protection from a second prosecution after trial for the same offense has commenced; and protection from multiple punishments for the same offense. That is, it protects individuals from multiple punishments and proceedings for the same criminal conduct.[16]

The main requirement for triggering the protection against double jeopardy is for both proceedings to be an attempt to prosecute or punish a citizen for the same offense. If the State attempts to punish a citizen for different crimes, then the constitutional protection against double jeopardy does not apply, although the citizen could be protected by statutory protections that embody the

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[15] *Pueblo v. Rivera Cintrón*, *supra*, at 493; *Pueblo v. Santiago*, *supra; Pueblo v. Martínez Torres, supra*, at 568. See, Ernesto L. Chiesa, *Doble exposición* [*Double Jeopardy*], 59 L. Rev. UPR 479, 482 (1990).

[16] *Pueblo v. Santiago, supra*, at 628; *Pueblo v. Martínez Torres*, *supra*, at 568-69; *Ohio v. Johnson,* 467 U.S. 493, 498 (1984); *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

same principles of public policy, such as the concept of concurrent offenses.[17]

When evaluating whether a person has been tried twice for the same offense, courts must apply the standard formulated in *Blockburger v. US*: two offenses are not the same if each offense requires proof of a fact that the other does not require.[18] Thus, the court must compare the definition of the offenses in dispute to determine whether or not the elements that need to be proved are the same. If they are, then both constitute the same offense and the constitutional protection against double jeopardy is activated. Likewise, this protection is activated if one of the offenses is a lesser offense included in the

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[17] Although the Weapons Act expressly provides that the concept of concurrent offenses shall not apply to the offenses defined therein, under other circumstances, the concept of concurrent offenses and the dual sovereignty doctrine may apply. 25 P.R. Laws Ann. § 460b. See Ernesto L. Chiesa, *Doble Exposición* [*Double Jeopardy*], *supra*, at 544.

[18] *Blockburger v. U.S.*, 284 U.S. 299 (1932). Chiesa, *Doble exposición* [*Double Jeopardy*], *supra*, at 485 (1990). The *Blockburger* standard was overruled in *Grady v. Corbin*, 495 U.S. 508 (1990), where the U.S. Supreme Court interpreted liberally the term *same offense* of the Fifth Amendment to activate the protection against double jeopardy when two offenses share at least one element of type. Subsequently, the U.S. Supreme Court overruled *Grady* and reinstated the *Blockburger* standard. Therefore, it is the current rule. *U.S. v. Dixon*, 509 U.S. 688 (1993).

other.[19] We have applied the *Blockburger* test on several occasion to determine the scope of the protection against double jeopardy under our Constitution, because the text of our Constitution limits the protection to the same *offense*.[20]

Rule 64(e) of the Rules of Criminal Procedure provides procedural effectiveness to the protection against double jeopardy.[21] In order to invoke such constitutional protection and seek dismissal of a second accusation or indictment, the defendant must demonstrate that a first trial was initiated or held for the same offense that he is being charged with in the second proceedings or for an offense subsumed thereunder. The first trial must have been held before a competent court and through a valid criminal complaint, and the proceedings or sanction must have been of a criminal nature.[22]

B

Both Article 5.01 of the Weapons Act and federal law establish that it is an offense to manufacture,

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[19] *See Pueblo v. Rivera Cintrón*, *supra*, at 495, for a list of new opinions in this regard.

[20] *See* Ernesto L. Chiesa, *Doble exposición* [*Double Jeopardy*], *supra,* for an analysis of the implications of the differences in the way the law was drafted in each constitution.

[21] 34 P.R. Laws Ann. App. II, R. 64(e).

[22] *Pueblo v. Santiago*, *supra*, at 626; *Pueblo v. Martínez Torres*, *supra*, at 568. *See also* Chiesa *op. cit.*, § 16A.

import or sell a firearm without a permit to do so.[23] They both require the State to prove the same criminal elements, although in federal court it must also de demonstrated that the sale occurred through interstate or international commerce. As the Majority Opinion very well points out, one of the offenses for which both petitioners were prosecuted in the trial court is a misdemeanor included in the federal offenses and constitutes the same offense under the *Blockburger* standard.[24] Consequently, we concur with the Majority Opinion in that only the charges for violations of Art. 5.01 are in conflict with the constitutional protection against double jeopardy, because they expose the petitioners to a second criminal prosecution and to the possibility of receiving a second punishment for the same criminal conduct punished in the U.S. District Court.[25]

However, since the criminal proceedings were initiated in the courts of two different jurisdictions—that of the United States Federal Government and that of the Government of the Commonwealth of Puerto Rico—we must examine the petitioners' situation in light of the dual sovereignty doctrine.

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[23] 25 P.R. Laws Ann. § 458; 18 U.S.C.A. § 922(a)(1)(a).

[24] Maj. Op. at 9.

[25] Although the Court of First Instance dismissed all the charges against the petitioners, the other offenses do not conflict with the protection against double jeopardy, as they constitute different offenses pursuant to the *Blockburger* test.

III

Despite the primacy of the principles embodied in the protections of the Fifth Amendment within the constitutional structure of the United States, the U.S. Supreme Court has developed an exception to the protection against double jeopardy: the dual sovereignty doctrine. According to this exception, the constitutional protection against double jeopardy set forth in the Fifth Amendment does not apply when two different sovereigns initiate criminal proceedings against a citizen for the same offense.

As the United States Supreme Court has explained, since crime is an offense against the authority and dignity of a sovereign, when defining certain conduct as an offense, the government exercises its own sovereignty. When a single act violates the laws of two sovereigns, it offends the peace and dignity of each sovereign and, consequently, two different crimes are committed, even when they share the same elements and involve the same acts. Therefore, since each sovereign prosecutes the individual for a different offense, the Fifth Amendment does not bar the other sovereign from initiating a second criminal prosecution.[26]

Although the Supreme Court applied this doctrine for the first time in 1922, in *U.S. v. Lanza*,

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[26] *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *Wheeler v. U.S.*, 435 U.S. 313, 320; *Lanza v. U.S.*, 260 U.S. 377, 382 (1922).

its foundations were articulated in several decisions issued in the Nineteenth Century.[27]

In *Lanza*, the U.S. District Court dismissed five charges against several citizens for violations of the National Prohibition Act, because a court of the State of Washington had convicted these citizens for the same acts and for identical offenses under state

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[27] *U.S. v. Lanza*, *supra*. In 1833, the U.S. Supreme Court held that the Bill of Rights of the United States Constitution was not binding on States. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243. This means that the Fifth Amendment did not bar states from prosecuting citizens time and time again, though there could very well be analogous protections in the state's legislation or constitution. However, the Fifth Amendment did bar the federal government from prosecuting an individual multiple times for the same offense. Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Col. L. Rev. 1, 4 (1995). Based on the reasoning in *Barron*, the Court later held that successive punishments by the state and federal governments would not be prohibited, since the prohibition of the Fifth Amendment was only binding on the federal government. *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). Later, in *Moore v. Illinois*, the petitioner argued that the possibility of prosecution in federal court invalidated his conviction in state court. The Court rejected the argument and focused on the concept of *offense* or *crime* from the government's standpoint and reasoned that since the defendant was at the same time a citizen of two sovereigns, Illinois and the United States, he owed allegiance to both. Since his conduct violated the laws of both sovereigns, each could punish him, hypothetically for different offenses. 55 U.S. (14 How.) 13, 20 (1852). See Reed Amar, *supra*, at 7.

law.[28] Nevertheless, the United States Supreme Court held that when the State of Washington defined the sale of alcohol and the other offenses in question as crimes, it exercised its own sovereignty and, therefore, a power independent from the federal Government's authority to punish crimes.[29]

The dual sovereignty doctrine is based on the concept that a crime is an offense against the sovereignty of the government and relies on the premise that citizens of the United States are at the same time citizens of a State or territory and, therefore, owe allegiance to two sovereigns, each having authority to punish him, independently of how the other sovereign proceeds.[30] Therefore, for purposes of the prohibition against double jeopardy and the dual sovereignty exception, a sovereign is the political body that has authority to define which conduct will constitute a crime.

However, according to the dual sovereignty doctrine, mere authority to create and punish crime is not sufficient. Both jurisdictions must derive such

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[28] The National Prohibition Act, 41 Stat. 305, codified the prohibition against manufacturing, selling or possessing alcohol that the 18th Amendment of the U.S. Constitution, now repealed, imposed throughout the entire United States. *U.S. v. Lanza*, *supra*, at 379.

[29] *U.S. v. Lanza*, *supra*, at 382.

[30] *Heath v. Alabama*, *supra*, at 88; *Bartkus v. People of State of Ill.*, *supra*, at 131-32, citing *Moore v. People of State of Illinois*, 55 U.S. (14 How.) 13, 19-20 (1855).

authority from different sources.[31] **For purposes of the dual sovereignty doctrine, government entities shall be deemed to be separate sovereigns if they derive their authority to punish crime from different sources of power.**[32] When the U.S. Supreme Court has upheld the dual sovereignty exception, it has examined whether an independent sovereign authority to prosecute exists, instead of analyzing the nature of the political relations between both entities.

The analysis of the ultimate source of power to define and punish crimes rests on a legal fiction that allows the proper functioning of American federalism: within a single territory, which is a sovereign vis-à-vis other nations at the international level, there are two main political entities—member states of the Union and the federal Government—that exercise particular powers and authority, distributed by the U.S. Constitution. This distribution of powers is more complicated than the mere federal Government-State division, because the territory of the United States contains multiple political entities and jurisdictions whose powers occasionally overlap each other, such as the District of Columbia, Indian tribes, territories, military bases and the Commonwealth of Puerto Rico, among

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[31] *Heath v. Alabama*, *supra*, at 88; *U.S. v. Lanza*, *supra*, at 382.

[32] *U.S. v. Wheeler*, *supra,* at 320.

others.[33] The juridical development and history of American federalism obscure the distinction between

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[33] The Majority Opinion at 25-27, mentions decisions of two different Federal Circuit Courts of Appeals that have determined that the U.S. Virgin Islands and Guam are not sovereigns for purposes of the dual sovereignty doctrine. It further states, though federal courts have yet to decide this, that this is probably the case of the Northern Mariana Islands. The superficiality with which the Court's Majority addresses this topic leads it to a grave error. First, the United States has several unincorporated territories subjected to its sovereignty with different degrees of self-government. The case of the U.S. Virgin Islands, Guam and American Samoa are clearly distinguishable from Puerto Rico's case. These three territories are currently governed by organic laws legislated by Congress, which, in each one of these organic laws, has reserved to itself the power to legislate locally and veto or annul laws passed by the territories. Thus, the Legislative Assembly of the Virgin Islands may amend or repeal any local law and pass any new legislation, as long as it is not inconsistent with United States laws applicable to the territory, "subject to the power of Congress to annul any such Act of the Legislature." 48 U.S.C. § 1574(c) (Our translation). In the case of Guam, the Governor must send to the United States Department of the Interior any legislation enacted by the territory. The Department, in turn, sends it to Congress, which "reserves the power and authority to annul the same." 48 U.S.C. § 1423i (Our translation). Lastly, amendments or modifications to the constitution of American Samoa can be made by Congress only. 48 U.S.C. § 1662(a). The foregoing is in keeping with the language cited in the Majority Opinion of 42 U.S.C. § 1704 which establishes that any criminal prosecution in the Virgin Islands, Guam and American Samoa shall bar any other criminal proceedings from being carried out for the same acts in federal court, and *vice versa*. Clearly, these three territories are governed by territorial laws where Congress is the ultimate and

the sovereignty of the federal Government and the sovereignty of the other political entities in its territory and under its control. Furthermore, the federal structure demonstrates that within the U.S. political and legal system there is not a one single or universal conception of *sovereignty* but that, to the contrary, multiple conceptions of *sovereignty* coexist.

When the U.S. Supreme Court began to develop the bases of what would later become the dual sovereignty doctrine, it was not clear which political entities in the United States had the attributes of a sovereign and which did not. In *Moore v. Illinois*, the Supreme Court not distinguish between states and territories of the United States, expressing that a citizen owes allegiance both to these and the federal government:

> Every citizen of the United States is also a citizen of every **State or territory**. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction

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unappealable legislator. On the other hand, other territories with different political arrangements with the United States that do not entail the same legislative restrictions may be considered distinct sovereigns for purposes of the dual sovereignty doctrine. *See* José Trías Monge, *Puerto Rico: Las penas de la colonia más antigua del mundo* [*Puerto Rico: The Hardships of the Oldest Colony in the World*], UPR Publishing House, 1st Edition, at 191-205 (1999) (hereinafter, Trías Monge, *Las Penas* [*The Hardships*]. *See also* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States & its Affiliated U.S.-Flag Islands*, 14 U. Haw. L. Rev. 444 (1992).

> on the laws of either. The same act may be an offense or transgression of the laws of both.[34] (Emphasis added).

Although in 1907 it was held in *Grafton* that territories are not sovereigns separate from the federal government, in 1959, both in *Bartkus* and in *Abatte*, the U.S. Supreme Court cited with approval the statements made in *Moore v. Illinois, supra*, which imply that a single act may be an offense of the laws of the sovereigns that a citizen owes allegiance to: the federal Government and the states or territories. Nor was any attempt whatsoever made to give some sort of content to the expression "sovereignty" that would allow one to determine when and how such status is reached or enjoyed.

Moreover, under the concept of sovereignty in English common law it would not be understood that states of the Union and the federal Government constitute separate sovereigns. According to common law, "sovereignty" refers to the final, indivisible and unlimited power that must exist in every political society.[35] A simple reading of the

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[34] *Moore v. Illinois*, *supra,* at 19-20; *Bartkus*, *supra*, at 131; *Abbate*, *supra*, at 192.

[35] "The conventional British position understood 'sovereignty' as that indivisible, final and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail, and the only limitations on that sovereign will were those that the sovereign itself

United States Constitution reveals that the ultimate source of the United States' power, in all its manifestations, is the American People.[36] They are the ones who possess the ultimate sovereign will from which both the powers of the federal Government and of the states are derived.

In contrast to the Articles of the Confederation, the United States Constitution is not like a treaty between independent sovereign states. Rather, it is an agreement of wills through which the People of the United States created a new federal union after the initial failure of the Confederation. The Articles of Confederation were agreed to by the States and did not confer on the federal Government jurisdiction over the inhabitants of the United States. Given the weakness of the political arrangement of the Confederation and the problems of legitimacy and governance that ensued, the United States Constitution was inspired by popular sovereignty—the will of the people—to legitimize the powers that

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voluntarily chose to observe." Daniel A. Braun, *Praying to False Sovereign: The rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. of Crim. L. 1, 26 (1992) citing Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1245, 1430 (1987)

[36] "We, *the People of the United States*, in Order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." I P.R. Laws Ann. (emphasis added).

the federal Government possesses and to confer on it jurisdiction over the citizens of the states.[37]

In 1816, Associate Justice Story clearly identified the source of political power in the United States, when he stated the following in *Martin v. Hunter's Lessee:*

> The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the People of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain those powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right… to make the powers of the state governments, in given cases, subordinate to those of the nation or to reserve to themselves those sovereign

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[37] José J. Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales con Estados Unidos* [*Constitutional Law of Puerto Rico and Constitutional Relations with the United States*], TEMIS Publishing House, at 4-5 (2009).

> authorities which they might not choose to delegate to either…[38]

Consequently, if we apply the standard articulated by the U.S. Supreme Court, the ultimate source of the authority to create and punish crime really falls upon the People of the United States and not on the federal Government or the states of the Union.

Applying the dual sovereignty doctrine, the U.S. Supreme Court has held that the doctrine allows a State to punish an individual even after another State has already punished him for the same offense.[39] It also allows this when the entity that originally punishes the person for the same offense is the federal Government,[40] just as it allows the federal Government to punish an individual when the State has already punished him for the same offense.[41] Finally, it allows the federal Government to punish a person for the same offense for which an Indian tribe has already punished him.[42] The only instances when the Supreme Court has held that the dual sovereignty doctrine does not apply is when the

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[38] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 324-25 (1816).

[39] *Heath v. Alabama*, *supra.*

[40] *Bartkus v. People of State of Ill.*, *supra.*

[41] *Abbate v. U.S.*, *supra.*

[42] *U.S. v. Lara*, 541 U.S. 193 (2004); *U.S. v. Wheeler*, *supra.*

criminal proceedings occur under the authority of the federal Government and a territory of the United States,[43] or under the authority of a municipality and the state that it belongs to.[44]

Let us evaluate the treatment that the U.S. Supreme Court has given to each of the sovereigns that coexist in the U.S. jurisdiction.

A

The States of the Union: *E Pluribus Unum*

As shown above, the U.S. Supreme Court has had no trouble holding that the states of the Union are separate sovereigns for purposes of the dual sovereignty doctrine. This is framed within the principles of U.S. federalism: since the federal Government is a government with enumerated powers, the states retain, under the Tenth Amendment, the powers that were not expressly delegated to the federal Government. Among the powers retained, is the authority to establish and punish crimes.[45]

In *Bartkus v. People of Ill.*, the State of Illinois's criminal prosecution of the defendants after they had been acquitted in Federal Court for the same offense

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[43] *Grafton v. U.S.*, 206 U.S. 333 (1907).

[44] *Waller v. Florida*, 397 U.S. 387 (1970).

[45] *Heath v. Alabama*, *supra*, at 89, citing *U.S. v. Lanza*, *supra*, at 382.

was upheld.[46] In *Abbate v. US*, the Court addressed the opposite situation because the defendants pled guilty in the Court of Illinois before they were prosecuted in Federal Court. Both decisions, issued the same day, validated the dual sovereignty doctrine and reiterated what was stated in *Lanza*.[47]

The holdings in *Bartkus* and *Abbate* are based on the following premise: that within the structure of the United States federal system, the States and the federal Government are independent political communities.[48] That is why the degree of control that may be exercised by the federal Government over state Government does not prevent a state from, in turn, exercising its own sovereignty to punish.[49]

Once the doctrine was formulated, the U.S. Supreme Court continued to extend its application in several cases. In *Heath v. Alabama,* the State of Alabama charged Larry Gene Heath with ordering the kidnapping and subsequent murder of his wife. Heath had already been prosecuted in the State of Georgia where the murder took place, and he had pled guilty in exchange for a life sentence.

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[46] *Bartkus v. People of Ill.*, *supra*, at 129. After rejecting the application of the Fifth Amendment to the State of Illinois, the Supreme Court analyzed the controversy in light of the due process of the Fourteenth Amendment.

[47] *Abbate v. U.S.*, *supra*, at 195.

[48] *U.S. v. Wheeler*, *supra*, at 320.

[49] *Id.*, citing *U.S. v. Lanza*, *supra*, at 382.

Immediately thereafter, the State of Alabama, where Heath and his wife resided and where she was kidnapped, initiated criminal proceedings against Heath for the same acts and eventually sentenced him to death. The U.S. Supreme Court reaffirmed *Bartkus, Abbate* and *Wheeler*, and held that Georgia and Alabama were separate sovereigns, and therefore the dual sovereignty exception applied. According to the Court, the controversy required the Court to determine whether the dual sovereignty doctrine allowed successive criminal proceedings under the laws of different states in situations where, ordinarily, the constitutional protection against double jeopardy would apply.[50] It explained that the dual sovereignty doctrine is triggered when the two governments derive their authority to punish from different sources.[51] Citing what was already stated in its prior opinions, the U.S. Supreme Court reaffirmed that states derive their power to prosecute those who violate their laws from what it called their "inherent sovereignty" which it characterized as follows:

> States are not less sovereign vis-à-vis each other than with respect to the federal government. Their powers to initiate criminal proceedings are derived from separate and independent sources of power and authority that

[50] *Heath v. Alabama*, *supra*, at 88.

[51] *Id.*

> belonged to them before they were admitted into the Union and were preserved through the Tenth Amendment.[52]

We can see that the Court stated two reasons why it considers that states are sovereigns: they possessed an inherent sovereignty *before* they were admitted into the Union—which was preserved under the Tenth Amendment—and the distribution of powers between the states and the federal Government recognizes their sovereignty.[53] Since Georgia and Alabama are separate sovereigns, Alabama did not transgress the constitutional protections against double jeopardy when it prosecuted and sentenced Mr. Heath for the same offense to which he had pleaded guilty in Georgia. The Court held that Heath committed two separate murder offenses, because with one same act, he violated the laws of two sovereign states, violating the peace and dignity of each. In 1992, the State of Alabama executed Larry Gene Heath.[54]

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[52] *Id.* at 89.

[53] *Id.*, citing *Coyle v. Oklahoma*, 221 U.S. 559, 567 (1911). *See* Section VI of the Concurring Opinion, *infra.*

[54] Heath's death sentence was carried out on March 20, 1992. *See Alabama Executes Man Who Arranged his Wife's Murder*, The New York Times, published on March 21, 1992. Available at *http://www.nytimes.com/1992/03/21/us/alabama-executes-*

According to the U.S. Supreme Court, the states were sovereigns before they were admitted into the Union. However, its analysis regarding the sovereignty of states is inadequate from a historical standpoint as it completely ignores the process of incorporation and admission of territories as states of the Union. This process points in a very different direction.

The theory that the current state of the Union once had an "original" or "inherent" sovereignty could only be true with respect to the first states who achieved their independence from the British Empire before executing the Articles of Confederation. The states that created the Confederation committed themselves under their sovereign power and reserved for themselves all the powers not expressly delegated to the general government.[55] However, it is implausible to suggest that most of the other states that were incorporated into the Union ever enjoyed original or inherent sovereignty, since each

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man-who-arranged-his-wife-s-murder.html (last visit on February 12, 2015).

[55] A detailed account of the process through which the United States were created and developed is beyond the scope and purposes of this Opinion. Our objective is to analyze in general terms the process of colonization, incorporation and subsequent admission as federated states of the territories that the United States annexed in its process of expansion. We will thereby try to discover where such original or inherent sovereignty that the U.S. Supreme Court and the Majority of this Court attribute to the states of the Union lay, if it ever existed.

of these states' "sovereignty" originated at the time they were admitted into the Union.[56]

In the U.S. constitutional scheme, Congress has the power to admit new territories as states of the Union, pursuant to Article IV of the U.S. Constitution.[57] The law known as the Northwest Ordinance of 1787, the first of territorial laws that preceded the constitutions of many states, provided for the creation of a territorial civil government in three phases. In the last phase, the territory was allowed to draft a state constitution once the territory had reached a population and level of "Americanization" acceptable for Congress.[58]

The law forced territories to create a republican government, to protect the civil and religious freedoms of the inhabitants of the territory and to

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[56] Eric Biber, *The Price of Admission: Causes, Effects and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. L. History 119, 121-22 (2004).

[57] "New States may be admitted by the Congress into this Union." U.S. Const., Art. IV, Section 3, cl. 1.

[58] Biber, *supra*, at 135, citing Andrew R. L. Cayton, *The Northwest Ordinance from the Perspective of the Frontier*, in the book by Robert M. Taylor, Jr., *The Northwest Ordinance 1787: A Bicentennial Handbook*, 1987 Ed. To understand the original scheme of the law, *see Northwest Ordinance* of 1787, 1 Stat. 50-53. This Law of Congress replaced the *Northwest Ordinance* of 1784. After the ratification of the United States Constitution, the *Northwest Ordinance* of 1787 was reenacted by Congress with minor changes. *See* Biber, *supra*, at 134 n.39.

always maintain themselves in the Union, subject to the limits imposed by the U.S. Constitution and the rules of their organic law.[59] Under the language of the statute, the provisions containing the obligations imposed on the territory would be known as the "articles of compact" and these could never be altered unless the consent of both parties was obtained.[60] As we can see, there was no such "original sovereignty." The territories converted into states were not free to create a government with a constitution that corresponded to their absolute will. Instead, they had to adhere to the minimum demands imposed by the United States Congress and the United States Constitution. Based on the express language of the *Northwest Ordinance*, the obligations and commitments imposed on the inhabitants of the territory through this organic law did not disappear once federal statehood was attained. That is, not even after achieving statehood were these new states freed from the restrictions imposed by the "articles of

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[59] *Northwest Ordinance* of 1787, Section 14, Articles I-VI.

[60] "It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent." *Id.* Article VI of the "articles of compact" established in its last clause that the state constitution that the inhabitants of the territory were authorized to establish had to create a republican government that conformed to the articles of the "compact." As Fernós Isern would later reveal, this was the model that was used for Law 600. Trías Monge, *History*, Vol. 3, at 50.

compact" of the *Northwest Ordinance*. These would continue to apply to the new states, which were precluded from changing or repealing them.[61]

Although what was provided in the *Northwest Ordinance* of 1787 varied as the organic laws of the various territories were adopted, Congress used its main elements when it authorized the admission of several territories as states of the Union.[62] The process of admitting a new state began with Congress's approval of an enabling act or *"ley de bases"* as Trías Monge called it, establishing a procedure for the territory to hold a constitutional assembly, draft a state constitution and elect its representatives in Congress.[63] Then the state constitution was sent to Congress to review whether it met the conditions and restrictions imposed in the enabling act. If Congress understood that the state constitution met the requirements, it then issued a resolution simultaneously approving the constitution

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[61] *See* Biber, *supra*, at 132-35.

[62] *Id.* at 126 n.19.

