

PUERTO RICO AND THE CONSTITUTION: CONUNDRUMS AND PROSPECTS

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Last November, the people of Puerto Rico went to the polls to indicate their preference on the political status of the island and its relationship to the United States. With almost three-quarters of registered voters participating, the plebescite produced inconclusive results. Just over 48% of the voters selected retention of commonwealth status, 46% preferred statehood, and 5% chose the independence option. The status question has dominated Puerto Rican politics for decades (the major political parties on the island are identified by their preferred solution), yet has received surprisingly little attention on the mainland. It has received virtually no attention in constitutional law treatises, casebooks, or courses.¹ This omission is not a good measure of the significance of the issues. If Puerto Rico were to achieve statehood, it would be the 25th most populous state in the Union, sending two senators and half a dozen representatives to Congress. The island, once proclaimed the “showcase for democracy” and the alternative to Cuban-style socialism, is now the American “gateway” to the developing Caribbean basin.

The constitutional status of Puerto Rico raises complex and interesting puzzles. The United States acquired sovereignty over the island at the close of the Spanish-American War, and half a century later Puerto Rico attained the status of Commonwealth (*Estado Libre Asociado* in Spanish). At the time, it was argued that the establishment of Commonwealth represented an act of self-determination by the people of Puerto Rico and constituted an end to the island’s status as a colony of the United States. But it is recognized today that Commonwealth—at least in its 1950s form—is not a permanent solution to the status question. Decolonization of Puerto Rico remains a work in progress.

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1. See Hon. José A. Cabranes, *Puerto Rico and the Constitution*, 110 F.R.D. 475, 477 (1985).

Commonwealth was a new and novel form of territorial government. It did not, like earlier home rule arrangements for territories, presuppose eventual Puerto Rican statehood; and it was seen as responding to Puerto Rico's desires to remain part of the United States while retaining a distinct culture and language.² Commonwealth raises a host of constitutional questions regarding the continuing scope of federal power over the island and the rights of Commonwealth residents (who have been U.S. citizens since 1917). Constitutional law ought to find these issues interesting in their own right. But beyond satisfying intellectual curiosity, the questions open up broader themes of citizenship, the divisibility of sovereignty, and cultural nationalism which are of increasing salience in the United States and the world. This essay—in this anniversary issue—is an attempt to spark interest in these fascinating and important issues of constitutional membership and political sovereignty.³

2. See Rafael Hernández Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 *Revista del Colegio de Abogados de Puerto Rico* 207, 210 (1959).

3. I reserve for consideration at a later date the vexing question of who should vote on the status question. Some have argued that the 2.5 million Puerto Ricans living on the mainland (about 1 million of whom live in New York City) should have been able to vote in the November plebescite. Difficulties with defining who is "Puerto Rican" and practical problems with voting procedures led the Island political parties to limit the referendum to residents of Puerto Rico. In effect, the answer sides with the view of Puerto Rico as a "proto-state" rather than an independent nation: voting turns, as it does in state elections, on residence, not "nationality." Of course, underlying much of the debate on participation by mainland Puerto Ricans were strategic political calculations of how the off-Island population would vote.

Legislation introduced in the 101st Congress would have authorized the government of Puerto Rico to enable persons not residing in Puerto Rico to vote in a referendum on status if they were born in Puerto Rico or had at least one parent who was born in Puerto Rico. H.R. 4765, 101st Cong., 2d Sess. § 3 (1990). Supporters of independence have criticized the refusal to extend voting privileges to mainland Puerto Ricans, declaring that the referendum denied these "Puerto Rican nationals" the right to vote, while enfranchising "more than 100,000 foreigners with United States citizenship [residing] in Puerto Rico." U.N. GAOR Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 1422nd mtg. at 52, U.N. Doc. A/JAC.109/PV.1422 (1993) (statement of Juan Mari Brás); id. at 24 (statement of Carlos Noriega Rodríguez, President of the Bar Assoc. of Puerto Rico). See generally *Puerto Rico Self-Determination Act, 1990: Hearings on H.R. 4765 Before the Subcomm. on Insular and Int'l Affairs of the House Comm. on Interior and Insular Affairs*, 101st Cong., 2d Sess. pt. 1 (1990). See generally Angelo Falcón, *A Divided Nation: The Puerto Rican Diaspora in the United States and the Proposed Referendum*, in E. Meléndez and E. Meléndez, eds., *Colonial Dilemma: Critical Perspectives on Contemporary Puerto Rico* 173-80 (1993).

Despite neither congressional nor Commonwealth authorization of a mainland vote, balloting was organized in New York in October, 1993. Plans for votes in Chicago, New Jersey, and elsewhere were ultimately abandoned.

