

2020

## CONSTITUTIONAL LAW—PUERTO RICO AND THE AMBIGUITY WITHIN THE FEDERAL COURTS

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### Recommended Citation

Claribel Morales, *CONSTITUTIONAL LAW—PUERTO RICO AND THE AMBIGUITY WITHIN THE FEDERAL COURTS*, 42 W. New Eng. L. Rev. 245 (2020), <https://digitalcommons.law.wne.edu/lawreview/vol42/iss2/4>

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CONSTITUTIONAL LAW—PUERTO RICO AND THE AMBIGUITY !  
WITHIN THE FEDERAL COURTS !

CLARIBEL MORALES\*

*The island of Puerto Rico has a rich culture and a storied history. This history is also plagued by legal and political ambiguity which is still visible in recent Federal and Supreme Court jurisprudence. The purpose of this article is to conceptualize the complicated legal and political relationship between Puerto Rico and the United States—from Puerto Rico’s colonial inception to the Insular Cases,<sup>1</sup> which defined Puerto Rico’s status as a territory to its current political stalemate. Further, these decisions created a familiar Plessy v. Ferguson-type legal doctrine in the form of second-class citizenship for the inhabitants of Puerto Rico.*

*First, this article will briefly discuss the history of Puerto Rico, from its colonial incarnation of Spanish rule to the signing of the Jones-Shafroth Act, which established United States citizenship for the people of Puerto Rico. Next, this article will detail the inconsistency that the federal courts have shown to Puerto Rico. In Puerto Rico v. Sánchez-Valle, Justice Breyer’s dissenting opinion demonstrated how the majority oversimplified Puerto Rico’s judicial autonomy. To further exemplify this inconsistency, Puerto Rico went from having the ability to construct its own Constitution in 1952 to the 2016 Supreme Court decision in Puerto Rico v. Franklin California Tax-Free Trust, which denied Puerto Rico the ability to control its own debt management during its fiscal crisis.*

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\* Claribel Morales graduated from Western New England University School of Law in 2019. This article is dedicated to the beautiful and courageous people of the island of Puerto Rico, including the author’s beloved family. She stands for Puerto Rican independence, and is an admirer of Puerto Rican attorney, social activist, and nationalist, Pedro Albizu Campos.

1. See generally Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 287 (2007). “The basic issue being explored [in the Insular Cases] was how these new territories were to be governed, whether the Constitution applied therein, and if so, to what extent.” *Id.* at 291.

*Lastly, this article will argue that there still remains the unfortunate reality of Puerto Rico's political status as an unincorporated territory, which is further aggravated by the recent diaspora of its inhabitants forced to leave their beloved island due to the effects of natural disasters and political antagonists. The ambiguity espoused by the federal courts and the Supreme Court places Puerto Rico's people in an indeterminate position as to whether their United States citizenship entitles them to the same protections as citizens on the mainland, or whether it stops short.*

## INTRODUCTION

Before venturing into the analytical framework of this article, it is important to offer a brief narrative of Puerto Rico's history. First, this article will briefly discuss the history of Puerto Rico, from Spanish rule to the signing of the Jones-Shafroth Act, which established United States citizenship for the people of Puerto Rico. Next, this article will detail the inconsistent treatment by the federal courts regarding the territorial status and the rights of Puerto Rican's. Lastly, this article will argue that there still remains uncertainty regarding Puerto Rico's current political status as an unincorporated territory and the alleged autonomy that was given to Puerto Rico when it was granted its right to create its own Constitution.

The tumultuous details are important to establish the foundation of the current relationship between Puerto Rico and the United States. Ultimately, this article will serve as an introduction to the complexity of the treatment of Puerto Rico by the federal courts.

### I. BRIEF HISTORY OF PUERTO RICO

Puerto Rico is a United States territory subject to congressional authority derived from the Territorial Clause of the U.S. Constitution.<sup>2</sup> The Territorial Clause grants Congress the "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."<sup>3</sup> Congress has enacted various statutes to address specific matters concerning Puerto Rico's political status.<sup>4</sup> After Spain ceded Puerto Rico to the United States in 1898, a civilian government was established by Congress in 1900.<sup>5</sup> The Foraker Act established an "executive council" consisting of a civilian

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2. *De Lima v. Bidwell*, 182 U.S. 1, 195–96 (1901).