[63] *Id*. at 127-28. These laws establish certain conditions that the territories had to meet before and even after being admitted through their adoption in the state constitutions or through "irrevocable ordinances" passed by the constitutional assemblies of the territories. *Id. See Ohio Enabling Act,* 2 Stat. 173; *Louisiana Enabling Act*, 2 Stat. 641 § 3 (1811); *Omnibus Enabling Act*, 25 Stat. 676 § 4 (1889). However, some states did not have an enabling act. Biber, *supra*, at 128 n.25.

and admitting the territory as a new state of the Union.[64]

The foregoing brief historical analysis allows us to draw two conclusions. First, the proclaimed original or inherent sovereignty of states of the Union does not exist, or at least it is very imprecise from a historical standpoint.[65] The reality is that an immense majority of territories had to go through a process of colonization and development of their territorial government before being admitted as states of the Union. In this process, the socio-cultural realities of the territories and U.S. politics played a determining role in deciding what conditions would be imposed and how long Congress's guardianship over the territory would last.[66] Therefore, the affirmation that an immense majority of the states of the Union had original or inherent sovereignty is only a juridical fiction that arises at the same time that the state is admitted into the Union.[67] Second, even after being admitted

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[64] *Id*. *See An Act for the Admission of the State of Louisiana*, 2 Stat. 701 (1812).

[65] *See* Biber, *supra*.

[66] *Id*. at 126. For example, California was admitted as a state of the Union almost immediately after the cession made by Mexico, while New Mexico had to wait about 60 years.

[67] The political nature of the United States government that the Majority's Opinion refers to, where sovereign power is distributed between distinguishable spheres of government—one general or federal and another local or state—does not

as states, they continue to be tied and bound by the conditions that Congress imposed unilaterally, so the U.S. Supreme Court attributes to them a sovereignty independent from that of the federal Government that is not absolute or unlimited.

It is clear that the theory of original or inherent sovereignty would only be applicable to the original thirteen states that obtained their independence from the British Empire before joining the Union. Therefore, the dual sovereignty doctrine cannot be based on the fact that the states had sovereignty before joining the Union. However, it is evident that states have independent authority to prescribe what would constitute an offense to their "sovereignty" and implement laws to punish such conduct.[68]

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change this historical reality or its implications for the dual sovereignty doctrine at all. Though this is, indeed, the political arrangement and system recognized in the country, it is still based on a juridical fiction.

[68] The Majority's Opinion, at 49, provides a brief account of the process that some of the states followed before being admitted into the Union. As explained therein, once Congress ratifies or modifies the territorial constitution, it decides whether or not it accepts the territory as a state of the Union in a subsequent process. It is asserted that "[t]hat phase of acceptance as a federated state has not occurred with Puerto Rico." *Id.* However, as we explained, the act by which Congress ratifies the constitution of a territory **is the very moment in which it is admitted** as a state of the Union, and not a subsequent act. *See* Biber, *supra*, at 128. It is true that Puerto Rico, under Law 600, was not admitted as a state of the Union, but this was due to the fact that said legislation never anticipated the admission of Puerto Rico as a state. The island

B

Indian Tribes and Congress's Plenary Power

The U.S. Supreme Court has held that the dual sovereignty doctrine allows a U.S. District Court to prosecute a member of a tribe for the same offense for which he was already tried in the courts of an Indian tribe.[69] Nevertheless, the manner in which the Court has applied this doctrine reveals the internal inconsistencies of the standard established to determine what entities may be considered sovereigns.

Although Indian tribes are physically located inside the U.S. territory and are subjected to the plenary powers of Congress, they are considered separate peoples that have the power to control their internal affairs and social relations.[70] The U.S. Supreme Court has held that Indian tribes have an inherent sovereignty that has not become extinguished, although their incorporation into the United States territory necessarily stripped them of certain sovereign attributes. Thus, Indian tribes have all the sovereign attributes that they have not

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did not, at the time, and still today, meet the criteria of assimilation and homogeneity that serve as justification for the enabling acts by which Congress usually admits new states. Biber, *supra*, at 120-21. Again, *e pluribus unum*.

[69] *U.S. v. Lara*, 541 U.S. 193 (2004); *U.S. v. Wheeler*, *supra*.

[70] *U.S. v. Wheeler*, *supra*, at 322, citing *U.S. v. Kagama*, 118 U.S. 375, 381-82 (1886).

lost through treaties or legislation, or as a necessary consequence of their status of dependence on the federal Government.[71]

The Supreme Court addressed the dual sovereignty doctrine in the context of Indian tribes in 1978, in *U.S. v. Wheeler*. A member of a Navajo Tribe was sentenced in tribal court for violating the penal code. One year later, a federal grand jury found cause to prosecute him in the U.S. District Court for the District of Arizona for the federal offense of statutory sexual assault. The defendant sought to dismiss of the indictment on the ground that the offense for which he had been sentenced by the Tribe was a lesser offense included in the federal offense. The federal court dismissed the indictment.

The U.S. Supreme Court overturned the dismissal and held that the dual sovereignty exception applies to Indian tribes, at least with respect to their authority to punish the members of their own tribe. After evaluating the dual sovereignty exception and the instances when it had upheld or invalidated its application, the U.S. Supreme Court concluded that the Navajo Tribe never waived its original sovereignty (primeval sovereignty) to punish offenses committed by members of their own tribe. Thus, "when the Navajo Tribe exercises its power, it does so as part of the

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[71] *Id.* at 322.

sovereignty it retained and not as an extension of the federal Government."[72]

In other words, the ultimate source of the tribe's power to prosecute is the "primeval" sovereignty that they possessed before they were conquered by the United States and not a delegation of authority by Congress. The fact that Congress regulates the manner and scope of the tribes' self-government does not mean that it is the source of such power.[73] Although the treaties between the tribes and the United States delegated the authority for the United States to punish members of the tribe that committed offenses against individuals, these did not eliminate the Tribe's jurisdiction to punish its own members.[74] The power to govern their internal affairs was not a delegation of authority by Congress either, because such delegation is not mentioned in the treaties or the laws.[75]

There is inherent tension between asserting that Indian tribes have sovereignty for purposes of the double jeopardy clause, while recognizing the plenary control that Congress still has over them. Although tribes are considered separate sovereigns for purposes of the dual sovereignty doctrine, by

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[72] *Id.* at 328. (Our translation).

[73] *Id.*

[74] *Id.* at 324.

[75] *Id.* at 326.

virtue of the U.S. Constitution, Congress has plenary powers to legislate over them.[76] Therefore, the sovereignty of a tribe to create and punish offenses is subject to the federal control that Congress can exercise unilaterally through legislation.[77]

The apparently paradoxical treatment given to the sovereignty of tribes did not take long to produce undesirable results. In *Wheeler*, the Supreme Court only acknowledged that when an Indian tribe punishes *its own members* it is exercising one of the powers inherent in their limited sovereignty that they never gave up. However, in *Duro v. Reina* the U.S. Supreme Court held that these vestiges of sovereignty did not authorize a tribe to prosecute members of other tribes, even if the offenses were committed within their territory.[78] In direct response to this decision, Congress legislated to recognize and affirm the inherent authority of a tribe to initiate criminal proceedings against an Indian who is not a member of the tribe.[79]

The U.S. Supreme Court analyzed this new statutory authority in the context of the dual sovereignty exception in *U.S. v. Lara*.[80] A member of

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[76] *U.S. v. Lara*, *supra*, at 200.

[77] *U.S. v. Wheeler*, *supra*, at 327.

[78] *Duro v. Reina*, 495 U.S. 676 (1990).

[79] 25 U.S.C. § 1301(2).

[80] *U.S. v. Lara*, *supra*.

another tribe who lived inside the territory of the Spirit Lake Tribe pleaded guilty to assault on a federal officer in tribal court. Subsequently, he was prosecuted in the U.S. District Court for the District of North Dakota for the same offense. Considering that Congress legislated to overturn the outcome of *Duro v. Reina*, in evaluating whether the federal accusation constituted a violation of the protection against double jeopardy, the U.S. Supreme Court framed the controversy to the following: What was the ultimate source of the Tribe's authority to punish Indians from other tribes, its original sovereignty or a federal delegation of authority?[81]

The statutory language of the law examined in *Lara* was carefully drafted so that it was in keeping with the rule established in *Wheeler*. The legislative history demonstrated that the statute did not delegate to the tribes jurisdiction over more individuals. Instead it recognized and affirmed that the power of tribes to punish members of other tribes insider their territory is one of the powers that tribes did not cede to the federal Government. By virtue of this statement of legislative intent, the U.S. Supreme Court concluded that the law was not a delegation of authority by Congress, but instead a valid acknowledgement of the tribe's inherent sovereignty, which can be modified pursuant to the

[81] *Id.* at 199.

plenary powers of Congress.[82] That is, since the legislative intent was to recognize the inherent sovereignty of tribes, the law that authorizes tribes to prosecute Indians who are not members of that tribe was not a delegation of power by Congress, but rather a valid exercise of Congress's authority to alter the restrictions that political branches had imposed on the punitive power of tribes.[83]

C

Subject to the Will of the Sovereign: Territories and Cities.

Federal courts have recognized very limited exceptions to the dual sovereignty doctrine.[84] The most important exception—on which the Majority bases its reasoning today—occurs when the criminal

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[82] *Id.* at 209. In fact, in 2013, Congress granted criminal jurisdiction to tribes over individuals who are not members of any tribe. Zachary S. Price, *Dividing Sovereignty in Tribal & Territorial Criminal Jurisdiction*, 117 Col. L. Rev. 657, 668, n.40 (2013). Violence Against Women Reauthorization Act of 2013 (VAWA), Pub. L. No. 113-4, tit. IX, sec. 904.

[83] *Id.* at 199.

[84] With respect to the sovereignty of cities vis-à-vis the state they belong to, the Supreme Court has expressed that: "[a]ny power it has to define and punish crimes exists only because such power has been granted by the State, the power 'derive[s] … from the source of [its] creation … the judicial power to try petitioner … in municipal court springs from the same organic law that created the state court of general jurisdiction.'" *Waller v. State of Florida*, 397 U.S. 387 (1970).

proceedings are initiated by the government of a territory of the United States and the federal Government. Since the government of a territory derives its powers from Congress, its territorial courts are nothing but an extension of such authority, so that both entities exercise the punitive power of the same sovereign, and the protections of the Fifth Amendment prevents both of them from prosecuting an individual for the same offense.[85]

The U.S. Supreme Court established that territories were not sovereigns separate from the federal Government fifteen years before it articulated the dual sovereignty doctrine in *Lanza, supra*. In *Grafton v. U.S.*, decided in 1907, a U.S. soldier was acquitted of murder in military court, but was later found guilty of the same offense by a territorial court in the Philippines. The U.S. Supreme Court reasoned that the government of the Philippines owed its existence absolutely to the will of the United States. That is, the legitimacy of the government of the Philippines depended on the jurisdiction and authority that the United States had over the archipelago, and both courts—military and territorial—exercised their powers under the authority of the same sovereign, the United States.[86] Therefore it overturned the conviction entered by the court of the territory of the Philippines because the

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[85] *Grafton v. U.S.*, 206 U.S. 333, 354 (1907).

[86] *Id.* at 354-55.

Fifth Amendment prevented the defendant from being tried twice for the same offense.[87]

In 1907, the Philippines were a U.S. territory obtained as a result of the war with Spain in 1898. At the time, the Philippines had a civil government created by virtue of the Organic Law of the Philippines of 1902, also known as the Cooper Act.[88] The Cooper Act was a congressional statute that granted a civil government to the recently annexed country and authorized it to elect a legislative assembly once all armed rebellion against the United States had ceased.[89] However, although this organic law gave the territorial legislative assembly limited legislative powers, the Congress reserved its power to unconditionally veto and annul any legislation with which it did not agree.[90] We should not be surprised then that the U.S. Supreme Court found that laws passed by the Philippine legislative assembly by virtue of the Cooper Act were in reality a power delegated by Congress, which was the source of the authority to adopt them and which retained the last word to authorize or annul them.

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[87] *Id.* at 352.

[88] 32 Stat 691.

[89] Organic Law of the Philippines, *supra*, Section 7.

[90] *Id.*, Section 86. The statute established that "all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same." *Id.*

As we will see below, the Foraker Act of April 12, 1900, that instituted in Puerto Rico a civil government strongly subjected to the guardianship of the United States government, contained a similar provision that preserved Congress's veto power on the territorial legislature.[91] Therefore, since the territorial law—whether that enacted by the Philippines under the Cooper Act or that enacted by Puerto Rico under the Foraker Act or the Jones Act—was in reality an expression of Congress's authority, judicial proceedings in federal court or territorial court were carried out in accordance with the authority of the same sovereign, the federal Government.

It is in this historical context that we must analyze the case of *People of Porto Rico v. Shell Co.,* where the U.S. Supreme Court, in dictum, reaffirmed what was already stated in *Grafton* to the effect that the dual sovereignty doctrine does not apply in territories.[92] In *Shell Co.*, the U.S. Supreme Court analyzed the power that Puerto Rico's territorial Legislative Assembly had to pass antitrust and

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[91] 31 Stat. 77. *See* Trías Monge, *Las penas* [*The Hardships*], at 61 *et seq*. "Provided, however, that any law decreed by the Legislative Assembly shall be reported to the United States Congress, which hereby reserves the power and authority to annul the same if it deems this convenient." 1 P.R. Laws Ann., at 43. The Jones Act of 1917, which replaced the Foraker Act to provide a civil government to Puerto Rico, maintained this provision in Section 34.

[92] *People of Porto Rico v. Shell Co.*, 302 U.S. 253 (1937).

unfair competition laws, a field that was governed by the *Sherman Anti-Trust Act* of 1890.[93] The Court decided that Congress's exercise of its power to regulate commerce did not bar other initiatives on the part of States or territories regarding the same topic.

In its analysis, the U.S. Supreme Court expressed that the authorization that Section 32 of the Foraker Act, *supra,* gave the insular legislature to legislate on internal affairs included the power to create laws to penalize conspiracies to restrain commerce. Since that was not in doubt, the question was whether the territorial law and the federal law could coexist.[94] In its explanation, the U.S. Supreme Court expressed that the design of the territorial government, both in continental territories and in Puerto Rico, was devised to grant the inhabitants of the territory as many powers of self-government to deal with local affairs as were compatible with the supremacy and supervision of the federal Government, in addition to certain fundamental principles established by Congress.[95] There being no doubt that the local antitrust law and the Sherman Act could coexist, and

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[93] 15 U.S.C.A. §§ 1-7. On March 14, 1907, Puerto Rico's Legislature, constituted under the very limited powers of self-government that the Foraker Act granted, enacted a territorial law with a scope of action and application equal to that of the Sherman Act.

[94] *People of Porto Rico v. Shell Co., supra*, at 261.

[95] *Id*. at 260.

that preventing illegal contracts that could affect the economy from being executed was a legitimate local interest on which the territorial legislature could legislate, the U.S. Supreme Court held that the local law was valid. Once this was held, the U.S. Supreme Court expressed, in dictum, what had already been stated in *Grafton*, *supra,* that since the legislation and federal and territorial courts were created by the same sovereign—Congress—prosecution in one court with competence under the laws of either of these would, necessarily, bar prosecution under the other legislation or in the other court.[96]

In the context of *Foraker* and *Jones* organic laws, which limited the island's government and placed it practically under the control of American officials and under the strict supervision and control of Congress, it was natural to conclude that the same logic stated in *Grafton* would apply. Under the organic laws, our insular legislature's authority to legislate was clearly a delegation of powers by Congress, which had the power to veto or annul Puerto Rico's antitrust law that was in dispute in *Shell Co.* Congress stated its intent not to veto the Puerto Rican law and to allow it to be enacted and remain in effect.[97]

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[96] *Id*. at 264.

[97] This view is clearly expressed in the last paragraph of *Shell Co.*: "It is hard to see why a conflict as to which law shall be enforced and which jurisdiction shall be invoked should ever arise, since the officers charged with the administration and

In analyzing the position of the U.S. Supreme Court regarding the relationship between territories and Congress for purposes of the dual sovereignty doctrine, we have seen that when it has been denied that two sovereigns exist, the determining factor has been the lack of independence to determine what conduct constituted an offense, since the legitimacy of the territorial government and the legislation it passes depends necessarily on the powers that Congress delegated to it.[98] Clearly, the lack of authority to define criminal conduct independently is what prevented the Philippines from being considered a sovereign separate from the federal Government, since its territorial legislation could be annulled or vetoed unilaterally by Congress, which also intervened in the appointment of its principal executive officers. This very lack of independent legislative jurisdiction, not the territorial status of Puerto Rico, is what explains the Supreme Court's dictum in *Shell Co., supra*.

The historical adaptation of what was held in *Shell Co.* and the statement of sovereignty of the

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enforcement of both acts are, in the last analysis, under the control of the same sovereignty and, it well may be assumed, will work in harmony." *Id*. at 271. There is no doubt in our mind that when *Shell* was resolved in 1937, and pursuant to the doctrine expressed in *Grafton,* the understanding was that the Puerto Rican government's authority stemmed exclusively from the sovereignty that the United States exercised over the island.

[98] *Grafton v. U.S.*, *supra*, at 352.

People of Puerto Rico established throughout our Constitution of 1952 cast doubt upon the legal grounds that led the U.S. Supreme Court to express that Puerto Rico does not possess sovereignty of its own, for purposes of the dual sovereignty doctrine.[99]

D

In summary, let us attempt to give a principled description of the concept of sovereignty for purposes of the protection against double jeopardy laid down in the Fifth Amendment, as articulated in U.S. Supreme Court case law.

As we have seen, the true sovereign both for states of the Union and for the federal Government is the People of the United States. However, it is a fundamental and unquestionable principle that for internal affairs, States and the federal Government are separate sovereigns, and therefore an analysis into the ultimate source of power must be confined to the limits imposed by U.S. federalism.

The tensions inherent by American federalism underscore that the states and the federal Government are not only distinct sovereigns, but also that they are different types of sovereigns. The federal Government is a government with enumerated powers and its scope of action is limited

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[99] *See also Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, *infra*. [Due to the change that occurred in the relationship between Puerto Rico and the United States, Section 3 of the Sherman Act no longer applies to Puerto Rico because it ceased to be a U.S. territory.]

to what is authorized under the Constitution. On the other hand, states have all the powers that were not delegated to the federal Government. This distribution of powers between the two principal political entities in the United States has fluctuated over the years, and today, they both exercise powers very different from those envisaged when the U.S. Constitution was drafted.[100] The same is true for Indian tribes, as they also possess a sovereignty qualitatively different from that of states and the federal Government. Tribes, as we explained above, are subjected to the plenary powers of Congress, yet they are still separate sovereigns for purposes of the prohibition against double jeopardy.

To that effect, sovereignty does not have to be permanent, as we have seen that the sovereignty of tribes can be broadened, restricted, created or extinguished unilaterally by Congress. Nor does it have to be absolute, as it can be subjected to the plenary powers of Congress, as in the case of tribes, or to the limits imposed by the United States Constitution on states and the federal government. Nor does it have to precede the existence of the United States, because even though the tribes and the thirteen colonies had prior sovereignty, states subsequently incorporated into the Union did not.

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[100] *See, e.g.*, the expansion of federal power through the interpretation of the commerce clause. José J. Álvarez González, *op. cit.*, at 5-6.

Moreover, if we look at the instances in which the Court has found that there was not sovereignty from a different source, we see that territories lack independent authority to create and punish offenses, as they are not only subjected to the plenary powers of Congress, but Congress can also veto local legislation and even adopt a local penal code that exceeds the enumerated powers of Congress.

It is against the foregoing backdrop that we must analyze whether the Commonwealth of Puerto Rico is a sovereign for purposes of the dual sovereignty doctrine. That is, we must examine whether Puerto Rico has sufficient authority independent from that of the federal Government to define and punish offenses autonomously.

IV

We do not intend to perform an exhaustive analysis of the more-than-a-century old juridical and political relationship between Puerto Rico and the United States, as that is not our objective. [101] Yet we

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[101] With regard to the topic of the historical, political and juridical relationship between both countries, *see* José Trías Monge, *Historia Constitucional de Puerto Rico* [*Constitutional History of Puerto Rico*], UPR Publishing, 1st Edition, 1980 (hereinafter, Trías Monge, *History*); José Trías Monge, *Puerto Rico: Las penas de la colonia más antigua del mundo* [*The Hardships of the Oldest Colony in the World*], UPR Publishing, 1st Edition, 1999 (hereinafter, Trías Monge, *The Hardships*); José Julián Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales con Estados Unidos* [*Constitutional Law of Puerto Rio and Constitutional Relations with the United States*], TEMIS Publishing (2009).

need to briefly discuss that history to understand the context in which that relationship developed.

A

Annexation to the United States

The United States annexed Puerto Rico as a result of its brief war against Spain from April to August 1898. After the armistice between these two countries, the signature of the Treaty of Paris on December 10, 1898, sealed Puerto Rico's fate as an indefinite overseas possession of the United States.[102] The fact that the United States could acquire new territories by means of post-war cessions was nothing new, because in 1828, the United States Supreme Court had held that the constitutional power to declare war and formalize treaties implied the power to acquire territory by either of these means.[103]

When the United States acquired Puerto Rico as a territory in 1898, the general understanding was that annexed territories would be incorporated

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[102] *See* Trías Monge, *History*, *op cit*. Vol 1, at 146-58. Article II of the Treaty of Paris established that: "Spain hereby cedes to the United States the Island of Puerto Rico and the islands that are currently under its sovereignty…," and in the last paragraph of Article IX that "[t]he civil rights and political status of the natural inhabitants of the territories hereby ceded… shall be determined by Congress." Treaty of Paris, 1 LPRA, Historical Documents, Articles II and IX.

[103] *American Ins. Co. v. One Hundred Bales of Cotton*, 1 Peters 511 (1828).

immediately and then admitted as states of the Union.[104] Although the United States eventually annexed as states all the territories that it acquired before 1898, the territories acquired in the Treaty of Paris would have a different future.

The continuity of the continental territory facilitated the United States' process of expansion from the very beginning. This allowed the homogenization or "Americanization" of the territories that would eventually be admitted as states of the Union. Likewise, the conditions imposed on the territories were part of Congress's strategy to assimilate the society and government of the territory to the rest of American society.[105] This public policy proved to be effective, because the territories acquired before 1898 were mainly contiguous and scarcely settled, allowing U.S. colonizers to quickly populate them.[106]

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[104] *Downes v. Bidwell*, 182 U.S. 244 (1901), Concurring Op. of Justice White, pages 299-300 and 311-12. Before 1898, the United States had annexed territories through treaties that expressly provided for the incorporation of the territory: Louisiana (France, 1803); Florida (Spain, 1819); Oregon (British Empire, 1846); New Mexico, California, Colorado, Nevada, Utah and part of Arizona (Mexico, 1848); parts of New Mexico and Arizona (Mexico, 1853); and Alaska (Russia, 1857). José López Baralt, *The Policy of the United States Towards its Territories with special reference to Puerto Rico*, at 11 n.21 (1999).

[105] Biber, *supra*, at 132.

[106] López Baralt, *op. cit.*, at 86-87. (Our translation).

In addition, at the end of the Nineteenth Century and beginning of the Twentieth, the European nations had embarked on a journey to expand, conquering territories and creating colonial empires both in Africa and in Asia and the Pacific. At the time it was understood that the United States could not participate in this colonial expansion or forge its own empire if it did not have the flexibility to annex territories without this necessarily implying their incorporation.[107]

The territories acquired at that time were different form the ones previously annexed, because they had their own culture and idiosyncrasy. That is why the United States did not want to annex them as states of the Union.[108] The U.S. Supreme Court would then have to justify the United States' exercise of sovereignty over a territory without it later becoming a state of the Union, with the mutual rights and obligations that this implied. That is, it had to justify the existence of colonies within the legal and political code of the United States, a nation

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[107] Trías Monge, *The Hardships*, at 31-32.

[108] In his book, López Baralt explains that this was due to the fact that as opposed to the territories acquired by the United States before 1898, the territories acquired after 1898 "were outside the continent, and were populated by people of a different race, language and culture… There was no way they could be colonized by Americans. Under these conditions, you could hardly expect the United States to maintain its previous policy of incorporation." López Baralt, *op. cit.*, at 6-87. (Our translation).

forged by colonies who fought against the tyranny of the British Empire to defend their rights and freedoms and achieve their independence. It eventually articulated this justification, the theory of territorial incorporation, in the decisions known today as the Insular Cases.[109]

The first expression of the doctrine of territorial incorporation occurred in the concurring opinion of Justice White in *Downes v. Bidwell*, which was later adopted unanimously in *Balzac v. People of Porto Rico*. After providing a historical account of all the treaties through which the United States had annexed and incorporated territories before 1898, Justice White concludes that ever since the beginning of the United States' constitutional history, political powers understood that the incorporation of territories would not be automatic, and that the provisions of each of the treaties in question had to be followed.[110] In his analysis of the Treaty of Paris, Justice White found no language

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[109] Much has been written about the racist imperialistic tones of the Insular Cases and the social, cultural and historical context in which they were decided. *See, e.g.*, Efrén Rivera Ramos, *American Colonialism in Puerto Rico: The Judicial and Social Legacy* (2007); Cristina Duffy Burnett *et al.*, *Foreign in a Domestic Sense* (2001).

[110] *Downes v. Bidwell*, *supra*, at 319. Subsequently, the majority opinion in *Balzac* applied the same analysis.

that would indicate that Congress intended to incorporate the acquired territories.[111]

Under the theory of incorporation, territories annexed by the United States are divided into two categories: incorporated and unincorporated.[112] The inhabitants of a territory in the first category would have all the rights and privileges guaranteed by the U.S. Constitution and would be destined to eventually enter into the Union as another state. Those in the second category would belong to the United States as a possession, and their inhabitants would only have the constitutional rights that were considered fundamental, without any promise of future incorporation or statehood, and Congress could even relinquish its sovereignty over these. In order to incorporate a territory, Congress must expressly consent to the incorporation. If this intent, which cannot be inferred, is not expressly affirmed, the territory is considered unincorporated.[113]

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[111] *Id.* at 340. Associate Justice White was referring to the stipulations of the Treaty of Paris found in Articles II and IX of the Treaty. *See Downes v. Bidwell*, *supra*, at 318-19.

[112] *See Downes v. Bidwell*, *supra*, at 341-42. *See also* Trías Monge, *The Hardships*, at 56; López Baralt, *op. cit.*, at 298; and Christina Duffy Burnett and Adriel I. Cepeda Derieux, *Los casos insulares: Doctrina Desanexionista* [*The Insular Cases: The Anti-Annexation Doctrine*], 78 UPR L. Rev. 661 (2009).

[113] According to the U.S. Supreme Court, this was due to the fact that before 1898, the difference between incorporated and unincorporated territories was not important, therefore

Evidently, the racial and cultural differences of the Puerto Rican people, and the imperialistic ambitions of the time, were the elements that produced the Insular Cases and are the basis of the colonial politics that the United States established for Puerto Rico.[114] We cannot ignore these political considerations when discussing the creation of the Commonwealth of Puerto Rico and its implications for purposes of the dual sovereignty doctrine.

"[b]efore that, **the purpose of Congress might well be a matter of mere inference from various legislative acts,** but in these latter days, **incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view."** *Balzac v. People of Puerto Rico*, *supra*, at 306. (emphasis added).

[114] Clearly, the reasons the Supreme Court had to draw up the doctrine of incorporation were political and not legal. This was demonstrated when the Court distinguished Puerto Rico's case from Alaska's:

> "It is true that in the absence of other and countervailing evidence, a law of Congress…, declaring an intention to confer political and civil rights on the inhabitants…, may be properly interpreted to mean an incorporation of it into the Union. … But Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States."

Balzac v. People of P[ue]rto Rico, *supra*, at 309. *See also* López Baralt, *op. cit.*, at 296.

B

Immediate Antecedents of Law 600 and the Debate on Puerto Rico's Constitution

When it became a territory of the United States, Puerto Rico was governed by a military government and later by a civil government of limited powers.[115] In 1917, Congress enacted the Jones Act, altering the territorial government to increase the insular government's degree of autonomy. However, Congress maintained the government of Puerto Rico under federal control, appointing its Governor and reserving its right to veto or annul local legislation and legislate directly on the subject matter.[116]

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[115] Foraker Act. *See* Trías, *History*, Vol. 2, at 102.

[116] The *Jones Act* created a territorial government for the island with a Governor appointed by the President with the advice and consent of the U.S. Senate; seven insular departments, of which two of their executives, the Commissioner of Education and the General Advocate, would be appointed by the President with the advice and consent of the U.S. Senate until 1947, and an insular legislature, with a House of Representatives and a Senate whose members would be elected by qualified voters of Puerto Rico. All the local legislative powers fell upon the Legislative Assembly of Puerto Rico, except for those specifically laid down by Congress by law. *See* Trías Monge, *History, op. cit.*, Vol. 2, at 93. The legislation considerably strengthened the powers of the Governor, who was appointed by the federal Government, increasing the power and influence of the Federal Bureau of Insular Affairs and the Department of Defense on the insular government, as they oversaw his work directly. *Id.* at 92. Furthermore, under the

Therefore, when the U.S. Supreme Court addressed Puerto Rico's sovereignty and the dual sovereignty doctrine in *Shell Co., supra*, the federal Government supervised and exercised strict control over the internal affairs of Puerto Rico. As in the case of the Philippines in *Grafton, supra*, under the regime of the *Jones Act*, the government of Puerto Rico was clearly an extension of Congress's authority, as Congress was its ultimate and unappealable legislator, even over internal affairs, with complete prescriptive and legislative jurisdiction over the island.

Law 600 also arose in a context very different from that of the prior organic laws that the United States had enacted for its territories. At the end of World War II, in 1945, the Charter of the United Nations was adopted to establish a new international organization to promote peace and security after the failure of the former League of Nations.[117] Article 73 of the Charter laid down the then new international

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Jones Act, once the session of Puerto Rico's Legislative Assembly had ended, the Governor of Puerto Rico had the obligation to send all legislation passed by the Assembly to the government of the United States, which, in turn, transmitted it to Congress. *Jones Act, supra*, Art. 23. Congress could simply annul or veto it and directly legislate on the subject matter. *Id.*, Art. 34. *See* Trías Monge, *History, op. cit.*, Vol. 2, at 100.

[117] United Nations, Charter of the United Nations, October 24, 1945, 1 UNTS XVI, available at: *http://www.un.org/es/documents/charter/* (last visited on January 22, 2015).

rule against the absolute power of a nation over the government of other people or territories that have not yet "attained a full measure of self-government."[118] Said article imposed on colonizing countries the duty to protect the culture of the peoples concerned and to promote their developing self-government as soon as possible.[119]

There is no doubt that the foregoing international rule applies to the case of Puerto Rico: our archipelago is a Caribbean nation from a sociological-cultural standpoint, possessing all the attributes of a distinct culture, with a language and idiosyncrasies of our own that differentiate us from any other nation.[120] That is why Article 73 of the Charter of

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[118] Article 73, Chapter XI, Charter of the United Nations, *supra*.

[119] The right of self-determination of the people was later ratified by resolutions 1514 (XV) and 1541 (XV). G.A. Res. 1514 (XV), of December 14, 1960; G.A. Res. 1541 (XV), of December 15, 1960. *See* José J. Álvarez González, *Law, Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 L. and Inequality 359, 384, n.114-15 (1999).

[120] According to Trías Monge, by the end of the Nineteenth Century, Puerto Rico had a well-defined national identity and a profound sentiment for its own culture. Trías Monge, *The Hardships*, at 19-20. According to Professor Álvarez González, "[u]nder any reasonable definition, Puerto Rico is a nation, with a separate culture, a distinct personality and a characteristic language … [t]he concept of nationality is cultural and sociological." Álvarez González, *The Great State*, *supra*, at 383, 385. The Puerto Rico Supreme Court has made statements reiterating Puerto Rico's status as a nation. *See Ramírez de*

the United Nations, and Resolutions 1514 (XV) and 1541(XV) apply, for example, to Puerto Rico and the Mariana Islands, and not to Florida or Oregon. The last times that the United States Congress has attempted to fully deal with the political status of Puerto Rico, it has expressly recognized its right to self-determination pursuant to international law[121] and the Decolonization Committee of the United Nations has exercised jurisdiction over Puerto Rico's case since 1973.[122]

With this background, we proceed to examine the passing of Public Law 600 in 1950 and the creation of the Constitution of the Commonwealth of Puerto Rico. The nature and purpose of Law 600 went beyond the organic laws that preceded it, the

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Ferrer v. Marí Brás, *infra*, Concurring Opinion of Chief Justice Hernández Denton, at 253. [Such citizenship of Puerto Rico was originally conferred by the U.S. Congress in response to the obvious fact that the Puerto Rican peoples were a people with customs, habits and traditions different from those of the American peoples. That is, the citizenship of Puerto Rico is the legal expression of a sociological fact: Puerto Rico is in the eyes of the world, a nation.] *See also* the expressions of Associate Justice Negrón García in *De Paz Lisk v. Aponte Roque*, 124 P.R. Dec. 472, 507 (1989).

[121] Álvarez González, *The Great State, supra*, at 382. *See also* S. 712, 101st Cong. (1990) [The United States of America recognizes the principle of self-determination and other applicable principles of international law with respect to Puerto Rico]; and H.R. 856, 105th Cong. (1998), cited in Álvarez González, *The Great State*, *supra*, at 382, n.111.

[122] Trías Monge, *The Hardships, op. cit.*, at 175-76.

Foraker Act and the Jones Act. Evidently, the purpose was not to create another organic law for Puerto Rico. This was a piece of legislation that sought to satisfy the demands presented for many years by all the political forces on the island and that still had not been satisfied.

Public Law 600 authorized the People of Puerto Rico to elect delegates for a Constitutional Assembly that was to draft a constitution that would establish a republican government and include a bill of rights.[123] According to the very terms of Law 600, it was established in view of the acknowledgement of the "principle of government by consent of the governors" and as a "compact."[124] In that sense, Law 600 was a mechanism similar to the one that Congress used to authorize incorporated territories to create their own constitution and annex them as states of the Union.

With the passing of Law 600, the U.S. Congress and Government lost complete and effective control to administer the internal affairs of the island, and these were left exclusively in the hands of Puerto Ricans and subject only to what is provided in the U.S. Constitution, Law 600, the Federal Relations Act and the Constitution of Puerto Rico.[125] That is,

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[123] Law 600, 64 Stat. 314, art. 2.

[124] *Id.*, Art. 1.

[125] Once Puerto Rico's constitution took effect, several articles of the Jones Act became the "Federal Relations with

the Constitution of Puerto Rico would be limited to the conditions imposed by Congress unilaterally, in a manner similar to when incorporated territories enact their constitutions, pursuant to the limits imposed by their "enabling acts."

Having contextualized the environment in which Law 600, *supra*, was legislated and authorized and cognizant of both the nature of the United States' colonial politics regarding its territories and the real reasons for implementing them, we are in a better position to understand what happened between 1950-1952. The Opinion issued today by the Court places great emphasis on the expressions made both by Puerto Rico's representatives and the members of Congress who participated in the debate to pass Law 600 and the Constitution of the Commonwealth of Puerto Rico.[126] Clearly, if we analyze these expressions outside the context in which they were made, we can easily arrive at the conclusion that Puerto Rico did not alter its status as a territory completely subordinated to the will of Congress. However, the objective of the expressions made by

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Puerto Rico Act." Id, Art. 4. However, Articles 12, 23 and 34 of the Jones Act, *Id.*, Article 5, were automatically repealed. When Article 34 was repealed, Congress's power to annul local laws was eliminated. It would be illogical to think that Congress intended to retain all of its legislative power over Puerto Rico, which it had under the Jones Act, when at the same time it was repealing the legal framework that allowed it to do so expressly.

[126] Maj. Op. at 41-45.

U.S. congressmen during the debates in Congress was to prevent Law 600 from being interpreted as an incorporation of the territory of Puerto Rico, because that would imply that eventually Puerto Rico would have to be admitted as a state of the Union. As we will see, the creation of the Commonwealth of Puerto Rico was not the futile and insignificant exercise that the detractors of the current model of government insist it represented.

According to the positive reports of the Senate and Congress, focused on the specific language of *Balzac* and the territorial incorporation doctrine, the new Law 600 could by no means be interpreted as a law that incorporated Puerto Rico into the United States, but at the same time it clearly states that it is intended to grant Puerto Rico as much power as possible over its internal affairs. When it adopted its Constitution, Puerto Rico would have complete legislative authority, becoming the sole and ultimate legislator of its internal affairs. Such was the understanding demonstrated by the debate held in Congress when Law 600 was passed.

C

The new constitution was drafted between September 17, 1951, and February 6, 1952, when it was passed by 81 of the 92 delegates of the Constitutional Convention.[127] President Truman's

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[127] *Id.* at 145-46. Puerto Rican voters ratified the new constitution on March 3, 1952. On March 12, 1952, it was sent

statement in his letter sending the new constitution to Congress leave no room for doubt as to the new authority attained by Puerto Rico: "When passed, [the constitution] vests in the people of Puerto Rico complete authority and responsibility for local self-government."[128] When the new constitution was ratified by Congress, it was reiterated that the political relations between Puerto Rico and the United States remained unaltered. In the process, Congress demanded that Section 20 of the new constitution be eliminated and that the provision regarding mandatory education be clarified.[129] These conditions were approved by the Constitutional Convention on behalf of the People of Puerto Rico; and on July 25, 1952, the Constitution of the Commonwealth of Puerto Rico took effect.

As we have noted from the outset, it is not our purpose to definitively establish the meaning of the process that the Puerto Rican People and the U.S. Congress carried out during the 1950's. Nor is the resolution of that controversy incumbent on us.[130]

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to President Truman for him to, in turn, transmit it to Congress, which was done on April 22, 1952.

[128] *Id.* at 146.

[129] *Id.* at 148-49.

[130] As this Court held in *Ramírez de Ferrer v. Marí Brás*, "[t]he matter of whether the relationship between Puerto Rico and the United States ceased to be of a colonial nature under the Commonwealth, is clearly not for us to resolve. This is

However, the drafting and ratification of our Constitution by the People of Puerto Rico was not a marginal and insignificant event, as the Majority insists, basing itself on an unreal and obsolete definition of sovereignty. With the passing of the Constitution of 1952, Puerto Rico demanded and obtained sovereignty over its internal affairs. Nothing in the legislative history of the passing of Law 600 and the Constitution of the Commonwealth by Congress suggests that Puerto Rico did not attain sufficient sovereignty for purposes of the dual sovereignty doctrine.[131]

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mainly up to the political sphere." *Ramírez de Ferrer v. Marí Brás*, *supra*, at 192.

[131] To the contrary, the legislative history demonstrates that what concerned the congressmen was that Law 600 should not be interpreted as an incorporation of Puerto Rico to the United States, with the mandatory promise of admission as a state that this would entail. In fact, even the expressions made during the ratification hearings for the Commonwealth's Constitution held in the U.S. Senate go against this theory. The words of congressman Lloyd M. Bentsen, member of the House of Representatives' Committee that reviewed the Commonwealth's Constitution, answering Congressman Meader, who asked him if with the passing of the constitution "Congress … would have made an irrevocable delegation of authority to Puerto Rico, similar to that granted when we admit a State into the Union," show the scope of sovereignty that the bill conferred on Puerto Rico. Bentsen answered, "Yes. In my interpretation, I think we are doing that. I think that is what we should be doing for Puerto Rico, because I think they have shown a great deal of economic and political progress. I see no reason why we should treat them as a vassal or serf." Trías Monge, *History, op. cit.*, Vol. 3, at 292. Another sign of the level

After Puerto Rico's constitution was passed, the Commonwealth of Puerto Rico's ultimate source of power and authority to create and punish crimes has been the People of Puerto Rico.

Of course, this sovereignty is not absolute, nor is that of the federal Government, the states of the Union, the tribes or the rest of the political communities in the United States' federal system. The fact that Puerto Rico can be subjected to the plenary power of Congress, even after the Constitution of the Commonwealth of Puerto Rico was passed, something the U.S. Supreme Court has never established and which, as we will see,is contrary to the interpretation made by the U.S. Court of Appeals for the First Circuit, does not prevent us from affirming, pursuant to the

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of internal authority or "sovereignty" that Congress intended to grant Puerto Rico by passing the Commonwealth's Constitution is found in the expressions of Frances Bolton, Congressman for Ohio, who participated in the process of passing the laws that led to the creation of the Commonwealth of Puerto Rico before the United Nations on November 3, 1953, during the process followed to discharge the United States form its obligation to submit reports about Puerto Rico under Article 73 of the Charter of the United Nations. Bolton expressed, "The nature of the relations established by compact between the people of Puerto Rico and the United States, far from preventing the existence of the Commonwealth as a fully self-governing entity, *gives the necessary guarantees for the untrammeled development and exercise of its political authority. The authority of the Commonwealth of Puerto Rico is not more limited than that of any State of the Union; in fact, in certain aspects it is much wider." See Ramírez de Ferrer v. Marí Brás, supra*, at 167.

responsibility delegated to us by the People, that Puerto Rico is a sovereign for purposes of the dual sovereignty exception.[132]

The fact that the autonomy and sovereignty of Puerto Rico over matters not governed by the U.S. Constitution is comparable to that of the states since the Constitution of the Commonwealth was passed means that Puerto Rico, just as the states, has absolute power to legislate on its internal affairs to the same extent as any state of the Union.[133] For this reason, it is important to briefly analyze how the federal courts and also this Supreme Court have interpreted the powers of Puerto Rico under its constitution.

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[132] As we already saw, in *U.S. v. Lara*, "Congress, with this Court's approval, has interpreted the Constitution's "plenary" grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *Lara*, *supra*, at 202. The U.S. Supreme Court went even further when it stated that the plenary power and control of Congress over Indian tribes was so broad that it could even terminate the existence of the tribes and then resuscitate them. *Id.* at 203. Certainly, if the "inherent" sovereignty of the states of the Union and of Indian tribes are comparable, this gives rise to serious doubts as to the meaning of "sovereignty" in the context of the protection against double jeopardy and the dual sovereignty exception.

[133] *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982), citing *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974) (Our translation).

V

During the first years after the Constitution of the Commonwealth took effect, the U.S. Supreme Court was silent about the new legal structure of the island.[134] For this reason, the first interpretations of the nature of the Commonwealth Constitution and the changes that it entailed in the relationship between Puerto Rico and the United States can be found in the decisions issued by the U.S. Court of Appeals for the First Circuit.

Federal Judge Salvador E. Casellas points out in his article, *Commonwealth Status and the Federal Courts*, that "since 1952, it has been a well-established legal rule in the First Circuit that, with the creation of the Commonwealth in 1952, Puerto Rico ceased to be a territory of the United States subject to the plenary powers of Congress as provided in the federal Constitution."[135] In fact, Puerto Rico's new political relationship with the United States was acknowledged at least eleven times by the federal District Court for Puerto Rico during the period between 1952 and 1970.[136] At the

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[134] Álvarez González, *Derecho Constitucional de Puerto Rico*, *supra*, at 473.

[135] Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 Rev. Jur. UPR 945, 954 (2011), "Since then, the authority exercised by the federal government emanates from the compact executed by and between the People of Puerto Rico and the United States Congress." *Id.* (Our translation).

[136] *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953); *Mora v. Mejías*, 115 F. Supp. 610 (D.P.R. 1953); *Consentino v. ILA*, 126

First Circuit level, it was established on four occasions prior to 1960 that Puerto Rico had reached, under the Commonwealth Constitution, a new political status whereby Congress no longer exercised plenary power over the island.[137]

A

The Decisions of the First Circuit

In *Mora v. Mejías*, the U.S. Court of Appeals for the First Circuit (hereinafter the First Circuit), addressed a controversy involving the unconstitutionality of a Puerto Rico law authorizing the Puerto Rico Secretary of Agriculture and Commerce to control the price of rice.[138] As part of the controversy, the First Circuit had to analyze whether Puerto Rico was a "state" for purposes of

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F. Supp. 420 (D.P.R. 1954); *Carrión v. González*, 125 F. Supp. 819 (D.P.R. 1954); *Mitchell v. Rubiom*, 139 F. Supp. 379 (D.P.R. 1956); *U.S. v. Figueroa-Ríos*, 140 F. Supp. 376 (D.P.R. 1956); *Alcoa Steamship Co. v. Pérez*, 295 F. Supp. 187 (D.P.R. 1968); *U.S. v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968); *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co.*, 303 F. Supp. 414 (D.P.R. 1969); *U.S. v. Feliciano-Grafals*, 309 F. Supp. 1292 (D.P.R. 1970); *Long v. Continental Casualty Co.*, 323 F. Supp. 1158 (D.P.R. 1970).

[137] *Mora v. Mejías*, 206, F.2d 377 (1st Cir. 1953); *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956); *Moreno Ríos v. U.S.*, 256 F.2d 68 (1st Cir. 1958) and *Sánchez v. U.S.*, 256 F.2d 73 (1st Cir. 1958).

[138] *Mora v. Mejías*, 206 F.2d 377, 379 (1st Cir. 1953). This decision is particularly important because it was subsequently cited with approval by the U.S. Supreme Court on two occasions.

section 2281, which seeks to avoid undue interference by the federal courts with the laws of a state, given that states are "sovereigns over matters not ruled by the Constitution."[139] If Puerto Rico was considered a state for purposes of said section, only a District Court made up of three judges could order the injunction requested by plaintiffs.

The First Circuit concluded that, under the Jones Act, section 2281 clearly did not apply to Puerto Rico, since the island was then a territory of the United States.[140] However, it held that Puerto Rico, organized after 1952 as a political entity under its own constitution established pursuant to the terms of the "compact" of Public Law 600, could be a "state" for purposes of section 2281.[141] The Opinion states that:

> [i]f the constitution of the Commonwealth of Puerto Rico is really a "constitution"—as the Congress says it is, 66 Stat. 327,—and not just another Organic Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution' of the United States and thus a 'State'

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[139] 28 U.S.C. § 2281. *Mora v. Mejías*, *supra*, at 387.

[140] *Id.* at 387.

[141] *Id.*

> within the policy of 28 U.S.C. § 2281 ….[142]

Although the opinion does not answer the question—believing that said controversy warranted the benefit of having the briefs of the parties—its text clearly suggests that it would have answered the question in the affirmative.[143]

Likewise, there is no question that the First Circuit believes that there was an important change in terms of Puerto Rico's authority over its internal matters as a result of the enactment of the Constitution of the Commonwealth.[144] The opinion

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[142] *Id.*

[143] "A serious argument could therefore be made that the Commonwealth of Puerto Rico is a State within the intendment and policy of 28 U.S.C. Sec. 2281." *Id.* at 387. Additionally, as we will see, the U.S. Supreme Court stated in *Rodríguez v. Popular Democratic Party* that "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution." *Id.* at 8.

[144] *U.S. v. Bonilla Romero*, 836 F.2d 39 n.2 (1st Cir. 1987). As we stated in *Ramírez de Ferrer v. Mari Brás*, after 1970 the federal District Court and the First Circuit reiterated time and again "the scope of government authority that belongs exclusively to the Commonwealth." *Ramírez de Ferrer v. Mari Brás*, *supra*, at 161. Among these cases are: *Sánchez v. U.S.*, 376 F. Supp. 239 (D.P.R. 1974); *García v. Friesecke*, 597 F.2d 284 (1st Cir. 1979); *First Fed. S. & L., Etc. v. Ruiz De Jesus*, 644 F.2d 910 (1st Cir. 1981); *Cordova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981); *Cintrón-García v. Romero Barceló*, 671 F.2d 1 (1st Cir. 1982); *Enrique Molina-Estrada v. Puerto Rico Hwy. Auth.*, 680 F.2d 841 (1st Cir. 1982); *U.S. v. Quiñones*, 758 F.2d 40 (1st Cir. 1985); *U.S. v. López*

of the First Circuit in *Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank* is particularly important to the case at hand since, as in *Shell Co.,* the application of the Sherman Act in Puerto Rico was in controversy. In his opinion, Judge Stephen Breyer, now Associate Justice of the U.S. Supreme Court, outlined the controversy in the following terms:

> The … question that this case presents is whether section 3 of the Sherman Act applies to Puerto Rico… The Supreme Court, in 1937, specifically held that section 3 applied to Puerto Rico. But, in 1951 Congress passed the Puerto Rican Federal Relations Act, 64 Stat. 319, ("FRA") pursuant to which Puerto Rico adopted its own Constitution. Does the coming into effect of the FRA and this Constitution mean that certain federal acts, such as the Sherman Act, which apply within territories but not within states, can no longer be given greater

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Andino, 831 F.2d 1164 (1st Cir. 1987); *Camacho v. Autoridad de Teléfonos de P.R.*, 868 F.2d 482 (1st Cir. 1989); *Romero v. U.S.*, 38 F.3d 1204 (Fed. Cir. 1994); *Reeser v. Crowley Towing & Transp. Co.,* 937 F. Supp. 144 (D.P.R. 1996); *U.S. v. Vega Figueroa*, 984 F. Supp. 71 (D.P.R. 1997).

> effect as applied to Puerto Rico than as applied to states of the Union?[145]

The First Circuit stated that the Federal Relations Act and the Constitution of the Commonwealth "had the intention of effecting significant changes in the relationship between Puerto Rico and the rest of the United States. [146] Without a doubt, prior to the adoption of these laws, Puerto Rico's relationship with the United States was closer to that of a Territory than of a State. [147] After a quick analysis of the process of passing and enacting the Constitution of the Commonwealth, the First Circuit reached the following conclusion:

> **In sum, Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth**. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, … As the Supreme Court has written, **"the purpose of Congress** in the 1950 and 1952 legislation **was to accord**

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[145] *Córdova & Simonpietri Ins. v. Chase Manhattan Bank*, *supra*, at 38.

[146] *Id.* at 39.

[147] *Id.* at 40. The Opinion mentions, as an example of the absolute power that Congress had over the territory, the fact that "Congress insisted that acts of the Puerto Rico Legislature be reported to it, retaining the power to disapprove them." *Id.* at 39.

> **to Puerto Rico the degree of autonomy and independence normally associated with a State of the Union."**[148]

As a result, after the enactment of the Federal Relations Act and of the Constitution of the Commonwealth, section 3 of the *Sherman Act* no longer applied to Puerto Rico.[149]

It is clear, then, that the rule established in the First Circuit is that with the enactment of the Puerto Rico Constitution, there was a significant change in terms of the internal authority of the island. In fact, just as acknowledged in the majority opinion, the First Circuit has already held that Puerto Rico is a sovereign for purposes of the doctrine of dual sovereignty.[150] Other federal courts of appeals,

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[148] *Id.* at 41 (emphasis added) (citation omitted).