3. U.S. CONST. art. IV, § 3, cl. 2.

4. R. SAM GARRETT, CONG. RESEARCH SERV., R44721, POLITICAL STATUS OF PUERTO RICO: BRIEF BACKGROUND AND RECENT DEVELOPMENTS FOR CONGRESS 4 (2017).

5. *Id.*

governor appointed by the President and various department heads.<sup>6</sup> This new government also included a popularly elected House of Delegates (which shared decision-making power with the executive council)<sup>7</sup> and a U.S.-style judiciary system.<sup>8</sup> The Foraker Act also established the Resident Commissioner position to represent Puerto Rico's interests in Washington.<sup>9</sup> The duties of the Resident Commissioner came to include non-voting service in the U.S. House of Representatives, which is the primary role of the Resident Commissioner today.<sup>10</sup> The Resident Commissioner of Puerto Rico is a non-voting member of the U.S. House of Representatives elected by the voters of Puerto Rico every four years. The Resident Commissioner is the only member of the House of Representatives who serves a four-year term.<sup>11</sup> The current Resident Commissioner of Puerto Rico, Jenniffer González-Colón, was elected in 2017.

The Jones-Shafroth Act, enacted by Congress in 1917, “authorized appropriations for legislative staff and franking privileges for the Resident Commissioner.”<sup>12</sup> Additionally, the Jones-Shafroth Act extended U.S. citizenship to Puerto Ricans and established a Bill of Rights for the island.<sup>13</sup> The Federal Relations Act (FRA) was enacted by Congress in 1950 and established Puerto Rico's sovereignty, which led to the creation of Puerto Rico's Constitution in 1952.<sup>14</sup> Further, the United Nations removed Puerto Rico from the list of non-self-governing territories in 1953.<sup>15</sup> However, Puerto Rico remains subject to the Territorial Clause of the U.S. Constitution.<sup>16</sup>

In one of the first *Insular Cases*, *Downes v. Bidwell*, the Supreme Court established that Puerto Rico is “a territory appurtenant and

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6. Foraker Act, ch. 191, §§ 17–18, 31 Stat. 81 (1900) (codified as amended in scattered sections of 48 U.S.C.).

7. *Id.*

8. Foraker Act, ch. 191, § 33, 31 Stat. 84 (1900) (codified as amended in scattered sections of 48 U.S.C.).

9. Foraker Act, ch. 191, § 39, 31 Stat. 86 (1900) (codified as amended in scattered sections of 48 U.S.C.).

10. GARRETT, *supra* note 5, at 4–5.

11. R. ERIC PETERSEN, CONG. RESEARCH SERV., No. RL31856, RESIDENT COMMISSIONER FROM PUERTO RICO 1 (2009).

12. GARRETT, *supra* note 5, at 5.

13. Jones-Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. §§ 731–751).

14. GARRETT, *supra* note 5, at 5.

15. *Id.* at 18.

16. *Id.* at 4.

belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . . .”<sup>17</sup> The decision in *Bidwell* by itself may not have provided a historical significance; however, when taken in conjunction with other *Insular Cases*, it created the overarching principle that certain constitutional rights do not extend to unincorporated territories.

## II. THE INSULAR CASES

The legal and political relationship between Puerto Rico and the United States is founded on hundreds of years of colonialism and legal dogma created by the *Insular Cases*.<sup>18</sup> These cases are a “series of controversial and deeply divided early 1900s Supreme Court decisions,” which legalized the full extension of United States sovereignty to overseas territories without requiring the full extension of constitutional rights.<sup>19</sup> The current sentiment within the legal community is that the “*Insular Cases* represent classic *Plessy v. Ferguson* legal doctrine” and that these cases “should be totally eradicated from present-day constitutional reasoning.”<sup>20</sup> Legal scholars disagree on the number of *Insular Cases* that exist, with some stating that there are six, while others contend that there are more than two dozen.<sup>21</sup> However, the general consensus is that the *Insular Cases* began with *Downes v. Bidwell*, which created the distinction between incorporated and unincorporated territories.<sup>22</sup>

After Spain ceded the island of Puerto Rico to the United States, the Supreme Court had to grapple with the issue of revenue from its newly

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17. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

18. See generally *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (establishing that Sixth Amendment rights (i.e., trial by jury) do not apply to unincorporated territories of the United States); *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Puerto Rico belongs to the United States, but is not a part of the United States within the Revenue Clauses of the Constitution); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that Puerto Rico is not a foreign country for purposes of the tariff laws).

19. Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, HARV. L. REV. BLOG (Mar. 28, 2018), <https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy/> [<https://perma.cc/2HLV-8PXH>].

20. *Id.* at 2 (quoting Honorable Juan Torruella, Keynote Address at the Harvard Law School Conference, “Reconsidering the Insular Cases” (Dec. 19, 2014), <https://www.youtube.com/watch?v=aixtvS4Jack>).

21. Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017, 5:45 AM), <https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html> [<https://perma.cc/DE9D-MLJ4>].

22. See *Downes*, 182 U.S. at 244.

acquired territory.<sup>23</sup> In *De Lima v. Bidwell*, the Supreme Court decided that subsequent to its surrender to the United States in 1898, Puerto Rico was not a foreign country for purposes of the tariff laws of the United States.<sup>24</sup> Tariff laws required payment of duties on goods moving into the United States from a foreign country.<sup>25</sup> Further, the Supreme Court set contradictory precedents in *Downes* and *De Lima* based on the differing interpretations of the Uniformity Clause of the U.S. Constitution<sup>26</sup> and the subsequent implications of these rulings. Additionally, in *Balzac v. Porto Rico*, the unanimous opinion delivered by Chief Justice Taft argued that although the Jones-Shafroth Act had granted citizenship to Puerto Ricans, it had not incorporated Puerto Rico into the Union, and thus Puerto Ricans were not guaranteed a trial by jury.<sup>27</sup> Chief Justice Taft's reasoning for denying jury trials expressly echoed that of earlier *Insular Cases*. Taft argued that because Puerto Rico had been under the control of the Spanish for four hundred years before American possession, the inhabitants would be unprepared for jury service.<sup>28</sup> "*Balzac v. Porto Rico* also conclusively established that only incorporated territories were headed for statehood and that incorporation could occur solely through 'an express declaration from Congress,' something that body has never granted."<sup>29</sup> Chief Justice Taft's reasoning in *Balzac* identified that the island's location was determinative of its application of the Constitution.<sup>30</sup> Despite the United States' acquisition of Puerto Rico and its territorial status, the status of the people that live in it was not important in regards to judicial procedure.<sup>31</sup> Although all of the *Insular Cases* are not discussed in detail in this article, the ones considered above provide a narrative that creates uncertainty into the application of law and decision making by the federal courts and the Supreme Court as to Puerto Rico.

### III. ANALYSIS OF THE TREATMENT BY FEDERAL COURTS OF PUERTO

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23. See generally *De Lima v. Bidwell*, 182 U.S. 1 (1901).

24. *Id.*

25. *Id.* at 180.

26. U.S. CONST. art. I, § 8, cl. 1.

27. See *Balzac v. Porto Rico*, 258 U.S. 298, 309–10 (1922).

28. *Id.* at 309.

29. Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017), <https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html> [https://perma.cc/DE9D-MLJ4].

30. See *Balzac*, 258 U.S. at 309.

31. *Id.*

## RICO

The distinction of belonging to the United States but not being part of the United States has created a legal dichotomy for Puerto Rico. In *Harris v. Rosario*, the Supreme Court held that federal welfare laws, which treat residents of Puerto Rico differently from residents of the mainland, do not conflict with the Equal Protection guarantees of the Constitution.<sup>32</sup> Therefore, the Court ruled it was acceptable for the federal government to fund programs like Medicare, Medicaid, and Aid to Families with Dependent Children at lower rates in the territories than in the states as long as there was a “rational basis”<sup>33</sup> for doing so. Thus, *Harris* is based primarily on congressional power under the Territorial Clause of Puerto Rico.<sup>34</sup>