[149] *Id*. at 44.

[150] Maj. Op. at 29. In *U.S. v. López Andino*, the First Circuit concluded the following: "The question before us, therefore, is whether Puerto Rico and the United States are "two sovereigns" for purposes of double jeopardy. Two entities [that prosecute a citizen] are understood to be separate for purposes of [the protection] against double jeopardy when they derive their power from different sources. [Citations omitted]. It has been well-established [by caselaw] that when the states enact their own criminal laws, they act pursuant to their own sovereign power, [and] not that of the national government. [Citation omitted]. The status of Puerto Rico is not that of a state of the federal Union, but its criminal laws, like those of the states, emanate from [a] source different from the federal Government." *López Andino*, *supra*, at 1167-68. (Our translation). *López Andino* is just one more in the list of cases

particularly the Court of Appeals for the Third Circuit and the Court of Appeals for the Federal Circuit, have followed the rule established by the line of cases of the First Circuit.[151] For this reason, the decision of the Court of Appeals for the Eleventh Circuit in *U.S. v. Sánchez*, which is given so much weight by the Majority Opinion, is no more than an isolated exception the well-established rule that Puerto Rico is as sovereign as the states in matters that are not controlled by the federal Constitution.[152]

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of the First Circuit that have recognized to the Commonwealth an authority equal to that of the states of the Union for many purposes.

[151] "Puerto Rico possesses a measure of autonomy comparable to that possessed by the States"; and "Congress maintains similar powers over Puerto Rico as it possesses over the federal states." *U.S. v. Laboy-Torres*, 553 F.3d 715, 722 (3rd Cir. 2009); "On July 3, 1952, Congress approved the proposed Constitution of the Commonwealth of Puerto Rico, which thenceforth changed Puerto Rico's status from that of an unincorporated territory to the unique one of Commonwealth." *Romero v. United States*, 38 F.3d 1204, 1208 (Fed. Cir. 1994).

[152] *U.S. v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993). Judge Casellas explained that "[i]n doing so, [*US v. Sánchez*]—which is not binding and does not constitute precedent for the First Circuit—completely disregarded the long line of decisions which the First Circuit has rendered since 1953, and which the Supreme Court has issued since 1974, regarding the constitutional status of the Commonwealth …. To the extent that it viewed Puerto Rico as a territory without sovereignty, *Sánchez* is an isolated case and does not modify the long-held and well-settled doctrine regarding the constitutional nature of the Commonwealth of Puerto Rico." Casellas, *supra*, at 959 n. 75.

B

The New Constitution before the U.S. Supreme Court

The United States Supreme Court addressed the nature of the Commonwealth in 1974, when it published its opinion in *Calero-Toledo v. Pearson Yacht Leasing Co., supra*. Like the First Circuit in *Mora v. Mejías, supra*, the U.S. Supreme Court faced the question of whether the laws of Puerto Rico could be considered "state" laws for purposes of § 2281.[153]

After a brief analysis of the relationship between Puerto Rico and the United States, the Court stated the following:

> we believe that the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as "State statute(s)" for purposes of the *Three-Judge Court Act*, serves, and does not expand, the purposes of sec. 2281.[154]

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[153] *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*, at 670. Specifically challenging a Puerto Rico law whereby the Government seized a luxury yacht that had been used to transport drugs to the island. After *Stainback v. Mo Hock Ke Lok Po* it was clear that, regarding the laws enacted by a territory, there were no federal reasons to apply sec. 2281 if attempting to invalidate a territorial statute. *Calero-Toledo*, *supra*, at 670-671, citing *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 377 (1949).

[154] *Id.* at 675.

To reach this decision, the U.S. Supreme Court took into account the fact that the federal lower courts had established, since 1953, that Puerto Rico must be considered sovereign regarding matters that are not ruled by the federal Constitution.[155] The U.S. Supreme Court emphasized that in *Wackenhut Corp. v. Aponte*, a 1967 decision, it was established that the doctrine of judicial abstention was particularly appropriate regarding the legislation enacted by the Commonwealth, so that said new political entity would be the one to determine, based on the "compact" that it had reached with Congress, the scope and validity of its own legislation pursuant to the Constitution of the Commonwealth and the Constitution of the United States.[156]

The next time that the U.S. Supreme Court expressed itself on the nature of the Commonwealth was issued in *Examining Board of Engineers,*

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[155] *Id*. at 674. (Our translation).

[156] *Id*. Before reaching this conclusion, the U.S. Supreme Court had cited *Mora v. Mejías, supra*, in that "[t]he preamble to this constitution refers to the Commonwealth … which 'in the exercise of our natural rights, we (the people of Puerto Rico) now create within our union with the United States of America'. 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. [Citation omitted] … It is a political entity *created by the act and the consent of the people of Puerto Rico* and joined in union with the United States of America under the terms of the compact." *Calero-Toledo*, *supra*, at 672, citing *Mora v. Mejías, supra.* (emphasis added).

Architects & Surveyors v. Flores de Otero.[157] The dispute in that case involved the lawfulness of a Puerto Rico law that required U.S. citizenship in order to practice engineering.[158] *Citing Calero-Toledo, supra,* the U.S. Supreme Court reiterated 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, and accordingly, Puerto Rico "now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own Budget' **and amends its own civil and criminal codes."**[159]

Following a brief summary of the approval of the compact between Puerto Rico and Congress,[160] the Court stated that even though Puerto Rico, like the District of Colombia, occupied an exceptional place

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[157] *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976).

[158] *Id*. at 577.

[159] *Id*. at 594. (Emphasis added)

[160] *Id*. at 593. [The condition was accepted, the compact became effective, and Puerto Rico assumed "Commonwealth" status.]

within the federal system, that did not mean that it had been Congress' intention to exclude the Commonwealth from section 1983, under which the law in controversy in *Flores Otero* had been challenged.[161] Since Congress lacks the means to oversee state and territorial officials, the federal courts must have the jurisdiction to intervene. To those effects, the Court explained that:

> [t]he same practical limitations on Congress' effectiveness to protect the federally guaranteed rights of the inhabitants of Puerto Rico existed from the time of its cession and, after 1952, **when Congress relinquished its control over the organization of the local affairs of the island** and granted Puerto Rico a measure of autonomy comparable to that possessed by the States, the need for federal protection of federal rights was not thereby lessened.[162]

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[161] *Id*. at 595-96. Section 1983 grants a federal court jurisdiction over controversies where it is alleged that a state or territory official, "under the appearance of authority" has denied a U.S. citizen a right, privilege or immunity guaranteed by the federal Constitution or the laws of the United States. 42 U.S.C. § 1983.

[162] *Id*. at 596-97 (emphasis added). To understand the difficulty that the U.S. Supreme Court faced when analyzing whether after 1952 the federal courts had jurisdiction pursuant to sec. 1983 over acts carried out by Puerto Rico officials, we must remember that said statute refers to "states" or

As both decisions point out, after 1952, control over local Puerto Rico matters was in the hands of the Commonwealth, since Congress had relinquished control over the internal matters of the island. [163] Since then, Puerto Rico is a "sovereign in matters not ruled by the Constitution."[164]

In the summer of 1982, two additional decisions affirmed the rule that granted the Commonwealth all of the sovereign powers associated with the states of the Union in internal matters. The first of them, *Rodríguez v. Popular Democratic Party*, analyzed the authority of the Commonwealth of Puerto Rico to regulate its electoral matters.[165] After reiterating

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"territories." Because Puerto Rico could no longer be classified as either due to its "unparalleled relationship with the United States," the U.S. Supreme Court resorted to a practical or functional approximation: since sec. 1983 expressly applies to both states and territories, Puerto Rico had to fall somewhere between the two, and since Congress had not made any expression eliminating the jurisdiction of the federal courts under section 1983 when the Commonwealth was created, then section 1983 had to apply to Puerto Rico. *Id*. at 597. For the same practical reason, the U.S. Supreme Court did not define whether the protection of the rights of the inhabitants of Puerto Rico was guaranteed under the Fifth Amendment of the federal Constitution or under the Fourth. *Id.* at 600-01.

[163] *Id*. at 597.

[164] *Calero-Toledo*, *supra*, at 674. (Our translation)

[165] At issue was a Puerto Rico law that authorized a political party to fill a vacancy in the Legislative Assembly left by a legislator affiliated to said party if said legislator died, resigned or was removed from the position. *Rodríguez v. Popular Democratic Party*, *supra*, at 6.

that the constitutional rights of the inhabitants of Puerto Rico are protected by the guarantees of the due process of law and the equal protection of the laws, the U.S. Supreme Court stated the following regarding the Commonwealth and its political authority:

> **At the same time, Puerto Rico, like a state, is an autonomous political entity, "sovereign over matters not ruled by the Constitution."** The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference.[166] [Citations omitted]

In the second case decided that summer, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, the U.S. Supreme Court had to determine whether Puerto Rico had the authority granted to the states to defend the rights granted to its citizens by federal legislation.[167] The

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[166] *Id*. at 8 (emphasis added).

[167] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). The Secretary of the Department of Labor and Human Resources of the Commonwealth filed suit against a group of apple farmers in the State of Virginia, alleging that they had discriminated against Puerto Rican workers that had been sent to work to said state pursuant to the federal Wagner-Peyser Act. *Id.* at 594. Said act established a system to alleviate the high unemployment rate existing in some states during the Great Depression. With that system, the state offices

controversy was framed within the *parens patriae* rights of the states to vindicate, not their own sovereign rights, but the rights of their citizens when the violation of said rights somehow affects the quasi-sovereign interests of the state.[168] However, there are two statements by the U.S. Supreme Court in said case that are important to our controversy. First, the Court identified two sovereign interests possessed by the states of the Union:

> Two sovereign interests are easily identified: First, **the exercise of sovereign power over individuals** and entities within the relevant jurisdiction—**this involves the power to create and enforce a legal code, both civil and criminal;** second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders.[169]

The Court then explained that the quasi-sovereign interests of the states can be divided into two general categories: the protection of the health

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authorized by the U.S. Secretary of Labor identified whether they needed labor from outside the state for specific industries, and that labor was then supplied by workers from other U.S. jurisdictions, which had to be given priority over foreign workers. *Id*. at 594-95.

[168] *Id*. at 602.

[169] *Id*. at 601. (emphasis added)

and well-being of its residents, and the protection of its position in the federal system.[170] The fact that the opinion in *Alfred L. Snapp* did not dedicate a single paragraph to discussing the nature of the relationships between Puerto Rico and the United States shows that already in the summer of 1982, the U.S. Supreme Court had clearly established that the nature, scope of authority and sovereignty of the Commonwealth in internal matters were equal to those of the states of the Union.[171]

Between the decisions in *Calero-Toledo* and *Examining Board, supra*, and the decisions in *Rodríguez* and *Snapp & Son*, *supra*, the U.S. Supreme Court issued two opinions that seemed to sow doubt on the nature of the authority and autonomy of the Commonwealth. They are the opinions issued in *Califano v. Gautier Torres*[172] and *Harris v. Rosario*.[173] In both cases it was decided

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[170] *Id*. at 607-08.

[171] *Id*. at 608. This subject was dismissed by the Court with a brief expression in footnote 15: "Although we have spoken throughout of a "State's" standing as *parens patriae*, … the Commonwealth of Puerto Rico is similarly situated to a State in this respect: It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State."

[172] *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

[173] *Harris v. Rosario,* 446 U.S. 651 (1980). The Majority Opinion argues that these two cases, together with *Torres v. Puerto Rico, infra*, which we will address separately, show that Puerto Rico continued to be a territory subject to the plenary powers of Congress. Maj. Op. at 50. The truth is that none of

that Congress could exclude Puerto Rico from federal legislation granting economic benefits to U.S. citizens residing in the 50 states. However, in *Califano*, the U.S. Supreme Court did not express itself on whether Puerto Rico is subject to the plenary authority of Congress through the territorial clause of the federal Constitution; it simply did not discuss the political relationship between Puerto Rico and the United States.[174] Something similar happened in *Harris*, an opinion of a mere two pages in which the U.S. Supreme Court also failed to examine the relationships between both countries. In one portion of the short opinion, the Court states that, pursuant to the territorial clause of the federal Constitution, Congress can treat Puerto Rico differently, as long as there is a "rational basis" to do so.[175] Contrary to the holding in the Opinion of the Court in the case at hand, these decisions do not lead to the conclusion that Congress has plenary power

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those three opinions says that, and in *Califano* and *Harris* the U.S. Supreme Court did not even discuss the nature of the authority and the scope of autonomy of the Commonwealth, which led to Associate Justice Marshall's dissent. *See Harris v. Rosario*, *supra*, at 652.

[174] The U.S. Supreme Court briefly refers to the fact that Puerto Rico has an "unparalleled" relationship with Puerto Rico and that the federal District Court had "apparently" recognized the capacity of Congress to treat Puerto Rico differently. *Califano*, *supra*, at 907, n.4.

[175] *Harris v. Rosario*, *supra*, at 651-52.

over Puerto Rico to legislate the internal matters of the island.[176]

These two decisions came after *Calero-Toledo and Flores de Otero*, which means that the federal Court issued them while fully aware of its holdings in said cases.[177] It is our understanding that the decisions in *Califano* and *Harris* are framed within the traditional functional posture that the U.S. Supreme Court has assumed when facing the difficult questions occasionally posed by the Commonwealth within the federal system.[178] For the reasons that

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[176] Rather, like Trías Monge points out, the scope that has been attributed to the expressions of the U.S. Supreme Court far exceed what was actually said. "Quoting the territorial clause as basis for the approval of this or that law for Puerto Rico under circumstances such as those in *Harris*, in which Congress can constitutionally limit the nature of an aid program in the case of the states, treated as a group, does not necessarily mean that Congress continues to possess the authority to fully legislate for Puerto Rico. What this means is that Congress can legislate differently for Puerto Rico… The court was not faced with the problem of whether Congress keeps its plenary power over Puerto Rico or not" Trías Monge, *El Estado Libre Asociado ante los tribunales* (*The Commonwealth before the Courts*), 64 Rev. Jur. UPR 1, 26 (1995), cited in Álvarez González, *op. cit.*, at 513. *See also* Salvador E. Casellas, *supra*, at 958-59.

[177] *Flores de Otero*, *supra*, at 596.

[178] The U.S. Supreme Court itself explained that its reasons to hold that Congress can treat Puerto Rico differently were economic in nature: "[W]e concluded [in *Califano v. Torres*] that a similar statutory classification was rationally grounded on three factors: Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State

we have already discussed, we are not convinced by the attempt to establish that the statements made in those two decisions must be interpreted to mean that Puerto Rico continues to be inevitably subject to the plenary powers of Congress.[179] In any case, as we have already seen, notwithstanding the statements in *Califano* and *Harris,* the U.S. Supreme Court again reaffirmed the sovereign power of Puerto Rico in its subsequent decisions in *Rodríguez, supra*, and *Snapp & Son, supra.*[180] Lastly, as an example of how

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under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Harris*, *supra*, at 652.

[179] Renowned Constitutionalist and Professor David M. Helfeld stated the following when referring to the U.S. Supreme Court's reluctance to decide whether the due process of law provided by the federal Constitution applied to Puerto Rico through the Fifth or the Fourteenth Amendment: "[i]n this area of Constitutional law the Supreme Court apparently wishes to avoid clarity and precision, preferring instead the pragmatic approach; responding to the degree of control which Puerto Rico has achieved over its internal affairs." *See* Helfeld, *How Much of the Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452 (1986). *See also Ramírez de Ferrer v. Mari Brás*, *supra*, at 160. The fact that Congress can legislate regarding Puerto Rico on certain matters pursuant to the territorial clause of the federal Constitution does not mean that the Commonwealth lacks sovereign power in other matters related to its self-governance.

[180] In a more recent decision, *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), the U.S. Supreme Court again used a functional analysis when deciding that Puerto Rico, as the states, could ask another state to hand in a fugitive pursuant to the extradition clause of the federal Constitution, Article IV, Sec. 2, Cl. 2. The court preferred to decide the controversy under the Extradition Act, 18 U.S.C. § 3182, which clearly

complicated the subject of sovereignty within U.S. federalism can be, in exceptional cases Congress has legislated directly for the states of the Union in matters traditionally recognized as pertaining to state sovereignty.[181] Regardless, if it were subject to

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applied to both states and territories. However, the U.S. Supreme Court stated that: "The subsequent change to Commonwealth status through legislation, did not remove from the Government of the Commonwealth any power to demand extradition which it had possessed as a Territory, for the intention of that legislation was 'to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Id.* at 229-30. (Citation omitted)

[181] That was the case with the law known as the "Voting Rights Act" of 1965, 42 U.S.C. § 1973, *et seq*., (repealed by Public Law No. 113-234 of December 16, 2014, and turned into 52 U.S.C. § 10301). Said law established certain requirements, and even demanded that authorization be requested from the U.S. Department of Justice for certain states with a history of discrimination towards African Americans to be able to approve amendments to their electoral laws. *See* 42 U.S.C. §§ 1973b(b), 1973c(a). This congressional statute clearly intervened with the sovereignty of the states, although they are not territories of the United States and are not subject to the territorial clause of the federal Constitution. The legislation was validated by the U.S. Supreme Court in *State of South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). It was established that "[t]he Act suspends new voting regulations pending scrutiny by federal authorities … This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate." This situation was maintained for those states with a racist history until *Shelby County v. Holder*, 133 S. Ct 2612 (2013). To think that the Commonwealth would be free of these same

the plenary powers of Congress–which we reject–that would not prevent us from concluding that Puerto Rico is as much a sovereign as the tribes for purposes of the doctrine of dual sovereignty.

On the other hand, in *Torres v. Commonwealth of Puerto Rico*, the U.S. Supreme Court reversed a Puerto Rico Supreme Court decision confirming the conviction of a person under a Puerto Rico law that authorized the searching at the airport of the luggage of any traveler arriving from the United States.[182] The law was challenged pursuant to the clause against searches and seizures contained in the Fourth Amendment to the federal Constitution. As stated in the Majority Opinion, the U.S. Supreme Court used the doctrine of the insular cases to determine whether it was justified to apply this constitutional provision to the island.[183] In deciding that it applied, the Court took into account the fact that the previous organic acts enacted by Congress for the island had guaranteed individual rights equivalent to those of the Fourth Amendment to the residents of the island and that

> [a] Constitution containing the language of the Fourth Amendment, as well as additional language

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exceptional conditions would be going too far, even for the creators of the 1952 Puerto Rico Constitution.

[182] *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 466-67 (1979).

[183] *Id.* at 468-70.

> reflecting this Court's exegesis thereof **was adopted by the people of Puerto Rico and approved by Congress.**[184]

In keeping with the holding in *Dorr v. United States, supra*, the U.S. Supreme Court stated that the interests of the United States were not in danger in Puerto Rico and that there was no risk of injustice in applying the Fourth Amendment protection against searches and seizures directly to the island. Therefore, the decision in *Torres* leaves us in exactly the same position as *Calero-Toledo* and *Flores Otero, supra*.[185]

The Majority Opinion that gives rise to this concurrence recognizes the many times that the U.S. Supreme Court has acknowledged that Puerto Rico has a sovereignty and jurisdiction similar to that of the states over matters not ruled by the federal Constitution. However, it states that "the analysis… is not whether the entity is similar to, acts like or has certain attributes of a true sovereign. The fundamental question, according to the U.S.

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[184] *Id.* (Emphasis added)

[185] *Id.* at 471. However, true to the pragmatic posture that it had assumed since *Calero-Toledo*, the Court expressly stated that it was not necessary to decide whether the protection against searches and seizures applied to Puerto Rico by virtue of the Fourth or the Fourteenth Amendment. Had the Court expressed its view on this matter, it would have directly addressed the issue of whether Puerto Rico continued to be a mere extension of Congress or not; it preferred not to do so.

Supreme Court, is whether the two entities derive their authority from the same source of power."[186] As we have seen, this analysis has serious theoretical flaws that are not consistent with the historical reality of the United States; likewise, the analysis cannot be squared with the statements of the U.S. Supreme Court itself regarding the plenary power of Congress over the indigenous tribes that, as it said, is so broad that it could make them disappear at will, but even then, the indigenous tribes are "sovereigns" for purposes of the doctrine of dual sovereignty.[187] Even more importantly, the ultimate source of punitive power of the Commonwealth is the People of Puerto Rico.[188] For these reasons, nothing bars recognition, as the U.S. Supreme Court has done on so many other occasions, that the

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[186] *Id.* at 57.

[187] *U.S. v. Lara*, *supra*, at 202.

[188] Let us remember that our Constitution begins with the words "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 which, in the exercise of our natural rights, we now create within our union with the United States of America." P.R. Const. pmbl., 1 P.R. Laws Ann., at 266. It was neither Congress nor the People of the United States that created the Constitution of the Commonwealth. As we have already explained, it is not our duty to decide if, from a political standpoint, this change truly signified the end of a process of self-determination for Puerto Rico. But from the point of view of the authority of the Commonwealth Constitution, and of the source from which its power emanates, it cannot be said that it was not created by and is not subordinate to the will of the People of Puerto Rico.

Commonwealth has sufficient authority to be considered a sovereign for purposes of the doctrine of dual sovereignty. The Majority Opinion errs in deciding otherwise today.

C

The Rule of the Puerto Rico Supreme Court from 1954 to the Present

The Puerto Rico Supreme Court has issued statements several times about the scope and authority of our Constitution. For example, in *Pueblo v. Figueroa,* we established that the Constitution of the Commonwealth was not a congressional statute and that this Court had the final authority to interpret its provisions.[189] Regarding the source of authority of our Constitution, then-Chief Justice Snyder stated that our Constitution rested on a basis different than a mere delegation by Congress.[190] The reason to conclude thusly is that our Constitution:

> was approved by the elected representatives of the People of Puerto Rico in a Constitutional Convention. This took place after careful consideration of each clause in commissions and debate on the floor of the Convention. Finally, the People themselves expressed their approval

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[189] *Pueblo v. Figueroa*, 77 P.R. Dec. 188, 200 (1954).

[190] *Id.* at 194.

> at the polls, [for which reason it is] impossible to believe that the Constitution—a product of local drafting and debate–is in fact a federal law.[191]

Meanwhile, in *RCA v. Gobierno de la Capital*,[192] we clarified the scope and source of authority of the Commonwealth to levy taxes. We explained that the authority and power of the Puerto Rican constitutional Government:

> were not, as before, merely delegated by Congress, but *emanated from itself and were free of a higher authority*, subject only "to the limitations of its own Constitution … and to those obligations that the People imposed on themselves by accepting the federal relations that would exist and do exist with the

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[191] *Id.* The First Circuit confirmed these expressions in *Figueroa v. People of Puerto Rico, supra.* In his Opinion, Chief Judge Magruder said: "The answer to appellant's contention is that the constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. … This constitution is not an act of Congress, though congressional approval was necessary to launch it forth." *Figueroa v. People of Puerto Rico*, *supra*, at 620.

[192] *RCA v. Gobierno de la Capital*, 91 P.R. Dec. 416 (1964). Reversed on other grounds regarding the application to Puerto Rico of the commerce clause of the federal Constitution in its dormant state. *ELA v. Northwestern Selecta, infra.*

> United States pursuant to Public Law 600.[193]

These statements were repeated over and over in different decisions of this Court, including *Pueblo v. Castro García, supra*, which today the Majority of this Court has decided to overrule on erroneous grounds.[194] For this reason, in *Ramírez de Ferrer v. Mari Brás, supra*, we reiterated the validity of all of these cases and added the following:

> Furthermore … in the early years of the 21st century … it would be a crass legal anachronism to suppose that the minimum powers of self-governance that the Commonwealth currently enjoys do not emanate from the people themselves, but that they are a mere delegation of congressional authority. We repeat… that public authority and the governmental powers of the Commonwealth, in the scope that pertains solely to it within its relationship with the United States of America, emanate from the will of the People of Puerto Rico and can only be

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[193] *Ramírez de Ferrer v. Mari Brás, supra*, at 157, citing *RCA v. Gobierno de la Capital, supra,* at 428-29.

[194] *ELA v. Rodríguez*, 103 P.R. Dec. 636 (1975); *Santa Aponte v. Secretario del Senado*, 105 P.R. Dec. 750 (1977); *Pacheco Fraticelli v. Cintrón Antonsanti*, 122 P.R. Dec. 299 (1988); *Silvia v. Hernández Agosto*, 118 P.R. Dec. 45 (1986); *PIP v. CEE*, 120 P.R. Dec. 580 (1988).

> modified by the conscious consent of said People, expressing themselves directly at the polls.[195]

We then pointed out that the acknowledgment of the Commonwealth as an autonomous entity within the American federal system, with full and sovereign authority or jurisdiction over matters not ruled by the federal Constitution is the constitutional norm established by this Court "that prevails in the Country, regardless of the political preferences of some or others, until the current constitutional regime is altered through legitimate means.[196]

These were the grounds considered by this Court when deciding *Pueblo v. Castro García* in 1988. In that case, persons indicted for offenses related to the Puerto Rico Weapons Act requested before the Court of First Instance that the charges filed against them be dismissed. They argued that they had been processed by the federal District Court and convicted for identical offenses, for which reason the subsequent process against them in the Puerto Rican forum was a violation of the constitutional protection against double jeopardy. When reversing the dismissal issued by the trial court, we analyzed the relationship between Puerto Rico and the United States after the creation of the Commonwealth. Focusing the controversy on the acknowledgment of the Commonwealth as a sovereign entity in matters

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[195] *Ramírez de Ferrer v. Mari Brás*, *supra*, at 158.