The rationale that the Court provided for the differential treatment of residents of Puerto Rico in *Harris* was based on the precedent set by *Califano v. Torres*.<sup>35</sup> In *Califano*, the claimants argued that the provisions of the Social Security Act, which make benefits for aged, blind, and disabled persons under the supplemental security income program payable only to residents of the United States, violated their constitutional right to travel.<sup>36</sup> After the claimants relocated from the United States to Puerto Rico they lost their benefits.<sup>37</sup> The decision rendered by the Supreme Court stated that the Court has never held that the constitutional right to travel embraces any such doctrine, and declined to do so in the *Califano* case.<sup>38</sup> “Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any persons who had once resided there.”<sup>39</sup> Therefore, Puerto Rico is neither a sovereign nation nor a U.S. state, and because of this ambiguity, the “territory” lacks certain rights.

A. *Are Puerto Rico and the United States Separate Sovereigns for*

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32. *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980).

33. Stewart W. Fisher, *The Supreme Court Says No to Equal Treatment of Puerto Rico: A Comment on Harris v. Rosario*, 6 N.C. J. INT'L L. & COM. REG. 127, 129 (1981).

34. David C. Indiano & Harry O. Cook, *Harris v. Rosario*, 12 CASE W. RES. J. INT'L L. 641, 642 (1980).

35. Fisher, *supra* note 34, at 129.

36. *Califano v. Torres*, 435 U.S. 1, 3 (1978).

37. *Id.* at 2.

38. *Id.* at 4.

39. *Id.* at 3.

*Purposes of the Double Jeopardy Clause of the U.S. Constitution?*

A case recently decided by the Supreme Court considered the legal nature of the relationship between Puerto Rico and the United States in a unique context. In *Puerto Rico v. Sánchez Valle*, the Supreme Court examined whether defendants in a criminal case can be prosecuted under the local laws of Puerto Rico if they have been previously convicted under federal criminal law for the same conduct.<sup>40</sup> To further assess this case and provide analysis into the significance of this decision, the Double Jeopardy Clause of the Fifth Amendment should be defined. The Double Jeopardy Clause provides that no person “be subject for the same offense to be twice put in jeopardy of life or limb.”<sup>41</sup> However, under the dual sovereignty doctrine, if two separate sovereigns (the federal government and a state) were to prosecute a defendant for the same offense, the constitutional protection against double jeopardy would not be triggered.<sup>42</sup> Therefore, if the Puerto Rican government were considered a separate sovereign from the United States for purposes of the Double Jeopardy Clause, dual prosecutions by the federal government and Puerto Rico would be allowed.

However, Justice Kagan, writing for the Court, held that because Puerto Rico operates under power delegated to it by Congress, it is not to be treated as a separate sovereign for purposes of the Double Jeopardy Clause.<sup>43</sup> Using its application of the ultimate source test,<sup>44</sup> the Court reasoned that although Puerto Rico’s power to enforce criminal law is derived from its own Constitution, which was approved by the people of Puerto Rico, the “ultimate source” of prosecutorial power remains with Congress.<sup>45</sup> Furthermore, the Court stated that although Congress has broad power over the territories, it does not have the authority to eliminate its own role in having conferred political authority to Puerto Rico.<sup>46</sup> Thus, the Double Jeopardy Clause bars successive criminal prosecutions by Puerto Rico and the United States for the same offenses.<sup>47</sup>

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40. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1867–68 (2016).

41. U.S. CONST. amend. V.

42. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985).

43. *Sánchez Valle*, 136 S. Ct. at 1876.

44. *Id.* at 1865. In Justice Kagan’s opinion she relied on the “ultimate source” of power test. *Id.* The test examines what is the ultimate source of the prosecution’s power. *Id.* Dispositive of the test is whether the two sovereignties draw their ability to punish an offender from distinct sources of power. *Id.* The “ultimate source” of power test is used in the context of the Double Jeopardy Clause. *Id.*

45. *Id.* at 1874.

46. *Id.* at 1872.

47. *Id.* at 1876–77.

Although, for much of the criticism of the *Sánchez Valle* decision, it should be noted that the defendants in this case were seeking protections from two prosecutions for the same offense, and in the viewpoint of a defendant and criminal defense attorney, the decision rendered was a win in that regard. However, for the overall legal doctrinal analysis, it can be stated that the federal government has complete control over Puerto Rico.<sup>48</sup> Moreover, this case has various political implications, as it diminished the constitutional status that the Puerto Rican government thought it had since the enactment of the Puerto Rico Federal Relations Act of 1950 and the ratification of the Puerto Rican Constitution in 1952.<sup>49</sup>

Justice Breyer, joined by Justice Sotomayor in his dissent, argued against the notion that identifying the historical source of prosecutorial power resolves the question of double jeopardy.<sup>50</sup> Additionally, he stated:

This history of statutes, language, organic acts, traditions, statements, and other actions, taken by all three branches of the Federal Government and by Puerto Rico, convinces me that the United States has entered into a compact one of the terms of which is that the “source” of Puerto Rico’s criminal law ceased to be the U.S. Congress and became Puerto Rico itself, its people, and its constitution. The evidence of that grant of authority is far stronger than the evidence of congressional silence that led this Court to conclude that Indian tribes maintained a similar sovereign authority. Indeed, it is difficult to see how we can conclude that the tribes do possess this authority but Puerto Rico does not. Regardless, for the reasons given, I would hold for Double Jeopardy Clause purposes that the criminal law of Puerto Rico and the criminal law of the Federal Government do not find their legitimacy-conferring origin in the same “source.”<sup>51</sup>

These dueling opinions by the majority and dissent adopt a “precedent-based framework,” which creates a disparity in understanding the “ultimate source of power” test in the viewpoint of formalist or functionalist terms.<sup>52</sup> Justice Kagan’s formalist analysis detailed a divide between the types of entities that can and cannot enjoy Fifth Amendment protections.<sup>53</sup> In contrast, in his dissent, Justice Breyer “sought to reinvent

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48. *Id.* at 1874–75.

49. Federal Relations Act of 1950, Pub. L. No. 81–600, 64 Stat. 319 (1950) (codified as amended at 48 U.S.C. §§ 731b–731e (2018)).

50. *Sánchez Valle*, 136 S. Ct. at 1878.

51. *Id.* at 1884–85.

52. *Fifth Amendment—Double Jeopardy—Dual-Sovereignty Doctrine—Puerto Rico v. Sánchez Valle*, 130 HARV. L. REV. 347, 352 (2016) [hereinafter *Fifth Amendment*].

53. *Id.*

the dual-sovereignty doctrine on functionalist grounds.”<sup>54</sup> By doing so, Justice Breyer asked “whether a government has gained *sufficient* sovereign authority to become the ‘source’ of power behind its own criminal laws.”<sup>55</sup>

In order to predict the outcome of this issue in the future, the current makeup of the Supreme Court and its continuing effort to uphold *stare decisis* must be considered. Additionally, it is important to note the unfortunate direction of political dealings from the current administration with Puerto Rico.<sup>56</sup> Thus, for future cases involving the Double Jeopardy Clause and individuals living in Puerto Rico, the current legal doctrine will likely be maintained. However, if the political status of Puerto Rico changes, there is a chance that the legal doctrine could change as well. Specifically, if the political status changes the sovereignty of Puerto Rico, the outcome of the “ultimate source” test used by Justice Kagan will probably be different.<sup>57</sup> Until that time, Puerto Rico remains subject to age-old colonialism.<sup>58</sup>

#### B. *Does the Eleventh Amendment Apply to Puerto Rico?*

The Eleventh Amendment of the U.S. Constitution declares: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>59</sup> Since 1981, the First Circuit Court of Appeals has consistently held that Puerto Rico cannot be sued in federal courts without its consent.<sup>60</sup> However, there is ambiguity as to whether courts have recognized Puerto Rico’s Eleventh Amendment immunity or rather common law sovereign immunity.<sup>61</sup> To reiterate, Puerto Rico is neither a

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54. *Id.* at 353.

55. *Id.* at 354 (quoting *Sánchez Valle*, 136 S. Ct. at 1880).

56. Vann R. Newkirk II, *That Time Trump Threw Paper Towels at Puerto Ricans*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-legacy-is-tied-to-hurricane-maria/580060/> [<https://perma.cc/T777-ZM59>].

57. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1876–77 (2016).