[196] *Id.* at 160-61.

not ruled by the federal Constitution, as revealed by the cases discussed in the previous section, we concluded that:

> Puerto Rico is authorized, as if it were a state, to approve and enforce a penal code. The Commonwealth, in exercising its autonomy, has jurisdiction to apply its criminal laws to all persons who commit an offense within its territorial area.[197]

The source of that authority could not be any other than the People of Puerto Rico and its Constitution,[198] therefore, "the power of [Puerto Rico] to create and implement offenses emanates [contrary to the situation prevailing in *Shell Co., supra*] not only from Congress, but from the consent of the People and therefore, from itself, for which reason the doctrine of dual sovereignty applies to it." [199]

The rule that recognizes the full authority of the Commonwealth in its internal matters was recently

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[197] *Id.* at 754-55. (Citation omitted)

[198] "In 1952, the People of Puerto Rico came together politically under the name of the Commonwealth. … [t]he People gathered in assembly through their elected representatives and drafted their own Constitution. Since then, the political [power] of the island emanates from the consent and will of the People of Puerto Rico. … Puerto Rico is, then, sovereign for purposes of its internal affairs." *Id.* at 765.

[199] *Id.* at 779-81.

reaffirmed in *ELA v. Northwestern Selecta*. [200] In holding that the dormant Commerce Clause of the federal Constitution, applies to Puerto Rico and declaring the unconstitutionality of a tax law, we reaffirmed that the relationship between Puerto Rico and the United States "has been evolving and has been strengthened in different ways. The U.S. Supreme Court has stated on several occasions that Puerto Rico must be treated as if it were a state for constitutional purposes or purposes of statutory application. [201] In that respect, we cited from an opinion of the U.S. Court of Appeals for the Third Circuit to stress that:

> It is not surprising that "although Puerto Rico is not a state in the federal Union, "it … seems to have become a State within a common and accepted meaning of the word." Consistent with this common and accepted understanding, Congress frequently uses the term "State" to

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[200] *ELA v. Northwestern Selecta*, 185 P.R. Dec. 40, 48 (2012). Said case challenged the constitutionality of a law passed by the Legislative Assembly whereby a tax was levied on locally sourced and imported beef, with which a government program would be financed to promote, improve and foster the beef industry in the Country. A U.S. importer of meat requested that the statute be declared unconstitutional pursuant to the commerce clause of the federal Constitution in its dormant state. Associate Justice Fiol Matta issued a dissenting Opinion which was joined by Chief Justice Hernández Denton.

[201] *Id*. at 67.

> refer also to Puerto Rico. … More significantly, when Congress fails explicitly to refer to Puerto Rico, courts must nonetheless inquire whether it intended to do so. [202]

In *Northwestern Selecta*, this Court recognized that, in creating the Commonwealth, there was the intent of "granting the island a degree of autonomy and independence normally associated with the states of the Union." [203]

Today, the same Majority that held the above in *Northwestern Selecta* does an about-face and holds that Puerto Rico is but a mere territory subject to the arbitrariness of Congress. In addition to the clear doctrinal inconsistency that this represents, what is at play this time is much more than the economic interests of a private company. [204] We have absolutely no doubt that the statements in *Pueblo v. Castro García, supra*, and reiterated in *Northwestern Selecta*, are the state of law prevailing in the federal courts, including the U.S. Supreme Court and the First Circuit, regarding the authority of the Commonwealth. Therefore, for purposes of the doctrine of dual sovereignty as an exception to the

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[202] *Id.* at 67, citing *United States v. Laboy-Torres*, *supra*, at 721.

[203] *Id.* at 65.

[204] "It would not [be] the first time that a majority discriminated against itself for self-deprecatory reasons." Alvarez González, *The Great State*, *supra*, at 432.

Constitutional protection against double jeopardy, Puerto Rico enjoys a sovereignty equal to that of the states of the Union.

Nevertheless, in *Pueblo v. Castro García*, we erred in concluding that the fact of said authority was enough to forgo the constitutional guarantee against double jeopardy and apply the doctrine of dual sovereignty to Puerto Rico in order to allow for a citizen to be submitted twice to a criminal process for the same offense. [205] On the contrary, we must reject this conclusion due to its serious implications on individual peace and on the dignity of human beings which our Puerto Rican system seeks to protect with the ban against double jeopardy codified in Article 11 of our Constitution.

VI

The Doctrine of Dual Sovereignty: Criticism of Its Justification

In Part III of this concurring opinion, we discussed the weaknesses of the doctrine of dual sovereignty in a theoretical, constitutional and historical context. As we stated, in *Lanza*, and subsequently in *Abbate* and *Bartkus*, the U.S.

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[205] In said case, we accepted the erred reasoning employed by the U.S. Supreme Court in *Bartkus* and *Abbate* to justify the doctrine of dual sovereignty and we expressed that "[d]enying Puerto Rico the power to enact its criminal laws, because the federal Government or a state has won the race to the courts, would be shocking and would lead to a deprivation of its historical right and duty to maintain the peace and order in its territory." *Pueblo v. Castro García*, *supra*, at 782.

Supreme Court justified the doctrine of dual sovereignty using two premises. First, that the Fifth Amendment did not apply directly to the States, so it did not prevent a state from prosecuting multiple times, and it also did not prevent the federal Government from prosecuting after a state had done the same. Second, that the doctrine was necessary for the federal scheme for the distribution of power.

A

The first of these justifications was eliminated in 1969, when the U.S. Supreme Court held, in *Benton v. Maryland*, that the Fifth Amendment protection against double jeopardy applies to the states by virtue of the Fourteenth Amendment, since the protection "represents a fundamental ideal of our constitutional heritage." [206] After this decision, the dual sovereignty exception to the protection against double jeopardy turns out to be an anomaly in U.S. constitutional law.[207] It is important to point out that the U.S. Supreme Court has eliminated the dual sovereignty exception for other protections offered by the Bill of Rights of the federal Constitution: the right against self-incrimination and the protection against unreasonable searches and seizures.

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[206] *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

[207] Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Col. L. Rev. 1, 2 (1995).

The Right against Self-Incrimination and the Doctrine of Dual Sovereignty

Prior to 1964, a witness's statement after a federal offer of immunity was admissible in a criminal procedure filed against him in state court and vice-versa.[208] The reasoning behind this was that the Bill of Rights was only binding on the federal Government and not on the state Governments. The Court rejected this reasoning in *Murphy v. Waterfront Commission*.[209] On that same day, the U.S. Supreme Court had held that the privilege against self-incrimination of the Fifth Amendment was binding on the states through the Fourteenth Amendment, so the Court formulated the controversy in *Murphy* as follows: "whether a jurisdiction within our federal structure can force a witness—to whom it has offered immunity under its laws—to offer testimony that could be used to convict him in another similar jurisdiction."[210]

When addressing the controversy, the U.S. Supreme Court stated that the protection against self-incrimination embodies many of the most basic values of a civilized society. It reasoned that, given

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[208] *Id*. at 11; Chiesa, *supra*, at 543.

[209] *Murphy v. Waterfront Comm. of New York Harbor*, 378 U.S. 52 (1964).

[210] *Id*. at 53. (Our translation). *Malloy v. Hogan*, 378 U.S. 1, (1964), decided the same day as *Murphy*, held that the Fifth Amendment of the federal Constitution protected the individual from testifying in state court if doing so exposed him to criminal liability under state laws.

the level of cooperation existing between federal and state authorities in the criminal sphere, forcing an individual to incriminate himself in either of the two jurisdictions would defeat the principles and public policy of the constitutional protection against self-incrimination. It is notable that the U.S. Supreme Court included the inviolability of human dignity as one of the principles that informs the protection against self-incrimination offered by the federal Constitution.[211]

As the U.S. Supreme Court pointed out, since before the U.S. Constitution, the English courts had unanimously ruled that the privilege against self-incrimination protected a witness in an English court from being forced to offer testimony that could be used against him in courts in another jurisdiction.[212] Acknowledging that its prior decisions had strayed from this rule, the U.S. Supreme Court rejected the notion that the doctrine of dual sovereignty was an exception to the constitutional right against self-incrimination.[213] It held that the protection against

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[211] *Murphy*, *supra*, at 55-56.

[212] The protection applied even between courts of the English system with concurrent jurisdiction, such as the Court of Chancery and the common law courts. *Id*. at 57-58 (citations omitted).

[213] *Id*. at 72. However, the Court limited its decision to jurisdictions within the United States and to the jurisdiction of the federal Government, stating that there would be no obstacle if the testimony exposes the witness to criminal liability in a foreign country. *Id*. at 56, n.5.

self-incrimination offered by the Fifth Amendment of the federal Constitution protects a federal witness against self-incrimination in state court, and protects a state witness against self-incrimination in federal court.[214]

The Protection against Searches and Seizures and Dual Sovereignty

Pursuant to the doctrine of dual sovereignty, it was justifiable to admit in state court evidence obtained by means of an illegal search and seizure performed by the federal authorities, and vice-versa, since the Fourth Amendment of the federal Constitution only applied to actions of the federal law-enforcement agencies.[215] This doctrine, known as the *silver plate doctrine*, was rejected in *Elkins v. US*, decided in 1960, one year after *Bartkus and Abbate*.[216] The U.S. Supreme Court stated that the victim does not care who violated his constitutional protection against unreasonable searches and seizures and held that the correct thing to do was to exclude the evidence in the federal suit, regardless of

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[214] *Murphy*, *supra*, at 77-78.

[215] Reed Amar, *supra*, at 11.

[216] *Elkins v. U.S.*, 364 U.S. 206 (1960). In *Wolf v. Colorado*, 338 U.S. 25 (1949), the U.S. Supreme Court had held that, although the Fourteenth Amendment prohibited unreasonable searches and seizures by state officials, it did not prevent the evidence illegally obtained by state officials from being subsequently used by federal officials in a federal prosecution, since a sovereign could not be held responsible when it was another that violated the guarantees of the Fourth Amendment.

whether the victim's constitutional right had been violated by a state or by a federal official.[217] Subsequently, the holding in *Elkins* was extended to decide that evidence obtained by federal officials in violation of the Fourth Amendment was inadmissible in a state criminal procedure.[218]

When comparing these decisions with the decisions of the U.S. Supreme Court on the doctrine of dual sovereignty and the protection against double jeopardy, Professors Akhil Reed Amar and Jonathan L. Marcus point out the following:

> Here then, is the key puzzle: Whereas *Elkins* consciously built on *Wolf's* application of Fourth Amendment principles against states to overturn the silver platter doctrine, and *Murphy* explicitly built on *Malloy's incorporation* of the Incrimination Clause to overturn *Feldman*, the Court never chose to build on *Benton's* incorporation of the Double Jeopardy Clause to overturn *Barks* and *Abbate*. The Court has never explained—or even focused on—this anomaly.[219]

This analysis leads us to conclude that it is very difficult to reconcile the holding in *Elkins* and *Murphy* with the holding in *Bartkus* and *Abbate*. It

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[217] *Elkins v. U.S.*, *supra*, at 215.

[218] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[219] Reed Amar, *supra*, at 15.

is even more confusing if we consider that the protection against self-incrimination and the protection against double jeopardy emanate from the same source, the Fifth Amendment of the U.S. Constitution.

B

The second justification articulated in federal caselaw—that the doctrine of dual sovereignty is a requirement of federalism—also does not withstand a critical analysis. The U.S. Supreme Court has never addressed the historical basis of the protection against double jeopardy.[220] In fact, the first criticisms of the exception of dual sovereignty to the protection against self-incrimination highlighted how the U.S. Supreme Court, in *Lanza*, twisted the roots of the protection against double jeopardy in common law.[221]

The drafters of the federal Constitution wished for the clause against double jeopardy to include the doctrine recognized as of that time in Great

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[220] Dax Eric López, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Idem*, 33 Vand. J. Transnat'l L. 1263, 1295 (2000), citing Susan Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609, 625 (1994).

[221] J.A. C. Grant, *Successive Prosecutions by State & Nation: Common Law & British Empire Comparisons*, 4 UCLA L. Rev. 1 (1956). For a more detailed account of the history of the protection against double jeopardy, *see* Rudstein, *op. cit.*, at 1-29; and Eric López, *supra*, at 1266-71, comparing it with the development of *non bis in idem* in the civil law tradition.

Britain.[222] When the federal Constitution and its Bill of Rights were drafted, it was firmly established that the acquittal or conviction of a person in a court with competent jurisdiction prevented that that person were prosecuted again for the same offense in the English courts.[223] That is, before the protection against double jeopardy was included in the federal Constitution, the English courts had already rejected dual sovereignty as an exception to the protection against double jeopardy.[224]

That being the case, it could hardly be held that the intention of the American constituents was to include double sovereignty as an exception to the

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[222] This, although we recognize that there was not much debate regarding the meaning of the clause. Eric López, *supra*, at 1296. (Citations omitted).

[223] Reed Amar, at 6; Eric López, *supra*, at 1270. At least three cases had held that a conviction or acquittal in another jurisdiction activated the protection against double jeopardy in England. The most important case is *R. v. Hutchinson*. Hutchinson was accused of murdering a person in Portugal and was acquitted by the Portugal courts. He was later arrested in England and brought before the court, which decided, unanimously, that since he had been acquitted by the Portugal court, he could not be judged again for the same offense in England. Grant, *supra*, at 9. *See also* Rudstein, *op. cit*., at 1-29.

[224] This state of law was so widely accepted that it was articulated in several treaties of the time, including the renowned Blackstone. Rudstein, *op. cit.* at 4.

protection against double jeopardy.[225] Especially when the foundations of the doctrine of dual sovereignty are not articulated in the federal Constitution, but were developed based on caselaw to accommodate conflicts of concurrent jurisdiction between the states of the Union and the federal Government.[226]

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[225] In fact, some of the first decisions of the U.S. Supreme Court recognized as valid the criminal decisions of foreign courts. *See* Eric López, *supra*, at 1296.

[226] Eric López, *supra*, at 1274-75 (citations omitted). In *Bartkus*, Justice Black also criticized the notion that the exception of dual sovereignty was a requirement of U.S. federalism:

> The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of 'federalism'. This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created 'to establish Justice' and to 'secure the Blessings of Liberty,' not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards. I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments.

Bartkus, *supra*, at 155-56 (Dissenting Op. of Justice Black).

But in addition to being contrary to the development of English common law, the decisions of the U.S. Supreme Court—particularly *Heath v. Alabama*—give an unjustified value to the sovereignty of the government, whether state or federal, sacrificing the interest of the individual in not being processed criminally a second time.[227] As we saw in *Lanza*, the Court articulated the doctrine of dual sovereignty without discussing the interests that inform the protection against double jeopardy of the Fifth Amendment, which are aimed at protecting the individual when facing the immense power of the State. To the contrary, the doctrine of dual sovereignty unjustifiably allows for two governments to allow, in tandem, what each of them was not able to achieve on its own: submitting a citizen to multiple prosecutions and punishments for the same offense.[228]

The dissenting opinions of Justice Black in *Abbate* and *Bartkus* clearly point out the main flaws and inconsistencies of the doctrine of dual sovereignty as an exception to the protection against double jeopardy. In *Barktus*, Justice Black stated that the majority decision weakened the constitutional protection against double jeopardy, one of the main values of the People of the United States and a fundamental value for the entire Western tradition. He also pointed out that the

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[227] Reed Amar, *supra*, at 5.

[228] *Id.* at 2.

exception of dual sovereignty did not responsibly address the purpose of the ban against double jeopardy, which is none other than protecting the individual when facing the power of the State. From the point of view of the individual, it is of little importance that he is punished by two different sovereigns instead of one. In both cases, the citizen is exposed twice to being processed or punished for the same conduct.[229]

On the other hand, in *Abbate*, Justice Black pointed out that the exception of dual sovereignty allows for two sovereigns to achieve together what neither of them was able to achieve on its own.[230] Acknowledging that most nations with legal systems based on common law consider that a conviction in another jurisdiction prevents a prosecution in their own, Black deemed it unsustainable to conclude that the states of the Union are more foreign with regards

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[229] "Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, the danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct." *Bartkus*, *supra*, at 155, Dissenting Op. of Justice Black (Citations omitted).

[230] *Abbate*, *supra*, at 203 (Dissenting Op. of Justice Black).

to the federal Government than two countries that are completely disassociated from each other.[231]

The U.S. Supreme Court has tried to raise some practical justifications, on the basis of U.S. federalism, to hold that the doctrine of dual sovereignty is necessary. For example, it has reasoned that without the doctrine of dual sovereignty, a sovereign—such as a state of the Union—could legislate an insignificant penalty to prevent another sovereign from prosecuting its citizens for a greater offense.[232] According to the Court, this would undermine the criminal legislation of the second sovereign and would prevent it from being able to enforce its laws.[233] Therefore, when there is concurrent criminal jurisdiction, both sovereigns will simply compete to be the first to bring the accused before its courts.[234]

However, there are other alternatives to address the friction generated by American federalism and which is so concerning to the U.S. Supreme Court.

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[231] "It is as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the same offense." *Id.*

[232] *Lanza*, *supra*, at 80; *Abbate*, *supra*, at 195.

[233] *Abbate*, *supra*, at 195.

[234] *Lanza*, *supra*, at 385. We must not overlook the fact that *Lanza* was decided during the Prohibition, when the federal Government had many difficulties in implementing the prohibition of alcohol consumption and commerce.

For example, if there is national concern about a particular matter over which the federal Government and another sovereign share jurisdiction, such as the commission of a crime or offense that is particularly offensive or dangerous to national security, Congress can simply legislate and preempt.[235]

Another practical justification offered by the U.S. Supreme Court to uphold the doctrine of dual sovereignty is that it promotes the effective administration of justice in the federal jurisdiction. According to this posture, it would be impractical to require that federal authorities be kept abreast of the investigations performed by state authorities.[236] The same logic would apply to the States. However, given the high degree of cooperation between the federal government and state law-enforcement agencies, this justification responds to an outdated view of U.S. federalism, something that many commentators have criticized. This is especially worrisome today, considering the close collaboration between the federal Government and other sovereigns in criminal matters.[237] Puerto Rico is not the exception, since we have reached many

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[235] *See* Dissenting Op. of Justice Black in *Bartkus* and *Abbate*.

[236] *Abbate*, *supra*, at 195. Eric López, *supra*, at 1277.

[237] According to Eric López, this cooperation has reached the point where "the activities of the state and the federal law-enforcement agencies are so tightly intertwined that they cannot be considered separate and independent agencies." Eric López, *supra*, at 1299.

collaboration agreements with the federal authorities in several areas.

C

The Doctrine of Dual Sovereignty and the States

To properly address the undesirable consequences of the doctrine of dual sovereignty, some states have enacted legislation prohibiting its application.[238] Others have drafted their bill or rights to expressly include in the clause against double jeopardy the protection of the individual who has been prosecuted for the same offense in another jurisdiction.[239]

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[238] Several states have incorporated, through statutes, rules similar to Rule 1.10 of the Model Penal Code, which would considerably limit the authority of a jurisdiction to prosecute a citizen for conduct that also constitutes an offense in another jurisdiction. Most prohibit the initiation of a second criminal process for an offense that has already been punished in another jurisdiction, except if the offense in question seeks a different state interest that was not satisfied in the first prosecution in the other jurisdiction. The comments to the proposed Rule recognize the inconsistency between the decisions of the U.S. Supreme Court availing the exception of dual sovereignty in the context of the protection against double jeopardy and their decisions declaring the exception inapplicable regarding the protection against self-incrimination, despite the similarities of the principles to which each protection responds. *Model Penal Code and Commentaries*, Sec. 1.10, at 169.

[239] For example, the Montana Constitution expressly extends the protection against double jeopardy to proceedings in any jurisdiction. Mont. Const. Art. II, Sec. 25.

Even without expressly rejecting the doctrine of dual sovereignty, some of the states of the Union have interpreted their constitutional clause against double jeopardy in keeping with the principles that shape the Fifth Amendment, and have given the appropriate weight to the interests of the individual vis-a-vis the sovereign. For example, in 1971, the Pennsylvania Supreme Court expressed itself against a second prosecution and punishment in Pennsylvania after a punishment in another jurisdiction, except under certain circumstances.[240] The Pennsylvania Supreme Court criticized the reasoning of the U.S. Supreme Court in *Barktus, supra*, and pointed out that in said case, the majority did not contemplate the possibility that both sovereigns seek the same interests by prosecuting the individual. Even more importantly, it states that the interest of the citizen versus the possible interests of the sovereign were also not examined:

> When one examines the 'dual sovereignty' doctrine as it applies to the double jeopardy clause, we are really involved in a balancing process, whereby we place the interests of the two sovereigns on one side of the judicial scale, and on the other side we place the interest of the individual to be free from twice

[240] *Comm. v. Mills*, 447 Pa. 163, 169 (1971). Pennsylvania eventually incorporated in its system, through legislation, Rule 1.10 of the Model Penal Code and the holding of its Supreme Court.

> being prosecuted and punished for the same offense. The basic problem with *Bartkus* is that the majority first failed to recognize the interests of the two sovereigns might be the same, but more important they secondly failed to really examine the interest of the individual.
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> .....
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> The striking feature [of the double jeopardy clause's] general rules and policies is that the focus is always on the individual, on a person's basic and fundamental rights. This feature is the common thread that runs across all of the provisions of the Bill of Rights, and we believe this is the element the Supreme Court failed to adequately consider in *Bartkus*.
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> .....
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> We are talking about the two governments protecting their interests, when we really should be talking about the individual, since by focusing on the individual we see that it matters little where he is confined—in a federal or state prison—the fact is that his liberty is taken away twice for the same offense.[241]

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[241] *Id.* The New Hampshire Supreme Court held in 1978 that the State of New Hampshire was prevented from

VII

Human Dignity and the Protection against Double Jeopardy

As we stated in *ELA v. Hermandad de Empleados,* the delegates to the Constitutional Assembly wanted to create a broader Bill of Rights that incorporated the thoughts of different cultures and the contemporary developments on new categories of rights. Consequently, the courts are bound to liberally interpret the rights consecrated therein.[242]

The Bill of Rights of our Constitution begins by affirming that "the dignity of the human being is

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prosecuting a defendant that had been acquitted in federal court for the same facts. By doing so, the Court emphasized the need to consider the interest of the individual instead of the interests of the sovereign:

> "Looking at the matter from that standpoint, we cannot escape the conclusion that the individual citizen is as much endangered by a second prosecution by the same sovereign after an acquittal as he would be by such a second prosecution by a different sovereign under our federal system."

State v. Hogg, 118 N.H. 262, 267 (1978). It also reasoned that, because its Constitution was drafted prior to the federal Constitution, it should follow the doctrine firmly established in English common law.

[242] P.R. Const., Art. II § 19. "The foregoing list of rights shall not be understood as a limitation and it does not entail the exclusion of other rights belonging to the People in a democracy and not specifically mentioned."

inviolable."[243] Inspired by the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man, our constituents inserted Puerto Rico in the modern constitutional currents that arose in response to the horrors of the Second World War.[244] By enunciating the inviolability of the dignity of the human being as its starting point, our Bill of Rights does not do so as if it were merely an additional right to all the rest. The dignity of the human being is established as an independent right, demandable in and of itself, and at the same time, as a principle to which all of the other fundamental rights protected by our legal system answer:

> We must remember that [the inviolability of human dignity] is contained in a Bill of Rights, in a list that precedes the articles corresponding to the structure of the government. This Bill of Rights does not appear as an amendment to the Constitution. From its own terms, it is named as a right; in other words, it is not

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[243] P.R. Const., Art. II § 1.

[244] *López Vives v. Policía de P.R.*, 118 P.R. Dec. 219, 226-27; Carlos E. Ramos González, *La inviolabilidad de la dignidad humana: lo indigno de la búsqueda de expectativas razonables de intimidad en el derecho constitucional puertorriqueño* (*The Inviolability of Human Dignity: The Appalling in the Search for Reasonable Expectation of Privacy in Puerto Rican Constitutional Law*), 10 Academia Puertorriqueña de Jurisprudencia y Legislación 1, 1-2 (2010).

> articulated as a value or principle. It is expressed in absolute terms. It does not allow exceptions. It is not possible for a temporary violation of same to be tolerated. It does not allow higher values. Not only is it aimed at the State solely limiting the exercise of its powers; it is also aimed at society: nobody can violate human dignity.[245]

The Bill of Rights of the Constitution of the United States, which also inspired our Bill of Rights, has the main purpose of limiting the powers of the State against the individual. However, our Bill of Rights not only limits the powers of the State to protect the individual, but it also imposes on the State the obligation to vindicate the rights that it recognizes, since human dignity so demands. The main principle of our Bill of Rights, our Constitution and our legal system is, therefore, the protection of human dignity.

It is not easy to define a concept such as human dignity because its intrinsic meaning is significantly conditioned by cultural factors.[246] Although it is also the main criticism raised against it, it is precisely in the apparently inherent ambiguity of the concept of human dignity where its immense normative

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[245] Carlos Ramos, *supra*, at 5.

[246] Oscar Schachter, *Human Dignity as a Normative Concept*, 77 The Am. J. of Int. L. 848, 849 (1983).

potential resides.[247] It is we, constituted in the Puerto Rican society, who must provide it with concrete content according to the principles that we value and cherish as a people. This Supreme Court is only one of the many entities that exercise the sovereign power of the People of Puerto Rico and share the responsibility of defining the specific content of human dignity in our society. As Jaime Benítez stated in our Constitutional Assembly:

> I now would like to briefly point out the ideological architecture within which [the proposition of the Bill of Rights Commission] is mounted. Perhaps all of it is summarized in the first sentence of its first postulate: *the dignity of the human being is inviolable*. This is the cornerstone of democracy. In it lies its profound moral strength and vitality. Because before anything else,

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[247] Some hold that human dignity is an empty legal concept, subject to significant judicial manipulation. Matthias Mahlman, *The Basic Law at 6-Human Dignity and the Culture of Republicanism*, 11 German L. J. 9, 10, 12 (2010) (citations omitted). As Professor Alvarez González correctly points out, "[t]he fact that the concept of dignity is hard to define and apply should not signify that we should refuse to attempt it and banish this constitutional provision," particularly if we consider its primacy in our legal system and the constitutional imperative to provide it content. José J. Álvarez González, *Contestación al discurso del profesor Carlos E. Ramos González* (*Answer to Statement by Prof. Carlos E. Ramos González*), 10 Academia Puertorriqueña de Jurisprudencia y Legislación 31, 39 (2010).

> democracy is a moral force and its morals lie precisely in its acknowledgement of the dignity of the human being, of the high regard warranted by said dignity and the consequent responsibility of the entire constitutional order to rely on it, protect it and defend it.[248]

Articulating human dignity as the guiding principle of our Bill of Rights is unparalleled among the international declarations of human rights that inspired it, or in the federal Constitution or the constitution of any of the states.[249] However, there are other systems that place the dignity of the human being in a similar position to ours; for example, that of the Federal Republic of Germany. That is why it is useful to resort to the caselaw of the German Federal Constitutional Court to clarify the implications of declaring that human dignity is the cornerstone of our system.[250]

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[248] 2 *Diario de sesiones de la Convención Constituyente de Puerto Rico*, 1103 (1961) (Emphasis in original).

[249] Carlos Ramos, *supra*, at 7. Although the State of Montana, whose constitution was inspired by ours, includes the inviolability of the dignity of the human being in its bill of rights, it does not hold the same exalted place that our Constitution gives to it. *See* Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15 (2004).

[250] *Arroyo v. Ratan*, *supra*, at 60; *Figueroa Ferrer v. ELA*, *supra*, at 250.

As in our Constitution, in the German Constitution the inviolability of the human being is the cardinal principle from which its other basic rights are derived.[251] The Federal Constitutional Court has expressed that the inviolability of the human being is the most essential characteristic of its Constitution.[252] It has even gone so far as to give it normative meaning, assigning it concrete legal consequences. For example, based on the inviolability of human dignity, the caselaw of the German Constitutional Court has developed a ban on using the human being as an instrument, as well as the obligation to respect the autonomy of the human being over his personal and social life, and to respect his/her humanity.[253] Specifically, the German Federal Constitutional Court has ruled that a life sentence without the possibility of release violates the dignity of the individual, not because it uses him as an instrument, but because it fails to respect his humanity by not recognizing the possibility that the

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[251] For a comparison between the way in which the German system and the Puerto Rican system have addressed the inviolability of the dignity of the human being, *see* Luis A. Avilés, *Human Dignity, Privacy and Personal Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 Rev. Jur. UPR 343, 346 (1998).

[252] Mahlmann, *supra*, at 10.

[253] *Id.* at 24.

human being, as an autonomous subject, may modify his behavior and return to society.[254] Therefore:

> The guiding principle that German caselaw has derived from its dignity clause is that the human being is an end in and of itself and can never become an object of the power of the State. Based on that central concept, German caselaw has derived concrete consequences, both substantive and procedural.[255]

During the debates that developed in our Constitutional Assembly regarding the Bill of Rights of our Constitution, the Report of the Bill of Rights Commission stated that including the inviolability of the dignity of the human being as the first right of the Bill had the purpose of establishing it as the cardinal principle that informed all the other rights, and, therefore, our legal system. It also states that the Puerto Rican legal system, including this Court, is bound to expand the provisions of our Bill of Rights in order to adapt them to the needs of Puerto Rican society.[256] In other words, the so-called

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[254] *Id.* at 27. For a more detailed discussion, *see* Aviles, *supra*, at 352-53.

[255] Álvarez González, *Contestación*, *supra*, at 40. Professor Alvarez also points out that this caselaw conflicts with ours in certain areas, such as freedom of speech, which is given lesser protection there.

[256] 4 *Diario de Sesiones de la Convención Constituyente de Puerto Rico*, 2561 (1961).

"broader scope" of our Constitution not only occurs based on the liberal interpretation demanded by section 19 of the Bill of Rights, but is an imperative resulting from the inviolability of the dignity of the human being. Precisely because it informs the other fundamental rights and permeates all of our legal system, the dignity of the human being demands giving greater effectiveness to the principles that the People of Puerto Rico consecrated in the Bill of Rights.

Conceiving human rights as derived from true human dignity gives this Court authority to formulate new rights and expand the existing rights and adapt them to the new contexts of our society.[257] That is the legal and political logic that gives rise to the broader scope of our Bill of Rights.

In keeping with this reality, we have recognized that human dignity informs the rights included in the Bill of Rights, among them the right to intimacy, the protection against unreasonable searches and seizures, and the ban on wiretapping.[258] For example, we have stated that the right to intimacy and the right to work are consubstantial with human dignity.[259] We have also expanded the existing

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[257] Schachter, *supra*, at 853.

[258] P.R. Const., Art. II § 8; P.R. Const., Art. II § 10.

[259] *Arroyo v. Rattan*, *supra*, at 61.

rights, referring to human dignity, to address new contexts and create new rights.[260]

However, few of our opinions address the inviolability of the dignity of the human being independently and carefully, and we have never articulated human dignity as an independent right.[261]

VIII

Because of its own nature, the doctrine of dual sovereignty defeats the basic principles of the protection against double jeopardy. As we have already discussed, although firmly established in the caselaw of the U.S. Supreme Court, several considerations undermine its legitimacy. The doctrine of dual sovereignty is not consistent with the historical background of the protection against double jeopardy in England. It is also not consistent with the theoretical principle of the sovereignty of the People of the United States over the federal Government and over that of the states of the Union,

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[260] In *Arroyo v. Rattan*, *supra*, we held that the protection of intimacy protects the employee that refuses to submit himself to a polygraph test. In *Figueroa Ferrer*, we held that, pursuant to the right to intimacy and to dignity in our legal system, the grounds for divorce based on mutual consent or divorce without fault. [sic]

[261] *See* Carlos Ramos, *supra*, at 10; Álvarez González, *Contestación*, *supra*, at 36-37; Hiram Meléndez Juarbe, *La Constitución en ceros y unos: un acercamiento digital al derecho a la intimidad y la seguridad pública*, 77 Rev. Jur. UPR 45 (2008); Avilés, *supra*.

or with the historical processes of the admission of new states into the Union. Several states have decreed its invalidity, whether through constitutional interpretation or statutorily. Additionally, the U.S. Supreme Court itself has refused to apply the doctrine of dual sovereignty to other basic rights of the Bill of Rights of the federal Constitution—including other Fifth Amendment rights—and the concerns regarding federalism can be addressed in other ways. Therefore, none of the grounds that the U.S. Supreme Court has articulated moves us to uphold the doctrine of dual sovereignty in our legal system.

Even more importantly, the doctrine of dual sovereignty does not even attempt to balance the interest of the sovereign in punishing an offense and the right of the individual to not be punished or prosecuted several times for the same offense. This is a direct attack on the dignity of the human being, using him as a mere instrument of the punitive interest of the State.

Our analysis confirms without question that the Commonwealth of Puerto Rico is a sovereign for purposes of the constitutional protection against double jeopardy and the doctrine of dual sovereignty. However, it also confirms that the inviolability of the dignity of the human being is the cardinal principle that informs our entire legal system. Double exposure to a penal process based on dual sovereignty is incompatible with this constitutional reality. Thus, in order to be faithful to the aspirations and values that the People of Puerto Rico

expressed in their Constitution, we must eliminate the doctrine of dual sovereignty from our legal system.

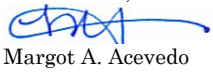
For the reasons stated above, I would partially overrule the holding by this Court in *People v. Castro García* and would hold that the constitutional protection against double jeopardy expressed in the Puerto Rico Constitution bars the Commonwealth from prosecuting an individual for the same offense already punished by another sovereign. Therefore, although for different reasons, I concur with the result of the Majority opinion and I would modify the judgment of the Court of Appeals to dismiss all of the indictments against Mr. Sánchez Valle and Mr. Gómez Vázquez under Art. 5.01 of the Weapons Act.

[signed]
Liana Fiol Matta
Chief Justice

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Margot A. Acevedo, of legal age, married, a resident of Shorewood, WI., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, July 1, 2015.



Margot A. Acevedo
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[CERTIFIED TRANSLATION]

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico
Respondent
v.
Luis M. Sánchez Valle
Petitioner

The People of Puerto Rico
Respondent
v.
Jaime Gómez Vázquez
Petitioner

The People of Puerto Rico
v.
René Rivero Betancourt

The People of Puerto Rico
v.
Rafael A. Delgado Rodríguez

CC-2013-0068
CC-2013-0072

"[A] constitutional State is precisely based on the regulatory proclamation

> that there is a sovereign and that this sovereign is the people."[1]
>
> "Whether God alone is sovereign, that is, the one who acts as his acknowledged representative on earth, or the emperor, or prince, or the people, meaning those who identify themselves directly with the people, the question is always aimed at the subject of sovereignty, at the application of the concept to a concrete situation."[2]

Dissenting Opinion issued by Associate Justice Rodríguez Rodríguez

San Juan, Puerto Rico, on March 20, 2015.

Once again, a majority of this Court hastens to overrule, on questionable grounds, firmly-established precedents of our legal system.[3] In this manner

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[1] Manuel Aragón, *Constitución, democracia y control* [*Constitution, Democracy and Control*] 15 (2002), available at http://biblio.juridicas.unam.mx/libros/1/288/4.pdf

[2] Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* 10 (George Schwab trans., 2005).

[3] *See, e.g.*, *Rivera Schatz v. Estado Libre Asociado de Puerto Rico*, 2014 T.S.P.R. 122, 191 P.R. Dec. ___ (2014) (revoking *Col. de Abogados de P.R. v. Schneider*, 112 P.R. Dec. 540 (1982)); *E.L.A. v. Northwestern Selecta*, 185 P.R. Dec. 40 (2012) (revoking *R.C.A. v. Gobierno de la Capital*, 91 P.R. Dec. 416 (1964)); *Roselló Puig v. Rodríguez Cruz*, 183 P.R. Dec. 81 (2011) (partially revoking *Toppel v. Toppel*, 114 P.R. Dec. 775 (1983)); *E.L.A. v. Crespo Torres*, 180 P.R. Dec. 776 (2011) (revoking,

concepts that are at the very core of the legitimacy of our political system and the Rule of Law that prevails in our jurisdiction are unexpectedly disturbed.

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among others, *Sepúlveda v. Depto. de Salud*, 145 P.R. Dec. 560 (1998); *Aulet v. Depto. Servicios Sociales*, 129 P.R. Dec. 1 (1991); *A.C.A.A. v. Bird Piñero*, 115 P.R. Dec. 463 (1984); *Cartagena v. E.L.A.*, 116 P.R. Dec. 254 (1985); *American R.R. Co. of P.R. v. Wolkers*, 22 P.R. Dec. 283 (1915); *Arandes v. Báez*, 20 P.R. Dec. 388 (1914)). It is worth pointing out that either intentionally or incidentally, at least three of the four aforementioned cases revoked precedents that were established during the time that this Court was presided by our most renowned jurist, Mr. Jose Trías Monge. *See Schneider*, 112 P.R. Dec. 540; *Toppel*, 180 P.R. Dec. 775; *Cartagena*, 116 P.R. Dec. 254. There is no doubt that Mr. Jose Trías Monge, who presided this Court from April 19, 1974, to September 30 1985, has been our most distinguished jurist. Evidence of this, for example, are his valuable contributions to our legal and intellectual heritage. In addition, it was the Trías Court that systematically broadened the enjoyment of civil and fundamental rights in our Country. *See, e.g.*, *Ortiz Angleró v. Barreto Pérez*, 110 P.R. Dec. 84 (1980); *Figueroa Ferrer v. E.L.A.*, 107 P.R. Dec. 250 (1978); *E.L.A. v. Hermandad de Empleados*, 104 P.R. Dec. 436 (1975). We also owe that court, to mention only one of so many contributions, the development of our "broader bill." *See* Ernesto L. Chiesa, *Los derechos de los acusados y la factura más ancha* [*The Rights of the Accused and the Broader Scope*]. Speech made at his induction into the Puerto Rico Jurisprudence and Legislation Academy on February 9, 1995, 5 P.R. Juris. & L. Acad. Rev. 61 (1998); Ernesto L. Chiesa, *Los derechos de los acusados y la factura más ancha*, 65 U.P.R. L. Rev. 83 (1996). *See also* Carmelo Delgado Cintron, *José Trías Monge: Las dimensiones del saber y del poder* [*José Trías Monge: The Dimensions of Knowledge and Power*], 73 U.P.R. L. Rev. 185 (2004).

Thus, I vigorously dissent from the opinion adopted by a majority of this Court setting aside the rule established in *Pueblo v. Castro García*, 120 P.R. Dec. 740 (1988), which recognized the Commonwealth of Puerto Rico (the Commonwealth) as a sovereign pursuant to the dual sovereignty doctrine for purposes of the constitutional protection against double jeopardy.

Even more significant is the fact that the majority thereby unjustifiably deprives the State of a valuable tool for its fight against crime. According to the majority's "reasoning," the Commonwealth is barred from indicting persons who are prosecuted at the federal level. In other words, corruption cases such as the ones that occurred during Victor Fajardo's tenure as Secretary of Education in the nineties could not have been filed in our local courts, as was done in the past. More recently, thanks to this decision, the Commonwealth will be unable to file bribery charges under Puerto Rico laws against the convict Lutgardo Acevedo, even if it is deemed appropriate. The inevitable outcome is that violations of our Puerto Rico laws will remain unpunished as a result of what has been the most serious stains on our Country's Judiciary. Ironically, it is the Judiciary itself, speaking through a majority of this Court, who endorses such impunity.

Furthermore, today's unfortunate decision, based more on ideology than on law, could very well have a negative impact on the collaborative agreements between agencies of the government of the United States and Puerto Rico. This, because prosecution at

the federal level will mean that violations of Puerto Rican laws cannot be prosecuted. In the end, such violations will be "free."[4] Moreover, I anticipate that sooner rather than later there will be a downpour of *habeas corpus* petitions pending before the courts of our Country. It appears that the majority does not care much about these detrimental and harmful effects on the administration of justice in our country, because they issued their decision very well knowing what is going to happen. Let me repeat again, I dissent.

Lastly, this ill-fated ruling once again turns this Court's back to the United States Constitution and the rules set by the Highest Court of the United States with regard to the scope and contents of the that Constitution.

The majority's decision is incompatible with *U.S. v. Wheeler*, 435 U.S. 313 (1978). Furthermore, it departs from, and even contradicts, the opinions of said Court in *Calero-Toledo v. Pearson Yacht Leasing*

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[4] The answer that the majority offers to this eventuality is little less than simplistic. It also demonstrates a vast lack of knowledge regarding collaboration agreements between the Puerto Rico Department of Justice and officials of the United States Department of Justice who work in Puerto Rico and how they operate and have operated. Lastly, it demonstrates clear and unfortunate disregard for the interest of any State or duly constituted political entity to enforce its own laws, as well as for the work that our local Department of Justice and prosecutors do every day. Instead, their work should be respected and acknowledged, not disregarded.

Co., 416 U.S. 663 (1974); *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572 (1976); *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982), and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). That should be enough for the United States Supreme Court to intervene in this case to bring the majority of this Court back to the fold of the United Sates Constitution.

I

Since the application of the dual sovereignty doctrine, as a threshold question, does not require a detailed account of the facts of the case, I will limit myself to what is indispensable.

A

On September 28, 2008, Mr. Luis M. Sánchez del Valle was charged with violations of Article 5.01 of the Puerto Rico Weapons Act, 25 L.P.R.A. § 458, for allegedly selling firearms without a permit. In addition, he was charged with a subsequent violation of the same article for selling ammunition without a permit. Lastly, he was charged with a violation of Article 5.04 of said criminal statute, which establishes that it is a felony to carry a firearm illegally. 25 L.P.R.A. § 458c.

Before the criminal proceedings against Mr. Sánchez del Valle in state court concluded, he was indicted by a federal Grand Jury for violations of federal criminal laws that prohibit the illegal traffic of firearms and ammunition through interstate commerce. 18 U.S.C. §§ 922(a)(1)(A), 923(a),

924(a)(1)(D) and 924(2). In due course, the United States District Court for the District of Puerto Rico found Mr. Sánchez del Valle guilty of the charges brought against him and sentenced him to five months in prison, five months of home arrest and three years of supervised release.[5]

Consequently, Mr. Sánchez del Valle filed with the Court of First Instance a motion to dismiss under Rule 64(e) of the Rules of Criminal Procedure, 34 L.P.R.A. App. II, R. 64(e), essentially claiming protection under the double jeopardy clause set forth in the United States Constitution, U.S. Const. 5th Amend., and in the Commonwealth of Puerto Rico Constitution, P.R. Constitution Art II, Section 11. He thus argued that the dual sovereignty doctrine recognized by this Court in *Pueblo v. Castro García*, should not apply because Puerto Rico continued to be a *territory* for purposes of the doctrine. For its part, the prosecution opposed the motion, arguing that the

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[5] As relevant hereto, it is worth noting that in Puerto Rico, those same felonies are subject to significantly greater sentences. *See* 25 P.R Laws Ann. § 458 ("Any violation of this section shall constitute a felony and shall be subject to a fixed, fifteen (15) year prison sentence, without the right to a suspended sentence, parole, or the benefits of any diversion program, good time credits or any alternative to the prison sentence laid down in this jurisdiction, and the convict shall serve in natural years the entire sentence imposed. In the event of aggravating circumstances, the fixed sentence established may be increased up to a maximum of twenty-five (25) years; and in the event of mitigating circumstances, it may be reduced to a minimum of ten (10) years.").

Commonwealth and the government of the United States (U.S.A.) derive their *ius puniendi*, that is, their authority to punish crimes, from different sources.

After considering the motion to dismiss, the lower court ruled in favor of the petitioner, Mr. Sánchez del Valle. It essentially determined that the Commonwealth and the United States are not different jurisdictions for purposes of the dual sovereignty doctrine. Therefore, the petitioner could not be prosecuted again in state court for the same crimes for which he was convicted in federal court,[6] because they constitute the *same offense* for purposes of the constitutional protection against double jeopardy. The prosecution appealed the decision to the intermediate appellate court.

B

On September 28, 2008, for acts related to the case discussed above, Mr. Jaime Gómez Vázquez was charged with violating Article 5.01 of the Puerto Rico Weapons Act, 25 L.P.R.A. § 458, which prohibits the illegal sale and transfer of a firearm. In addition, he 5.07, 25 L.P.R.A. § 458f, which prohibits carrying rifles, and 5.10, 25 L.P.R.A. § 458i, which prohibits transferring a mutilated firearm.

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[6] It is worth pointing out that Mr. Sánchez del Valle was not federally charged of any crime pertaining to illegally carrying firearms.

Moreover, also before the criminal proceedings in state court concluded, Mr. Gómez, as relevant here, was indicted by a federal grand jury for allegedly selling weapons illegally through interstate commerce, in relation to the same acts. 18 U.S.C. §§ 922(a)(1)(A), 923(a) and 924(a)(1)(D).[7] After several procedural events, Mr. Gómez Vázquez entered into a plea bargain in federal court. Then, on June 26, 2010, the federal court proceeded to sentence him to eighteen months in prison and three years on parole.

As a result, Mr. Gómez Vázquez proceeded to file with the Court of First Instance a motion to dismiss under Rule 64(e) of the Rules of Criminal Procedure, 34 P.R. Laws Ann. App. II, R. 64(e). In his motion, he essentially claimed the same as Mr. Sánchez del Valle, namely, that his prosecution in state court, having been convicted for *the same offenses* in federal court, violated the constitutional protection against double jeopardy laid down in the United States Constitution, U.S. Const. 5th Amend., and the Constitution of the Commonwealth, P.R. Const. Art. II § 11.

Consequently, he argued that Puerto Rico and the United States could not be considered different

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[7] As in the case of Mr. Sánchez del Valle, Mr. Gómez Vázquez was not charged with allegedly illegally carrying or mutilating firearms. Likewise, the sentence for such crimes in our jurisdiction is significantly greater. *See* 25 P.R. Laws Ann. § 458.

sovereigns and that the dual sovereignty doctrine was not applicable. The Prosecution opposed this and defended the Court's decision in *Pueblo v. Castro García*. That is, it argued that the Commonwealth is a sovereign entity separate from the U.S.A. for purposes of the constitutional protection against double jeopardy and that, therefore, the dual sovereignty doctrine does apply.

The lower court then proceeded to dismiss and, consequently, held that, indeed, Puerto Rico and the United States must be considered a sole sovereign for purposes of the protection against double jeopardy. The Prosecution filed an appeal with the intermediate court of appeals.

C

The Court of Appeals consolidated the appeals filed by the Prosecution in both cases. After examining the merits of the cases, it proceeded to set aside the appealed decisions, finding that in accordance with this Court's decision in *Pueblo v. Castro García*, the dual sovereignty doctrine does apply.

Petitioners separately appealed the intermediate court of appeals' decision. This Court, on its part, consolidated both appeals and today has set aside the rule it had endorsed in *Pueblo v. Castro García* regarding the Commonwealth's situation within the complex constitutional framework of the United States.

II

Among the various protections laid down in the Bill of Rights of our Constitution is the protection against double jeopardy, which provides that "[n]o person shall be twice put in jeopardy of punishment for the same offense." P.R. Const. Art. II § 11; *see Pueblo v. Santiago Pérez*, 160 P.R. Dec. 618 (2003). Likewise, the U.S. Constitution lays down a similar protection in its Fifth Amendment: "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. 5th Amend. *See Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)) (where it was held that the protection against double jeopardy applies to the states by virtue of the Fourteenth Amendment). In fact, our constitutional protection was formulated in accordance with its federal counterpart to incorporate its legal meaning, devised through numerous opinions of the U.S. Supreme Court[8] was deemed incorporated in ours. *See Diario de Sesiones de la Convención Constituyente de Puerto Rico* [*Legislative Record of the Puerto Rico*

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[8] *See, e.g.*, *U.S. v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)); *Illinois v. Vitale*, 447 U.S. 410 (1980); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Brown v. Ohio*, 432 U.S. 161 (1977); *Benton*, 395 U.S. 784; *Green v. U.S.,* 355 U.S. 184 (1957); *Blockburger v. U.S.*, 284 U.S. 299 (1932); *Gavieres v. U.S.,* 220 U.S. 338 (1911); *Vilas v. City of Manila*, 220 U.S. 345 (1911); *Grafton v. U.S.*, 206 U.S. 333 (1907); *Kepner v. U.S.*, 195 U.S. 100 (1904); *Ex parte Nielsen*, 131 U.S. 176, 187 (1889) (citing *Morey v. Com.*, 108 Mass. 433 (1871)).

Constitutional Convention] 2568-69, T. IV (1961). Thus, "[t]here is no basis to hold that the clause was given or should be given greater content" in the Puerto Rican constitutional order. Ernesto L. Chiesa Aponte, *Doble Exposición* [*Double Jeopardy*], 59 U.P.R. L. Rev. 479, 480 (1990). In addition, after *Benton,* it is undeniable that the federal constitutional doctrine pertaining to the clause is the very minimum applicable to Puerto Rico.

In short, in order to invoke such protection, it is imperative that a criminal action is invoked and the jeopardy must be related to one *same offense*. *Santiago Pérez*, 160 P.R. Dec. at 628-29. Moreover, the scope of the protection, as interpreted by the courts of justice, is not only about preventing multiple punishments. That is,

> [t]he constitutional guarantee against double jeopardy protects citizens in four instances, namely: (i) from being retried after being *acquitted* for the same offense; (ii) from being retried after being *convicted* for the same offense; (iii) from being retried for the same offense (after trial was started and did not conclude either in an acquittal nor in a conviction); and (iv) from *multiple punishments* for the same offense.
>
> *Id.* at 628 (citing *Pueblo v. Martínez Torres*, 126 P.R. Dec. 561, 568-569 (1990); *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *Brown v. Ohio*, 432 U.S.

161, 165 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Wade v. Hunter*, 336 U.S. 684 (1949)).

In addition, as we will see below, pursuant to the dual sovereignty doctrine, it is presumed that the protection will be invoked before one same sovereign.