58. “Colonialism” is defined as: “control by one power over a dependent area or people” and “a policy advocating or based on such control.” See *Colonialism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/colonialism>. As recently as 2016, the U.S. Congress instituted the PROMESA fiscal control board to decide Puerto Rico’s fiscal affairs. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as 48 U.S.C. §§ 2101–241 (2018)).

59. U.S. CONST. amend. XI.

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

61. Adam D. Chandler, *Puerto Rico’s Eleventh Amendment Status Anxiety*, 120 YALE L.J. 2183, 2197 (2011).

state nor an independent country and it remains under the Territorial Clause of the Constitution.<sup>62</sup> However, since 1981, federal courts have repeatedly afforded Puerto Rico's Eleventh Amendment immunity as though it were a state.<sup>63</sup> Justice Breyer, while a First Circuit judge, decided that Puerto Rico was entitled to the Eleventh Amendment's protection.<sup>64</sup> Meanwhile, unlike Puerto Rico, other territories have not enjoyed Eleventh Amendment immunity (e.g., the District of Columbia, the Territory of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands).<sup>65</sup>

It is essential to highlight the distinction between common law immunity and Eleventh Amendment immunity. Common law immunity is a pre-constitutional doctrine that gives protection to states.<sup>66</sup> Common law immunity protects a state from suits only in its own courts.<sup>67</sup> The Eleventh Amendment immunity can only be abrogated by Congress under Section Five of the Fourteenth Amendment, while common law immunity can be abrogated either by Congress or the state.<sup>68</sup> However, common law immunity does not protect a state from being sued in another sovereign's courts.<sup>69</sup> Therefore, common law immunity does not protect a state from being sued in federal court.<sup>70</sup> Furthermore, the opinion in *Ezratty v. Puerto Rico* discusses the Eleventh Amendment issue exclusively in a footnote.<sup>71</sup> There, Justice Breyer relies on two district court cases: *Carreras Roena v. Camara de Comerciantes, Etc.* and *Ursulich v. Puerto Rico National Guard*.<sup>72</sup> One of the opinions indicates that "Puerto Rico

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62. U.S. CONST. art. IV, § 3, cl. 2.

63. *Ezratty*, 648 F.2d at 776 n.7 ("The principles of the Eleventh Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico.")

64. *Id.*

65. Chandler, *supra* note 62, at 2197. The District of Columbia, the Territory of Guam, and the U.S. Virgin Islands remain under the complete legal authority of Congress and lack their own constitutions. *Id.* The Commonwealth of the Northern Mariana Islands became a constitutional commonwealth based on an agreement with Congress; however, the Eleventh Amendment was excluded from its list of constitutional protections. *Id.*

66. Omar J. Andino Figueroa, *Eleventh Amendment Immunity Status after Puerto Rico v. Sanchez Valle*, REVISTA JURIDICA, <http://revistajuridica.uprrp.edu/inrev/index.php/2017/03/29/eleventh-amendment-immunity-status-after-puerto-rico-v-sanchez-valle> [https://perma.cc/A7Y3-LQLV].

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1981).

72. *Carreras Roena v. Camara de Comerciantes, Etc.*, 440 F. Supp. 217, 219 (D.P.R. 1976); *Ursulich v. Puerto Rico National Guard*, 384 F. Supp. 736, 737 (D.P.R. 1974).

possesses the attributes of sovereignty possessed by the states, immunity from suit without consent being one of them.”<sup>73</sup>

However, the *Ezratty* case was decided in 1980, while the *Sánchez Valle* case was decided in 2016. It can be argued that since Puerto Rico remains a territory, it has independent sovereignty from the federal government. Further, it is important to note that the Supreme Court has never ruled that Puerto Rico deserves Eleventh Amendment protection. A question remains, how can the dichotomy between the federal courts’ decisions that “Puerto Rico possesses the attributes of sovereignty possessed by the states”<sup>74</sup> and the *Sánchez Valle* decision that Puerto Rico and the United States are not separate sovereigns be resolved?<sup>75</sup>

To further demonstrate another example of the ambiguity within the federal courts, another significant case was decided in 2016 by the Supreme Court, *Puerto Rico v. Franklin California Tax-Free Trust*.<sup>76</sup> In *Franklin*, the Court analyzed whether Puerto Rico is a “state” for purposes of the preemption provision of Section 903(2) of the Bankruptcy Code.<sup>77</sup> The opinion, authored by Justice Thomas, held that Puerto Rico is not a “state” for purposes of the gateway provision, but it is a “state” for purposes of the preemption provision, and therefore federal law preempts the Public Corporation Debt Enforcement and Recovery Act.<sup>78</sup> This decision prevented Puerto Rico from adopting a settlement plan for its debt through its own legislation, thus requiring Puerto Rico to depend on Congress for a solution.

Under *Franklin*, Puerto Rico, unlike the states, may not authorize its municipalities, including utilities, to declare bankruptcy and seek relief under Chapter 9 of the U.S. Bankruptcy Code.<sup>79</sup> In June 2014, Puerto Rico enacted the Puerto Rico Corporation Debt Enforcement and Recovery Act, which expressly provided different protections for creditors than Chapter 9 of the U.S. Bankruptcy Code.<sup>80</sup> The plaintiffs in this case were a group of investors who collectively held nearly two billion

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73. *Carreras Roena*, 440 F.Supp. at 219.

74. *Id.*

75. *Ezratty*, 648 F.2d at 776 n.7.

76. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016).

77. *Id.* See also 11 U.S.C. § 903 (2018) (covering the consent of a creditor and ability of a State to bind a creditor).

78. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1940.

79. *Id.* at 1943. See also 11 U.S.C. § 901–46 (2018) (covering the adjustment of debts of municipalities).

80. 2014 P.R. Laws 371. The Recovery Act allows public corporations to restructure their debt burdens. *Id.* Before the enactment of the Recovery Act, public corporations in Puerto Rico had no statutory ability to restructure their debt burdens under Chapter 9. *Id.*

dollars in bonds issued by one of Puerto Rico's public utilities, the Puerto Rico Electric Power Authority, which could potentially file for bankruptcy under the Recovery Act.<sup>81</sup> The plaintiffs sued Puerto Rico and argued that Chapter 9 of the U.S. Bankruptcy Code, which prohibits state municipal debt restructuring laws from binding creditors without their consent, preempts the Recovery Act.<sup>82</sup>

Judge Juan R. Torruella of the First Circuit Court of Appeals wrote that “[t]he language in [the *Franklin* decision] is reminiscent of the double speak found in *Downes v. Bidwell*, to the effect that although Puerto Rico belongs to the United States, it was ‘foreign in a domestic sense.’”<sup>83</sup> Additionally, because of the *Franklin* decision, Puerto Rico's ability to handle its economic crisis was taken away.<sup>84</sup> In her dissent, Justice Sotomayor, joined by Justice Ginsburg, argued that each provision of the Bankruptcy Code must be read within the context of the whole Code.<sup>85</sup> Crucially, the language of the Code also meant that the only way to solve Puerto Rico's fiscal crisis was for Puerto Rico to pass the kind of statute that it did, or wait for direct Congressional action.<sup>86</sup>

The result was PROMESA.<sup>87</sup> The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) is a 2016 federal law that established an oversight board,<sup>88</sup> a process for restructuring debt,<sup>89</sup> and expedited procedures for approving critical infrastructure projects<sup>90</sup> in order to combat the Puerto Rico's government-debt crisis.<sup>91</sup> Through PROMESA, Congress established an appointed Fiscal Control Board (FCB) to oversee the debt restructuring.<sup>92</sup> Consequently, through

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81. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1942.

82. *Id.*

83. Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of “Territorial Federalism”*, 131 HARV. L. REV. F. 65, 89 (2018) (quoting *Downes v. Bidwell*, 182 U.S. 244, 342 (1901)).

84. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1949. After the *Franklin* decision, Puerto Rico was unable to rely upon the Recovery Act passed by its own legislative assembly. *Puerto Rico Public Corporation Debt Enforcement and Recovery Act*, 128 HARV. L. REV. 1320, 1321 (2015).

85. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1950 (Sotomayor, J., dissenting).

86. *Id.* at 1504.

87. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as 48 U.S.C. §§ 2101–241).

88. 48 U.S.C. §§ 2121–2129 (2018) (establishment and organization of oversight board).

89. 48 U.S.C. §§ 2161–2177 (2018) (adjustments of debts).