III

The dual sovereignty doctrine,[9] to a certain extent, is a logical consequence of the United States federal system, under which states have residual sovereignty, protected by virtue of the Tenth Amendment, U.S. Const., 10th Amend. and the Eleventh Amendment, U.S. Const., 11th Amend. This doctrine was devised gradually throughout the nineteenth century in cases such as *Fox v. Ohio*, 46 U.S. 410 (1847);[10] *U.S. v. Marigold*, 50 U.S. 560 (1850),[11] and *Moore v. People of State of Illinois*, 55

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[9] For a brief account on the development of the dual sovereignty doctrine, *see* Ernesto L. Chiesa Aponte, *supra*, at 540-45.

[10] *See Fox,* 46 U.S. at 434 ("The punishment of a cheat or a misdemeanor practiced within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular of justifiable.").

[11] *See Marigold*, 50 U.S. at 569-70 ("With the view of avoiding conflict between the State and Federal jurisdictions, this court in the case *Fox v. The State of Ohio* have taken care to point out, that the same act might, as to its character and

U.S. 13 (1852).[12] *See also Cross v. State of North Carolina*, 132 U.S. 131, 139-40 (1889). However, it was not until *U.S. v. Lanza*, 260 U.S. 377 (1922), when the dual sovereignty doctrine was outright recognized as an exception to the constitutional protection against double jeopardy.[13] *See generally* William J. Bach, *Modern Constitutional Law* 507-09 (3d ed. 2011).

In *Lanza,* the defendants claimed that two punishments for the same criminal offense, one under the *National Prohibition Act* and another under state statutes, contravened the protection against double jeopardy laid down in the Fifth Amendment of the U.S. Constitution. *Lanza*, 260 U.S. at 379. In this case, by the time the defendants were prosecuted in federal court, they had already

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tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound…").

[12] *See Moore,* [55] U.S. at 20 ("[T]his court has decided, in the case of *Fox v. The State of Ohio*, (5 How. 432,) that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States v. Marigold* (9 How. 560,) that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States.").

[13] *See U.S. v. Wheeler*, 435 U.S. 313, 316 n.7 (1978) ("The first case in which actual multiple prosecutions were upheld was *United States v. Lanza* …").

been found guilty in state court for crimes related to the same acts, namely, manufacturing, transporting and possessing alcoholic beverages.[14] The U.S. Supreme Court, however, held that since two separate sovereigns deriving power from different sources were involved the protection against double jeopardy did not apply. That is, it reduced the protection's potential scope of applicability. Thus, from *Lanza* on, it is unquestionable that protection against double jeopardy only operates with regard to the same sovereign.

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory … Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

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[14] It is important to point out that, given the application of the dual sovereignty doctrine, it does not matter whether the offenses were the same for purposes of the protection against double jeopardy, because the protection simply cannot be invoked, because we are dealing with two separate sovereigns.

Lanza, 260 U.S. at 382.

About fifteen years after *Lanza*, the U.S. Supreme Court decided *People of Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937); a case that is particularly relevant to the matter concerning us now, especially considering the disproportionate weight that a majority of this Court attributes to that case. First of all, we must eliminate any doubt as to the exact controversy involved in the aforementioned case. Pursuant to the words of the U.S. Supreme Court itself, the matter was limited to addressing whether the third section of the *Sherman Act*, 15 U.S.C. § 33, prevented Puerto Rico's insular legislature at the time from promulgating a local statute to deal with the same matters already covered by federal law, that is, unfair market practices or antitrust. *Shell Co.*, 302 U.S. at 255 ("The single question which we have to decide is whether the existence of Section 3 of the Sherman Act … precluded the adoption of the local act by the insular legislature.").[15] It is evident, then, that what

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[15] The limited statutory scope of the controversy that the U.S. Supreme Court dealt with in *Shell Co.* is evident. It is enough to read the statement made by the Court later on in its opinion: "The only question, therefore, is whether the word 'territory' **as used in section 3 of the Sherman Act**, properly can be applied to a dependency now bearing the relation to the United States which is borne by Puerto Rico." *Shell Co.*, 302 U.S. at 257. *See generally Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., et al.*, 649 F.2d 36, 38-39 (1st Cir. 1981) (addressing the same controversy after the creation of the Commonwealth). To intend to give a broader

the highest court of the United States held was, above all, a statutory interpretation under the *Sherman Act*. Furthermore, it is important to point

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meaning to what was decided by the U.S. Supreme Court in that matter, given the unambiguous words used by said Court would be an attack against an "objective legal reality"; namely, the limited scope of said court opinion. *Cf.* Maj. Op. at 61.

Likewise, to extrapolate the meaning of the word "territory" in *Shell Co.* to other, much more complex contexts is, to say the least, too convenient for adjudicative purposes. Though it is true that Puerto Rico has traditionally been considered a "territory" for purposes of the territorial clause of the U.S. Constitution, this does not necessarily predetermine, in itself, the constitutional relationship between Puerto Rico and the United States throughout time. That is, it is conceivable, for example, that such relationship would change with the mere passing of time as well as the manner in which Congress has legislated in relation to Puerto Rico. *See Consejo de Salud Playa de Ponce v. Rullán*, 586 F. Supp. 2d 22 (D.P.R. 2008) (holding that, in view of the historical relationship between the U.S. and Puerto Rico, the latter has become an incorporated territory). Thus, to accept such possibility tends to also accept the possibility that the relationship between both has changed since the promulgation of the Commonwealth's Constitution, which implied the creation of a State and, in turn, the recognition of its constituents' sovereignty.

Nonetheless, it is important to point out that, as revealed through a careful examination of the complex history of the United States government and its relationships with territorial possessions and the complexity underlying same, we must inevitably conclude that such plenary powers are subject, and *may be subject*, to punctual limitations. For example, it is sufficient to point out the *Insular Cases* themselves, to the extent that they determine the applicability of the U.S. Constitution to territories, which in turn pose a first limitation to the plenary powers of Congress regarding these.

out that, at the time when *Shell Co.* was decided, Puerto Rico was governed by the *Jones Act of 1917*, 39 Stat. 951, the organic act promulgated by Congress in the exercise of its plenary powers over United States territories. *See* U.S. Const. Art. IV, Section 3.[16]

In *Shell Co.,* in a nutshell, the defendants argued in local court that the statute enacted by the insular legislature was inapplicable, because the third section of the Sherman Act, federal legislation, dealt with the same matters. Moreover, they argued that allowing them to be prosecuted in local courts would cause them to be put in jeopardy of being prosecuted more than once for the same offenses, in violation of the protection against double jeopardy established by the U.S. Constitution, given that, by virtue of the Sherman Act, federal courts could also do the same. On the merits, however, *Shell Co.* only held that the local antitrust statute was not in conflict with the relevant provision of the Sherman Act, that is, the statute was a valid exercise of Puerto Rico's insular

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[16] Regarding the plenary powers of Congress with regard to U.S. territories, *see, e.g.*, *Late Corporation of the Church of Jesus Christ of Latter-Day Saints et al. v. United States*, 136 U.S. 1 (1890); *First Nat. Bank v. Yankton County,* 101 U.S. 129; (1879) *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1826). Furthermore, we must inevitably take into consideration the so-called *Insular Cases* that revolve around the applicability of the U.S. Constitution in territories, as these are or not incorporated to the United States. *See*, *inter alia*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. U.S.*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182, U.S. 244 (1901).

legislature. Thus, in summary, the doctrine established in *Shell Co.* is limited to holding that the third section of the *Sherman Act* did not prevent the insular legislature of Puerto Rico from enacting a local statute pertaining to the same subject matter.

With regard to the arguments of potential double jeopardy, in *Shell Co.*, the U.S. Supreme Court merely stated by *dicta,*[17] that in any event the constitutional protection in question would not be violated. Thus, taking into consideration the prevailing historical circumstances,[18] it held that

> [t]he risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. Prosecution under

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[17] *See Waller v. Florida*, 397 U.S. 387, 393 n.5 (1970) ("See also Puerto Rico v. Shell Co. (P.R.), Ltd., 302 U.S. 253, 58 S.Ct. 167, 82 L.Ed. 235 (1937), where the Court in **dicta** approved of *Grafton*."). (Emphasis added.) *See also Castro García*, 120 P.R. Dec. at 761 ("[I]n the case of Puerto Rico v. Shell Co. … the application of the dual sovereignty doctrine to Puerto Rico was not in controversy, therefore, the statements made therein are dictum.").

[18] Irrefutable evidence of the fact that the U.S. Supreme Court did indeed take into consideration the prevailing historical circumstances is that it made sure to analyze Puerto Rico's constitutional situation at the time and further took into consideration the organic laws prevailing at the time in the Country. *See Shell Co.*, 302 U.S. at 257-64.

> one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court. *Shell Co.,* 302 U.S. at 264 (citing *Balzac v. Puerto Rico,* 258 U.S. at 312; *Grafton v. United States,* 206 U.S. 333 (1907)).

Lastly, with regard to *Shell Co.*, it is important to underscore that, as stated above, that case was decided under other historical circumstances. Its interpretation of the constitutional situation of Puerto Rico in its relations with the United States is, to say the least, anachronistic. Therefore, the statements made in *Shell Co.*, at a historical time when the Puerto Rican political system was a creature of the U.S. Congress, under the *Jones Act*, cannot be used to interpret the Commonwealth, as the creation of the Commonwealth in turn recognized a political community duly organized through its own constitutional process. The disproportionate importance that a majority of this Court gives this precedent is by all means wrong.

After *Shell Co.* was decided, the subsequent development of the dual sovereignty doctrine did not imply any major deviations with regard to its guiding principle: the sovereignty of the authority that intends to criminally prosecute an individual. In *Jerome v. U.S.*, 318 U.S. 101 (1943), for example, and in accordance with said principle, it was reaffirmed, in general terms, that "the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based

on the same acts has already been obtained." *Id*. at 105 (citing *Lanza*, 260 U.S. 377; *Herbert v. State of La.*, 272 U.S. 312 (1926)). Likewise, in *Bartkus v. People of State of Ill.*, 359 U.S. 121 (1959), the U.S. Supreme Court held that since two separate sovereigns were involved an acquittal in criminal proceedings at the federal level does not stand as a bar to subsequent prosecution, for the same crimes, in state court. *Bartkus*, 359 U.S. at 133-34. Moreover, in *Abbate v. U.S.*, 359 U.S. 187 (1959), it held, for similar considerations, that a state conviction did not stand as a bar to subsequent prosecution in federal court. *Abbate*, 359 U.S. at 193-96.[19]

It was not until *U.S. v. Wheeler*, 435 U.S. 313 (1978), when the U.S. Supreme Court was for the first time faced with an *atypical sovereign* within the scope of the dual sovereignty doctrine.[20] In *Wheeler*,

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[19] In *Abbate* the petitioners petitioned the Court to set aside the rule established in *Lanza*. This, however, did not prevail. The U.S. Supreme Court, therefore, expressly reaffirmed the effectiveness of said rule. *Abbate*, 359 U.S. at 195. It based its decision on the difference between federal and state interests, and the disparity in the vindication of such interests that would result from overruling the rule established in *Lanza*, to the extent that it allows dealing with both interests satisfactorily.

[20] As an initial matter, it was unusual for the decision of the U.S. Court of Appeals for the Ninth Circuit overturned by the U.S. Supreme Court in *Wheeler* to have compared the Indian tribes to the Commonwealth to determine that the tribes are not sovereigns for purposes of the dual sovereignty doctrine. *See U.S. v. Wheeler*, 545 F.2d 1255, 1257 (9th Cir. 1976) ("But

a member of the Navajo tribe, Anthony Robert Wheeler, was sentenced by a tribal court, after pleading guilty to disorderly conduct and delinquency of a minor, both conducts being defined as crimes in the Navajo Tribal Code. A little over a year later, he was charged with statutory rape in the United District Court for the District of Arizona. Wheeler, for his part, asked the Court to dismiss the charge, because his conviction in tribal court for an included misdemeanor stood as a bar to his prosecution in federal court. That is, he claimed that the dual sovereignty doctrine did not apply between the Indian tribe and the federal government.

The U.S. Supreme Court, in addressing such claims, ruled that the Indian tribes, given the historical peculiarities that have determined their

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at the same time they [the Indian tribes] do not have the sovereign status of a state. Nor is their 'semi-independence' like that accorded the Commonwealth of Puerto Rico.") (citations omitted) (overruled in *Wheeler*, 435 U.S. 313). Furthermore, said appellate circuit based its decision not to recognize Indian tribes as sovereigns on the restrictive interpretation made by the U.S. Supreme Court regarding dual sovereignty. *See id*. at 1257 ("The Court has construed its 'dual sovereignty' rationale narrowly and has never applied it outside of the federal court or state court context.") (citing *United States v. Kagama*, 118 U.S. 375, 379 (1886) ("Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States or of the states of the Union. There exists within the broad domain of sovereignty but these two.")). This restrictive interpretation, however, was expressly rejected by the U.S. Supreme Court. *Wheeler*, 435 U.S. at 330.

development at the heart of U.S. federalism, had retained a primeval sovereignty,[21] by virtue of which they were to be considered a separate sovereign for purposes of the dual sovereignty doctrine. *Wheeler*, 435 U.S. at 327-29. Therefore, these tribes derived their authority from a different source than the federal government. Likewise, in *Wheeler*, when faced with the contention that Indian tribes were not sovereigns because of the plenary powers that Congress had over them,[22] the highest federal court ruled:

> We think that the respondent ..., in relying on federal control over Indian

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[21] A sovereignty, however, that was initially limited to the criminal prosecution of members of the tribe. *Duro v. Reina*, 495 U.S. 676 (1990). This, however, changed with congressional legislation *recognizing* that Indian tribes had the authority to prosecute non-member Indians. 25 U.S.C. § 1301 (2). The U.S. Supreme Court, in *U.S. v. Lara*, 541 U.S. 193 (2004), interpreted that such legislation on the part of Congress did not mean a mere *delegation of power* on its part, and that instead it indeed broadened the primeval sovereignty retained by Indian tribes. Thus, it upheld Congress's *recognition* thereof through the promulgation of a statute.

[22] With regard to the plenary powers of Congress regarding Indian tribes, *see Wheeler*, 435 U.S. at 319 ("[C]ongress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.") (citing *Winton v. Amos*, 255 U.S. 373 (1921); *In re Heff*, 197 U.S. 488, 498-499 (1916) (revoked on other grounds by *U.S. v. Nice*, 241 U.S. 591 (1916); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Talton v. Mayes*, 163 U.S. 376, 384 (1986)).

> tribes, have misconceived the distinction between those cases in which the "dual sovereignty" concept is applicable and those in which it is not. It is true that Territories are subject to the ultimate control of Congress, and cities to the control of the State which created them. But that fact was not relied upon as the basis for the decisions in *Grafton, Shell Co.,* and *Waller.* What differentiated those cases from *Bartkus* and *Abbate* was not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken.
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> *Wheeler*, 435 U.S. at 319-20 (citations omitted).

It is important to also point out that in *Wheeler*, the U.S. Supreme Court expressly refused to limit the scope of the dual sovereignty doctrine to relations between the federal government and the various states of the Union. *Wheeler*, 435 U.S. at 330 ("The respondent contends that, despite the fact that successive tribal and federal prosecutions are not 'for the same offence,' the 'dual sovereignty' concept should be limited to successive state and federal prosecutions. But we cannot accept so restrictive a view of that concept, a view which, as has been noted, would require disregard of the very words of

the Double Jeopardy Clause."). Consequently, the highest federal court acknowledged the *atypical* sovereignty of Indian tribes in relation to the federal government.[23]

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[23] The *atypicality* of said sovereignty, when compared to that of the states—constitutionally protected by the Tenth Amendment and jurisdictionally guarded by the Eleventh Amendment—undeniably resulted from the Indian tribes' unique historical situation and the federal government. *See Wheeler*, 435 U.S. at 323 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory…") (citing *U.S. v. Mazurie,* 419 U.S. 544, 557 (1975)). *Cf. Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 596 (1976) ("We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history…."); *Romero v. United States,* 38 F.3d 1204, 1208 (Fed. Cir. 1994) ("On July 3, 1952, Congress approved the proposed Constitution of the Commonwealth of Puerto Rico, which thenceforth changed Puerto Rico's status from that of an unincorporated territory to the unique one of Commonwealth."); *Cordova* & *Simonpietri* 649 F.2d at 41 ("In sum, Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth.").

Once again, and given its importance in the U.S. Supreme Court's decision in *Wheeler* and in *Lara*, it is imperative to remember that the historical circumstances are fundamentally important in determining who is a sovereign and with regard to what it is a sovereign. Historical circumstances that, nonetheless, must be legally evaluated. This is consistent with the dual sovereignty doctrine, which shall not be applied restrictively, as long as the interests it guards are satisfied. *Wheeler*, 435 U.S. at 330-332. Furthermore, said conception of sovereignty, historically contextualized, shows, in its due complexity, the various nuances that inform power relations in U.S. federalism.

Finally, it is important to underscore the indispensable elements that, in one way or another, condition the recognition of sovereignty in these cases. Above all, the different interests between the federal and the tribal governments, given that the vindication of such interests on the part of one of the governments, does not necessarily entail the vindication of such interests on the part of the other. Articulation of these independent interests, therefore, is based on the fact that, in one case or another, distinct political communities are involved. *Wheeler*, 435 U.S. 313 (1978). Thus, these political communities—apart from the political subjection of one to the other, by virtue of the plenary powers of Congress—are justly distinguished in accordance with their diverse traditions and customs. *See Wheeler*, 435 U.S. at 331 ("They [the Indian tribes] have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation."). It would be absurd to think that Puerto Rico, as a political community duly organized in constitutional order, does not have similar interests.

It can be deduced from the foregoing discussion that the indispensable element on which the application of the dual sovereignty doctrine is conditioned is that: we must be dealing with two separate sovereigns that derive their power to punish from different sources. In the case of Puerto Rico, then, we must analyze whether, indeed, the Commonwealth derives its power to punish crime from a different source than the federal

government.[24] Therefore, we must determine the source of the coercive power exercised by the Commonwealth. First, however, we must seriously ask ourselves what this power means and what its

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[24] Regarding the *distinct* nature of the Commonwealth, in comparison with the political regime under the organic laws passed by Congress, it is sufficient to cite the most eminent Puerto Rican jurist, Mr. José Trías Monge:

> **If the foundation of the Commonwealth meant anything at all, it was the creation of an entity different from the one existing under the former organic laws.** Though the outlines are not very precise, the decision of the Supreme Court and the U.S. Court of Appeals leave no room for doubt as to the *different* nature of the new political body. The application of certain provisions of the United States Constitution to Puerto Rico is better explained by another concept: the people of Puerto Rico simply *consented* to it. One of the conditions imposed by Law 600 or the framework law was that the Constitution of Puerto Rico had to be adjusted to the terms and to 'the applicable provisions … of the United States Constitution.' The consent of the people of Puerto Rico, expressed through the referendum held to approve Law 600, is clearly the current basis for the application of certain provisions of the United States Constitution to the people of Puerto Rico.
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> José Trías Monge, *El Estado Libre Asociado ante los tribunales 1952-1994* [The Commonwealth before the Courts 1952-1994], 64 UPR L. Rev. 1. 42 (1995) (Citations omitted). (Emphasis added.)

essential attributes are; especially in the particular context of Puerto Rico as an integral part of the United States federal system. This inevitably leads us to ask ourselves, as opposed to the majority of the Court that signed the opinion, which evades this question, "*What is sovereignty?*"[25]

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[25] The majority opinion correctly states that "[t]he use of the word 'sovereignty' *in another context and for other purposes* is irrelevant in addressing the controversy before us." Majority Opinion, at 19. (Emphasis added). However, we need to define the implications of the use of the word "sovereignty" in the context of this controversy. Therefore, that statement, without more, does not meet the level of rigor required to address the controversy concerning this Court. That is, in a topic as complex as the matter of dual sovereignty, we necessarily must address the semantic dimensions of the term "sovereignty" in order to specify its meaning in the context that concerns us. Likewise, it is fundamental to examine the very nature of sovereign power, and the scope of its exercise, in order to definitively decide what its ultimate source is, or better yet, from what source it is derived. For this, it is also indispensable that we not lose sight of the complexity underlying the political relations that arise in U.S. federalism. Thus, to state that sovereignty is merely "the ultimate source of power" is surprising, since, to say the least, it is an incomplete and irresponsible definition, because it fails to deal with a whole series of issues that are incidental to this definition, which are particularly relevant to a case such as the Commonwealth, a political entity *sui generis* in U.S. constitutionalism. In short, in order to decide question of whether the Commonwealth should be considered "sovereign" for purposes of the dual sovereignty doctrine, we must necessarily formulate a precise definition of the term "sovereignty" and of the nature of the power that the very sovereign exercise. And such definition must also be doctrinally consistent and, therefore, applicable to

IV

The term sovereignty cannot be defined precisely or with semantic certainty. *See United States v. Spelar*, 338 U.S. 217, 224 (1949) (Frankfurter, J., concurring) ("The very concept of 'sovereignty' is in a state of more or less solution these days."); Naomi Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law*, 9 U. Haw. L. Rev. 487, 526 (1987) ("Commentators agree that sovereignty is an elusive and relative concept."). Since its initial theoretical formulation at the end of the Sixteenth Century until today, the concept has acquired various meanings.[26] In the words of our famous jurist, Mr. José Trías Monge:

> Another fanciful issue is the question of sovereignty. This old concept, which harks back to the sixteenth and seventeenth centuries, when it had a role in the development of the modern state, has for a long time now been put to use in the field of colonial governance, besides at

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the states, to the federal government and to Indian tribes. Once this distinction is made, then we can proceed to evaluate the case of the Commonwealth, which is so particular that it is improper to decide such a complex dilemma with an anachronistic invocation of the term "territory."

[26] *See generally* Ruth Lapidoth, *Autonomy: Flexible Solutions in Ethnic Conflicts* 41-47 (1997).

> times having temporarily become a hurdle to the growth of associations or peoples like the European Community. Sovereignty has been primarily and wrongly used as a synonym of indivisible power and as an indispensable attribute of a nation. Present thinking about sovereignty deals with the concept in a very different manner. **Sovereignty, like power, can be shared and does not necessarily rest in a single place.**
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> José Trías Monge, *Injustice According to Law*, in *Foreign in a Domestic Sense. Puerto Rico, American Expansion and the Constitution* 236 (Christina Duffy Burnett & Burke Marshall eds., 2001). (Emphasis added).[27]

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[27] *See also* José Trías Monge, *Injustice According to Law, supra*, at 237 ("'Sovereignty,' again, is another of the concepts in territorial parlance which should be rethought, together with those of 'participation,' 'plenary powers,' 'possession,' 'foreign in a domestic sense,' and the like. Talk about 'sovereignty' adds nothing meaningful to the realities of power and succeeds only in being offensive to the dignity of relationships based on the principle of equality or comparability of rights. **Old talk about undivided sovereignty is part of the language of subjection and should have no place in the decolonization context**.") (citations omitted); Ruth Lapidoth, *supra*, at 47 ("[T]he concept of sovereignty—in its classic meaning of total and indivisible state power—has been eroded

Likewise, when addressing the complexities entailed in defining—legally[28] and for our purposes—the concept "sovereignty," we can distinguish between "internal sovereignty" and "external sovereignty."[29] Cf. Donard Pharand, *Perspectives on*

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by modern technical and economic developments, as well as by certain principles included in modern constitutional and international law. As a result of innovations in the sphere of communications and transportation, state boundaries are no longer impermeable, and all national economic systems have become interdependent .... Similarly, according to Luzius Wildhaber, '[s]overeignty must be mitigated by the exigencies of interdependence.' This can be done, since 'sovereignty is a relative notion, variable in the course of times, adaptable to new situations and exigencies.'") (citations omitted). Cf. Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 Asian-Pac. L. & Pol'y J. 180, 191 (2003) ("It has long and widely been recognized, however, that absolute power to rule is not the only, or even the ordinary, meaning of the term and that other meanings of 'sovereignty' exist that are fully capable of accommodating a 'self-government' conformable to the U.N.'s definitions.") (citations omitted). *See also id.* n.42 (citing numerous legal interpretations of the concept "sovereignty").

[28] Tautology, that, nonetheless, is worth repeating: concepts, as discursive constructions inserted in various semantic planes, can acquire different meanings. Thus it is imperative that we not lose sight of this *reality* when defining the sense of a concept used in the legal sphere. Otherwise, the exercise would be one of abstraction that does not contribute much to the interpretative work incumbent on judges and the legitimacy of their duty.

[29] On "external sovereignty," that is, within the scope of Public International Law, *see*, *inter alia*, Ian Brownlie, *Principles of Public International Law* 290-98 (7th ed. 2008).