90. 48 U.S.C. §§ 2211–2217 (2018) (Puerto Rico infrastructure revitalization).

91. *See generally* 48 U.S.C. §§ 2101–2241 (2018).

92. 48 U.S.C. § 2121 (2018) (financial oversight and management board (i.e., fiscal control board)).

case law, self-determination and autonomy have been cast off from the shorelines of Puerto Rico.

The ambiguity within the foundational cases involving Puerto Rico's sovereignty, rights to its inhabitants, and its ability to pass statutes that provide relief to its economy has forced Puerto Rico into a circular limbo of colonial inequality. The case law discussed in this paper is just a glimpse of hundreds of years of ambiguity that have been studied and debated consistently for years. But there is a human element that is missed throughout the analysis of this legal doctrine: the millions of lives lost in 2016 due to Hurricane Maria because of outright disregard from the Trump administration in furtherance of the decades-old protectionist law, better known as the Jones-Shafroth Act.<sup>93</sup>

The Court has never expressly ruled that the Eleventh Amendment applies to Puerto Rico.<sup>94</sup> For that reason alone, it is difficult to foresee that the Court will suddenly change its course. However, there are not simple avenues of change within the judicial system in this case. Puerto Rico has a population perfectly capable of deciding its own future. Additionally, Congress has the authority to guarantee autonomy and freedom to Puerto Rico.<sup>95</sup> With an act of Congress the United States could vote to return sovereignty to Puerto Rico.

However, there should be uniformity and clarity within the judicial system regarding Puerto Rico's sovereignty. The bench on the current Court is not likely to decide on the issue, especially since Justices Breyer and Sotomayor stand alone in their dissents.<sup>96</sup> Because the judicial system will likely not act, Congress should give the authority to Puerto Rico that it was once entrusted with when Puerto Rico ratified its own Constitution in 1952.

#### CONCLUSION

The future of Puerto Rico's political status remains uncertain, with some pushing toward statehood, others desiring the removal of colonial strings, and the remaining wanting to continue with its current territorial status. Results from a June 2017 plebiscite show that 97.2% of voters in Puerto Rico chose statehood, 1.5% of voters chose free

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93. Jones-Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. §§ 731–751).

94. Adam D. Chandler, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 *YALE L.J.* 2183, 2197 (2011).

95. U.S. CONST. art. IV, § 3, cl. 2.

96. *See Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1878–1950.

association/independence, and 1.3% chose to stay within the current territorial status.<sup>97</sup> However, the turnout for this plebiscite was only twenty-three percent (approximately 518,000 of 2.3 million voters).<sup>98</sup>

The courts have played a sort of “legal ping pong” with Puerto Rico’s constitutional and political status, with some court decisions granting it “protections,” while others interfered with its ability to govern.

It is understandable, then, that many Puerto Ricans would come to view *Sánchez Valle*—when joined with the Court’s opinion in *Puerto Rico v. Franklin California Tax-Free Trust* and the enactment of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), all products of 2016—as one prong of an unholy trinity signifying nothing short of a resurgence of a colonial condition long believed to have been discarded from their shores.<sup>99</sup>

After years of corruption from its own elected officials, the citizens of Puerto Rico rose up in protest and forced the resignation of Governor Ricardo A. Rosselló, who left office in August of 2019.<sup>100</sup> However, with a spark of revolution and change comes self-determination, and with self-determination comes uncertainty. I am hopeful that through the fog of unrest, the beautiful and courageous people of Puerto Rico will continue to move past colonial oppression and move towards a collective idea of what their country should be.<sup>101</sup>

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97. GARRETT, *supra* note 5, at 15.

98. *Id.*

99. *Fifth Amendment*, *supra* note 53.

100. Patricia Mazzei & Frances Robles, *Ricardo Rosselló, Puerto Rico’s Governor, Resigns After Protests*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/rossello-puerto-rico-governor-resigns.html> [<https://perma.cc/MKK7-94B3>].

101. Isabela Herrera, *‘It’s Not Full Citizenship’: What It Means to Be Puerto Rican Post-Maria* (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/style/puerto-rico-united-states-citizenship-fantasy-island.html> [<https://perma.cc/8P3P-RSFW>].