Sovereignty in the Current Context: A Canadian Viewpoint, 20 Can.-U.S. L. J. 19 (1994). In the present context—that is, whether the Commonwealth is a sovereign entity for purposes of the criminal prosecution of an individual—it is obvious that we are interested in the internal aspect of sovereignty. This type of sovereignty could very well be defined, in modern times, as the authority that a political community, duly organized—that is, constitutionally organized[30]—has to govern its own plans with regard to primary social relations among the subjects constituting it. In other words, the power that a particular political entity has to govern the areas of interest that have traditionally been subsumed into the concept of *police power*. *See* D. Benjamin Barros, *The Police Power and the Takings*

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[30] *See* Gerardo Pisarello, *Un largo Termidor: Historia y crítica del constitucionalismo antidemocrático* 29 (2012) ("[T]he expression "Constitution," derived from the Latin word *cumstatuire* (to institute together with), is far from a modern invention. On the contrary, it was also used in Antiquity and the Middle Ages in contexts in which the State, as known since the modern era, did not exist. The term was used to refer to what later came to be known as the material concept of Constitution, that is, the manner in which a political community exists and the structures of power sustaining it, including existing class relations.") (citations omitted). Therefore, the term "constitution" is used in this material sense to mean the manner in which the sovereign powers of states have modernly been constituted, though subject to the complex and plural relations of power and interdependence that, in turn, imply a limit in the exercise of such constitutionally constituted sovereignties.

Clause, 58 U. Miami L. Rev. 471 473 (2004) ("The term 'police power' is generally, but vaguely, understood in American jurisprudence to refer to state regulatory power."); Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government*: *The Interaction of Police Power and Property Rights*, 75 Wash. L. Rev. 857, 861 (2000) ("The exercise of police power—governmental action to advance public health, safety, peace, and welfare—has long been a part of the very nature of government itself."); *see also* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745 (2007).

Taking into consideration the foregoing discussion, it is worth refining the concept of internal sovereignty to adapt it to the present context. Thus, it could very well be said that internal sovereignty, within the legal sphere, can be translated as the—sovereign—authority that a given political entity has to regulate aspects pertaining to families, private patrimonial relations, safety and, in general, wellbeing. *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232-33 (1945) ("A more candid statement is to recognize, as was said in *Manigault v. Springs*, *supra*, that the power 'which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the general welfare of the people, and is paramount to any rights under contracts between individuals.'") (citations omitted). *See also Barbier v. Connolly*, 113 U.S. 27, 31 (1884). It is important to specify also that this (sovereign) Commonwealth. *Id.*

at 204 (citing with approval *Córdova & Simonpietri*, 649 F.2d 36, 39-41 (1st Cir. 1981)).

Thus, the possibility of distinct sovereign powers, hierarchically defined and horizontally distributed,[31] is accepted, though subject to a limited central power, namely, the federal government. José Trías Monge, *Injustice According to Law*, *supra*, at 236 ("[T]he United States is itself, like other federations, a prime example of sovereignty apportioned between various units and a central government.") We can undeniably deduce from the foregoing that the concept of sovereignty, considering the complexity of power relations implied and predetermined in the U.S. federal system, does not have an unambiguous meaning. Moreover, we must imperatively define it taking into consideration the various contexts in which it operates. In this case, the internal relations

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[31] The horizontal distribution of sovereign powers in the U.S. federal system fundamentally alludes to the position of all the powers that are not federal. However, we would have to distinguish between various positions in such horizontality. That is, the scope of the sovereign powers delimited by the superior sovereignty of the federal government would depend on the identity of the political entity embodying them. Thus, a state would be subject to different limitations than, for example, an Indian tribe, a territory, or a *sui generis* entity such as the Commonwealth, even when the powers that Congress exercises on it stem from the territorial clause. *Cf. Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976) ("We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history…").

of a given political community, duly recognized as such by Congress.

V

A

It is well-known that at the end of the Spanish-American War, Puerto Rico, as booty, became a possession of the United States, subject to the sovereignty of the United States. *See* Treaty of Paris, 30 Stat. 1754 (1899). After a brief period of military government, in 1900 the U.S. Congress, exercising its territorial powers under Article IV of the U.S. Constitution, enacted the Foraker Act, 31 Stat. 77 (1900), which laid down, though in a limited manner, the Island's civil government. Furthermore, shortly thereafter, in 1917, Congress enacted the Jones Act, 39 Stat. 351 (1917), which established in greater detail, though summarily, the measures of self-government that had been granted to the Island under the prior legislation. In addition, it granted Puerto Ricans U.S. citizenship.

An exceptional characteristic of this legislation is that Congress enacted it exclusively by virtue of its plenary powers over Puerto Rico. Therefore, there was no involvement whatsoever on the part of the Puerto Rican people. The legitimacy of the power structure created in accordance with this legislation stemmed from the legitimacy of Congress' exercise of its powers. Strictly speaking, there was not yet a State to govern the Island, other than the federal government. Therefore, the exercise of public authority during those years was properly speaking

a delegated power to the extent that Puerto Ricans did not participate in its configuration.

B

As a result of insistent demands for autonomy, in 1950, Congress enacted Law 600, 64 Stat. 319 (1950), which empowered Puerto Ricans to take on the task of drafting and enacting their own constitution.[32] Moreover, the enactment of this law implied that Puerto Rico was being recognized as a distinct political community[33] and it established the basis for

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[32] It is worth pointing out that the mechanism by which the drafting and adoption of a constitution is authorized is extremely similar to the process by which states are admitted into the Union. *See* Eric Biber, *The Price of Admission*: *Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. L. Hist. 119, 127-28 (2004). **In the case of Puerto Rico, however, there is no dispute that the adoption of our Constitution was not a prelude to eventual admission to the union, as a state.** The latter may explain the interest in disparaging or undervaluing such historical process.

[33] In order to remove any doubt as to the implications that the enactment of Law 600 had for the political development of Puerto Rico, it is sufficient to cite the words of Judge Magruder:

> **The answer to appellant's contention is that the constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. Public Law 600 offered to the people of Puerto Rico a 'compact' under which, if the people accepted it, as they did, they were authorized to 'organize**

> **a government pursuant to a constitution of their own adoption.'** 64 Stat. 319. Public Law 600 required that such local constitution contain a bill of rights, but it did not require that the bill of rights so adopted by the people of Puerto Rico must contain a guaranty of jury trial. Notwithstanding the fact that under the terms of the compact the constitution as drafted by the local constitutional convention and approved by the people of Puerto Rico had also to be approved by the Congress of the United States before going into effect, it is nevertheless true that when such constitution did go into effect pursuant to the resolution of approval by the Congress, 66 Stat. 327, it became what the Congress called it, a 'constitution' under which the people of Puerto Rico organized a government of their own adoption. This Constitution was drafted by the people of Puerto Rico through their duly chosen representatives in constitutional convention assembled. It stands as an expression of the will of the Puerto Rican people.

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

For all practical purposes, the majority considers that Public Law 600 is just another federal law. That, in turn, implies that the consent of the People of Puerto Rico expressed democratically by a cast of votes was a mere insignificant spectacle of little or no relevance, even though said consent was an indispensable condition for the validity and legitimacy of the statute and the Constitution that it made viable. Moreover, the opinion signed by the majority regarding Law 600 ignores and disregards the interpretation made of Law 600 by the U.S. Court of Appeals, whose opinions, given its hundred-year-old relationship with Puerto Rico, should have significant weight on what pertains to the meaning and scope of the political

a new territorial relationship between the United States and the Island. This law was also approved by the People of Puerto Rico through a referendum held to that effect. Therefore, we must imperatively point out that

> [t]he keystone and legitimacy of Commonwealth status is the principle of the consent of the governed. It was so stated by Congress in laying the foundations upon which Puerto Rico's new status was to be built: "fully recognizing the principle of government by consent," Congress declared in 1950, "this act [Public Law 600] is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."" At first glance, Public Law 600 may be read merely as having furthered the right of the Puerto Rican people to constitute themselves, as a polity, according to their own design; that is, to establish a local government. A finer reading of its provisions, however, shows that Public Law 600 was not so narrow in scope; it

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process that preceded the creation of the Commonwealth. Evidently the majority thinks that this political process between the government of the United States and the People of Puerto Rico was a joke, a farce, an elaborate deception.

> also set forth the basis for a new relationship between the people of Puerto Rico and the United States."
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> Salvador E. Casellas, *Commonwealth Status and the Federal* Courts, 80 UPR L. Rev. 945, 948-49 (2011).[34]

Thus, after the Constitutional Convention was held, in 1952, after being passed by referendum by the People of Puerto Rico, the Constitution took effect. With it, the Commonwealth came to life both

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[34] *See also* Resolution No. 23, *Diario de Sesiones de la Convención Constituyente de Puerto Rico* [Legislative Record of the Constitutional Convention]*, supra,* T. IV, at 2410 ("When the Constitution takes effect the people of Puerto Rico will be organized in a commonwealth, constituted in accordance with the terms of consent established by common agreement, which is the basis of our union with the United States of America… We thereby have reached our goal of having our own government, disappearing from the principle of compact any colonial vestiges, and entered into an era of new developments in democratic civilization. Nothing can surpass in terms of political dignity the principles of free and mutual consent and agreement. The spirit of the people of Puerto Rico must feel free to embark on its great present and future ventures. Other forms of the Puerto Rican State may be developed from such complete political dignity by varying the compact by common agreement."); José Trías Monge, *supra*, at 46 ("The theory of consent also provides here a more adequate basis to explain the resulting relationship between the parties."); Hon. Calvert Magruder, *The Commonwealth of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 10 (1953) ("There is no doubt they [Puerto Ricans] thought something great and significant was happening…") (citations omitted).

politically and legally. Leaving aside any differences of opinion regarding the *meaning* of the constitutional process that allowed the creation of the Commonwealth over the relations between Puerto Rico and the U.S.A., we must imperatively conclude that the legitimacy of the political entity prevailing in our Country is grounded on the conditional recognition of sovereignty that the constitutional process that preceded it entailed, not on a mere delegation of powers sanctioned *solely and unilaterally* by Congress.

The truth of the matter is that Congress, in approving our Constitution, *relinquished* its plenary powers regarding Puerto Rico in what pertains to internal affairs, which were henceforth to be governed by our own laws, pursuant to *our* own Constitution. Such affirmation is also backed by interpretations of the highest federal court regarding the constitutional process that led to the creation of the Commonwealth. The U.S. Supreme Court, in *Flores de Otero*, addressing the meaning of the political process that preceded the creation of the Commonwealth, understood that Congress relinquished its control over the internal affairs of the Island. *See Flores de Otero*, 426 U.S. at 596 ("[A]fter 1952, when Congress **relinquished** its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the

States …").[35] Thus, in accordance with such relinquishment, the Commonwealth became sovereign in any and all affairs not regulated by the U.S. Constitution. *See Calero-Toledo*, 416 U.S. at 673-74 (citing with approval *Mora v. Mejías*, 115 F. Supp. 610 (D.P.R. 1953); *Marín v. University of Puerto Rico*, 346 F. Supp. 470, 481 (D.P.R. 1972); *Suárez v. Administrador del Deporte Hípico de Puerto Rico*, 354 F. Supp. 320 (D.P.R. 1972); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986) (citing with approval *Calero-Toledo*); *Rodriguez*, 457 U.S. at 8 (citing with approval *Calero-Toledo* and *Córdova & Simonpietri).*

The foregoing, therefore, requires recognition that Congress, by virtue of its plenary powers, can self-impose limits on the exercise of such power, granting its territories measures of self-government which give rise to vested rights in such powers of government that cannot be withdrawn by a subsequent Congress.[36] *See Cincinnati Soap Co. v.*

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[35] Note the use of the term *relinquished*, which can be defined as follows: "voluntarily cease to keep or claim; give up." *The New Oxford American Dictionary* 1439 (2001). The use of this term, therefore, contradicts, once again, any notion that Congress, in endorsing the Puerto Rican constitutional process, merely delegated its powers.

[36] This was recognized by former U.S. Supreme Court Chief Justice William Rehnquist. In a memorandum he signed regarding the federal government's negotiations with Micronesia, he wrote:

U.S., 301 U.S. 308 (1937) (where Congress grants the Commonwealth of the Philippines part of the plenary powers it exercised under the previous territorial status). And this is not an unusual situation in the history of U.S. constitutionalism. For example, it is sufficient to point out the *Northwest Ordinance of 1787*, an ordinance in which Congress laid down the manner in which the territories to the northwest of the Ohio River were to be treated. In the ordinance, pursuant to its plenary powers under the territorial clause, Congress also self-imposed limitations on the exercise thereof:

> It is hereby Ordained and declared by the authority aforesaid, that the following articles shall be considered as Articles of **compact** between the original States and the people and the states in the said territory, *and forever*

"The Constitution does not inflexibly determine the incidents of territorial status, *i.e.*, that Congress must necessarily have the unlimited and plenary power to legislate over it. **Rather, Congress can gradually relinquish those powers and give what was once a Territory an ever increasing measure of self-government. Such legislation could create vested rights of a political nature, hence it would bind future Congresses and cannot be 'taken backward' unless by mutual agreement."** Memorandum, Micronesian Negotiations, William Renhquist, August 8, 1971, Office of Legal Counsel, Department of Justice. (Emphasis added.)

> *remain unalterable, unless by common consent …*
>
> *Ordinance for the Government of the Territory of the United States North-West of the River Ohio* (July 13, 1787) in *Contexts of the Constitution* 74 (Neil H. Cogan ed., 1999).[37]

Therefore, we must inevitably conclude that Congress is capable of limiting itself in the exercise of its plenary powers, just as it did when it enacted Law 600 and provided for the Puerto Rican People to adopt [their] own Constitution, fully recognizing Puerto Rico's sovereignty regarding internal affairs. We must keep in mind that this Law very clearly provides: "Fully recognizing the **principle of government by consent**, this Act is now adopted **in the nature of a compact** so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b. Therefore, we should not be surprised that with regard to the internal affairs of Puerto Rico, federal courts have chosen to speak of a compact.

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[37] Once the U.S. Constitution was ratified, the Northwest Ordinance was in turn ratified by Congress. *See* George H. Alden, *The Evolution of the American System of Forming and Admitting New States into the Union*, 18 Annals of the Am. Acad. Pol. & Soc. Sd. 469, 479 (1901) ("[W]ith the adoption of the ordinance of 1787 and its ratification by Congress under the Constitution the outlines of the system [of admission of states] were definitely established.") (cited in Eric Biber, *supra*, at 126 n.18).

See Calero-Toledo, 416 U.S. at 671-73; *U.S. v. Quiñones,* 758 F.2d 40, 42 (1st Cir. 1985); *Córdova & Simonpietri*, 649 F.2d at 39, 41; *Reeser v. Crowley Towing & Transp. Co., Inc.*, 937 F. Supp. 144, 146-47 (D.P.R. 1996). Such self-limitations to the power of Congress on its territories are also consistent with the historical development of federal legislative power. In the words of Judge Magruder:

> In a sense it is true that one Congress cannot limit a succeeding Congress in the exercise of its legislative powers under the Constitution. But there are certainly instances of what amounts to a *fait accompli* pursuant to legislation, which subsequently cannot be undone by the repeal of the legislation. Thus the Congress could not, by the repeal of the Tydings-McDuffie Act undo the grant of independence to the Philippine Islands. Again, when a territory has been admitted to statehood, the status thereby achieved by the people concerned cannot be undone by a repeal of the act of admission and the passage of a new organic act for the local government of the former territory. Nor could a grant of private title to public lands under the homestead laws be recalled by a subsequent Act of Congress. Likewise, it would not be within the power of a subsequent Congress to recall a grant of American citizenship

> duly and lawfully obtained under an existing naturalization act. **These are instances of vested rights, which Congress cannot constitutionally take away**. (Emphasis added.)
>
> Hon. Calvert Magruder, *supra*, at 14 (citations omitted).[38]

To recognize the foregoing, however, does not lead to infer that Law 600 is something that it is not. With the enactment of said statute by Congress, it was clear that Puerto Rico's territorial relationship regarding affairs not included in the legislation would not undergo any changes whatsoever. The scope of the powers retained would not be subject to the various limitations contained in the U.S. Constitution regarding states.[39]

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[38] *See also* José Trías Monge, *supra*, at 48-49 ("[I]t is also worth pointing out the spent and superficial concept that one Congress cannot tie the hands of another. Why not? Can Congress undo the grant of independence to the Philippines? If Congress can detach itself from all its sovereignty over a given people, what remote legal principle bars it from relinquishing part of it? **The difficulty of recognizing Congress's power to enter into compacts with people that were formerly dependent is more emotional than legal.").**

[39] In exercising its plenary powers, Congress may pass legislation to favor Puerto Rico in terms of taxes, without abiding by the limitations of the U.S. Constitution's uniformity clause. U.S. Const. Art. I, Section 8. For example, the now repealed section 936 of the U.S. Internal Revenue Code for a

The recognition of the Commonwealth's internal sovereignty and the interpretation of the relevant facts underlying said recognition, does not contravene, by any means, what was decided by the U.S. Supreme Court in *Califano v. Gautier Torres*, 435 U.S. 1 (1978), and in *Harris v. Rosario*, 446 U.S. 651 (1980). In sum, in these cases, the U.S. Supreme Court upheld the opinion that Congress may legislate differently with regard to Puerto Rico, by virtue of its plenary powers, as long as it had a rational basis to do so. *Harris*, 446 U.S. at 651-52; *Califano*, 435 U.S. at 4. The exercise of such powers clearly exceeds the Commonwealth's scope of sovereignty. That is, the legislation that was brought for consideration to the highest federal court in those cases was related to aspects of Puerto Rico's external sovereignty, namely, its relationship with the federal government and certain welfare programs. Thus, the rule laid down in those cases came down to recognizing that Congress may

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long time granted significant tax advantages to certain companies in the Country. 26 U.S.C. § 936, as amended. *See Pepsi-Cola v. Mun. Cidra*, 186 P.R. Dec. 713, 729 (2012) ("Since the 1920's, it has been the policy of the U.S. Congress to exempt its domestic corporations from the payment of federal taxes on revenues they generate in its possessions, among which Puerto Rico. This benefit was laid down in Section 936 of the U.S. Internal Revenue Code.") (citing C.E. Díaz Olivo, *La autonomía de Puerto Rico y sus lecciones en términos fiscales y económicos* [Puerto Rico's Autonomy and its Lessons in Fiscal and Economic Terms], 74 UPR L. Rev. 263, 276 (2005); F. Hernandez Ruiz, *A Guide Across the Spectrum of Section 936*, 19 U.I.P.R. L. Rev. 131 (1984)). Cf. *Downes*, 182 U.S. 244.

legislate for Puerto Rico without the obstacles laid down in the U.S. Constitution regarding states. *See Ramírez de Ferrer v. Mari Brás*, 144 P.R. Dec. 141, 160 (1997); *Castro García*, 120 P.R. Dec. at 774; *Northwestern Selecta*, 185 P.R. Dec. at 102-3 (Rodríguez, J., Dissenting Op.).[40]

C

As a Court, it is not incumbent on us to sign a historical and political opinion on the events that have defined the creation and development of the Commonwealth.[41] Instead, we must *legally* assess these events. In addition, such assessment must focus on resolving the precise controversy presented to us: to determine whether for purposes of the dual sovereignty doctrine the Commonwealth should be considered a sovereign.

VI

Taking into consideration the foregoing discussion regarding internal sovereignty—founded on the interests of a given, duly constituted, political

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[40] *See also* Casellas, *supra*, at 958; José Trías Monge, *supra*, at 26-27, 46.

[41] History and politics—as academic disciplines—are certainly indispensable to perform a complete legal analysis of any controversy. Thus, to the extent that it is relevant to do so, as has been done throughout this entire dissenting opinion, we will resort to them. But what we cannot do as jurists is twist history and the Law to advance political or ideological opinions, trying to achieve through a court opinion what is exclusively incumbent on the political process.

community—it is evident that the Commonwealth has been granted police power. Moreover, such power protects powers that are sovereign, analogous and equivalent to the powers of the states of the Union. *See*, *e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (where the Commonwealth is accorded the capacity to sue by virtue of its *parens patriae* power). *See also Flores de Otero*, 426 U.S. at 594 ("[T]he 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 ….").

In addition, this Court has consistently recognized that the Commonwealth has the police power to vindicate its own interests regarding internal affairs. *See Bomberos Unidos v. Cuerpo de Bomberos*, 180 P.R. Dec. 723, 738-42 (2011); *Domínguez Castro v. E.L.A.*, 178 P.R. Dec. 1, 36-38 (2010). *See also Northwestern Selecta*, 185 P.R. Dec. at 60, 84; *San Miguel Lorenzana v. E.L.A.*, 134 P.R. Dec. 405 (1993); *Marina Ind., Inc. v. Brown Bovery Corp.,* 114 P.R. Dec. 64 (1983); *The Richards' Group v. Junta de Planificación*, 108 P.R. Dec. 64 (1983). It is very interesting to evaluate the definition of the concept that a majority of this Court adopted in *Domínguez Castro*. In that case, it was said that police power referred to "[t]he power ***inherent*** *in the State which is used by the Legislature* to prohibit or regulate certain activities in order to foster or protect the public order, health, moral and *general wellbeing of the community*, and which can be delegated to the municipalities." *Id.* at 36. It is sufficient to underscore that the adjective *inherent* contravenes

any notion of delegation of powers. That is, to recognize that the police power held by the Legislature of the Commonwealth is inherent, implies recognizing that, indeed, the Commonwealth is a sovereign entity, at least, with regard to its internal affairs, and that it exercises the pertinent powers without any delegation of power whatsoever. This interpretation regarding the Commonwealth's internal sovereignty has been endorsed by the U.S. Supreme Court. *See Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("At the same time, Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'") (citing *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 673 (1974); *Mora v. Mejías*, 115 F.Supp. 610 (PR 1953)). *See also Córdova & Simonpietri*, 649 F.2d 36, 39-42. After all, this is **not** about determining whether after the adoption of the Constitution "Puerto Rico continued to be a territory of the United States subject to the power of Congress, as provided in the territorial clause of the U.S. Constitution." Majority Opinion, at 58. To the contrary, the relevant issue is the current scope of such power, taking into consideration the legislative actions of Congress itself, the fact that it recognized the sovereignty of the Puerto Rican people with regard to internal affairs and relevant judicial precedents. As we have seen in the case of Indian tribes, the mere fact that Congress has plenary powers does not, in itself, prevent the recognition of sovereign entities that are nevertheless subject to such powers.

In light of the foregoing, it is indisputable that the Commonwealth, within the scope of its internal affairs, is a sovereign entity that must be considered as such for purposes of the dual sovereignty doctrine. Remember that "with respect to double jeopardy, the framework supports shifting the doctrine's emphasis away from formalistic questions of 'sovereignty' and towards consideration of the degree to which prosecutions reflect autonomous political and moral decision-making." Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657, 665 (2013).

VII

In *Castro García*, after performing a careful, detailed and well-informed analysis, based on U.S. constitutional doctrine, this Court held that the Commonwealth was a sovereign for purposes of the dual sovereignty doctrine. Thus, it held that when applying the doctrine, federal prosecution did not bar the Commonwealth from vindicating its—sovereign—interests to safeguard the wellbeing and safety of the Puerto Rican community. In fact, this decision was consistent with the opinion of certain federal courts. *See U.S. López Andino*, 831 F.2d 1164 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988); *U.S. v. Vega Figueroa*, 984 F. Supp. 71 (D.P.R. 1997). *See also U.S. v. González de Modestini*, 145 F. Supp. 2d 171, 174 (D.P.R. 2001). On that occasion, the Court also reviewed relevant precedents and the precise doctrine, in order to address the complex controversy presented for consideration. And, in accordance with the Law, it

enforced the legitimate interests of a State founded on the democratic basis of consent of the Puerto Rican people: The Commonwealth. Today, this Court, in a majority opinion that involves a disconcerting historical revisionism, undermines the careful legal analysis performed and instead opts to renounce its duty to interpret—not capriciously redo—the pertinent legal guidelines.

VIII

I conclude by stressing what is most evident: there can be no doubt that the Court majority's objective is to advance its ideology on the status of Puerto Rico and has used, and will continue to use, legal opinions to do so. This, despite the fact that ideological campaigns are incumbent on the political process, not court decisions. With such an objective, the majority disregards the provisions of our Constitution, our laws, what the social wellbeing of our Country demands and even the provisions of the U.S. Constitution and the precedents of the U.S. Supreme Court. In short, nothing persuades, nothing matters to this majority, when arguments are inconvenient to certain ideological posture. It appears that the only thing that matters to them is achieving through Courts what has not been achieved and should be done through the political process. That is, they are using the court's function as another mechanism to exercise political pressure to pursue their political ideologies, which, conveniently translates into simplistic and out-of-context legal interpretations. In the process, all of our prior opinions regarding Puerto Rico's

constitutional framework are dismantled. To use this higher court for such purposes is profoundly anti-democratic and, therefore, notably and ironically anti-American. It contravenes fundamental notions of how politics should be done and, in the process, tarnishes the legitimacy of this Court. As I have stated before: What a shame!

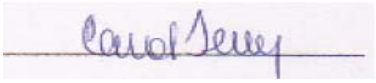
Based on the foregoing, I strongly dissent from the ahistorical opinion of a majority of this Court which departs from the precedents of the United States Supreme Court and perniciously affects criminal prosecution in our Country. Instead, I would uphold the judgments issued by the Court of Appeals and reaffirm the application of the dual sovereignty doctrine in Puerto Rico.

[illegible signature]
Anabelle Rodriguez Rodriguez
Associate Justice

CERTIFICATE OF TRANSLATION INTO ENGLISH

I, Carol Terry Cés, of legal age, married, a resident of San Juan, P.R.., a professional interpreter/ translator, certified by the Administrative Office of the United States Courts, do HEREBY CERTIFY that I have personally translated the foregoing document and that it is a true and accurate translation to the best of my knowledge and abilities.

In San Juan, Puerto Rico, today, June 25, 2015.



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