I. "PLENARY" FEDERAL POWER OVER THE TERRITORIES

The Constitution grants Congress power to make "all needful Rules and Regulations respecting the Territory . . . belonging to the United States."⁴ Perhaps the best known construction of the Territory Clause is Justice Taney's tortured reasoning in *Dred Scott*, holding that the Clause authorized congressional rule only of those territories held by the federal government at the time of the founding.⁵ But that reading was inconsistent both with earlier statements of John Marshall and with congressional practice,⁶ and was expressly rejected by the Court in the *Insular Cases*⁷—a set of turn of the century cases which considered the constitutional status of territories acquired after the Spanish-American war. It is now well established that Congress possesses plenary power to legislate for territories acquired by purchase, conquest, treaty, or war.⁸

Theoretically, the existence of Congress' plenary power is a sword of Damocles hanging over Puerto Rican self-government. What Congress has granted, the argument runs, it may always take away. The Eleventh Circuit recently stated this position in the baldest terms: "Congress may unilaterally repeal the Puerto Rican Constitution . . . and replace [it] with any rules or regulations of its choice."⁹ Yet despite the existence of this broad power, Congress has granted Puerto Rico increasing degrees of home rule. Under the Organic Act of 1900 (the Foraker Act), Puerto Rico was ruled by a Governor appointed by the President of the United States; the Governor served as commander in chief of the militia and had the power to veto legislation adopted by the locally elected Legislative Assembly and to appoint lower

4. U.S. Const. art. IV, § 3, cl. 2.

5. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 438-39, 443 (1856).

6. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828); Arnold H. Leibowitz, *Defining Status* 140-55 (Martinus Nijhoff Publishers, 1989).

7. E.g., *Dorr v. United States*, 195 U.S. 138, 142 (1904).

8. *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937); *Dorr v. United States*, 195 U.S. at 140 (quoting John Marshall's opinion in *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 337 (1810) (recognizing Congress' "absolute and undisputed power of governing and legislating" for territories)).

9. *United States v. Sanchez*, 992 F.2d 1143, 1152-53 (11th Cir. 1993) (holding that "dual sovereignty" doctrine does not apply in case of Puerto Rican and federal prosecutions for the same criminal conduct because "[t]he authority with which Puerto Rico brings charges as a prosecuting entity derives from the United States as sovereign"). The First Circuit has reached a contrary conclusion. *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988).

court judges.¹⁰ The 1917 Jones Act extended U.S. citizenship and a Bill of Rights to residents of Puerto Rico, and provided for popular election of both houses of the legislature. In 1947, Puerto Ricans were granted the right to elect their Governor. Three years later, Congress started the process to fuller self-rule by adopting “an Act to provide for the organization of a constitutional government by the people of Puerto Rico.” The 1950 statute (Public Law 600) declared:

Whereas the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and

Whereas under the terms of these congressional enactments an increasingly large measure of self-government has been achieved: Therefore,

Be it enacted . . . That, 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.¹¹

Under the procedures provided by Public Law 600, an island-wide referendum was held, approving a call for a constitutional convention. The draft produced by the convention was adopted by the people of Puerto Rico¹² and formally approved by Congress in 1952, with one exception¹³ and two provisos.¹⁴ The con-

10. Foraker Act, 31 Stat. 77, §§ 17, 31, 33 (1900) (repealed 1917). Laws enacted by the Legislative Assembly could also be annulled by Congress. § 31, 31 Stat. at 83. The Supreme Court of Puerto Rico and the upper house of the legislature were appointed by the President of the United States. §§ 18, 27, 33, 31 Stat. at 81, 82, 84.

11. Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319 [hereinafter Public Law 600].

12. Referendum on March 3, 1952: 374,649 to 82,923. Act of July 3, 1952, Pub. L. No. 447, ch. 567, 66 Stat. 327.

13. Congress refused to approve section 20 of Article II of the proposed Constitution, which provided a list of positive “human rights” such as the rights to obtain work and to a standard of living adequate for personal and family well-being, and “the right of motherhood and childhood to special care and assistance.” 66 Stat. at 327. These guarantees were thought to be incompatible with traditional understandings of a bill of rights.

14. The provisos required that the Puerto Rican Constitution be amended, first, to add the following to the section guaranteeing free and non-sectarian education: “Compulsory attendance at elementary public schools to the extent permitted by the facilities of the state as herein provided shall not be construed as applicable to those who receive elementary education in schools established under nongovernmental auspices.” The second proviso required the addition of the following to the article establishing an amendment procedure:

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

stitutional convention of Puerto Rico acted immediately to amend the Constitution as mandated by the Congress, and the Constitution of Puerto Rico took effect, after a formal proclamation of the Governor, on July 25, 1952.

It has been suggested that the establishment of Commonwealth status ended the Congress' "plenary power" under the Territory Clause. Under this reasoning, Congress lost general power to regulate the internal affairs of Puerto Rico or to amend the "compact" without Puerto Rican consent—much as Congress has no power to legislate for the now-independent Philippines or territories that have become states.¹⁵ (Congress could, of course, still adopt laws under other powers that applied in Puerto Rico, just as federal laws adopted under the commerce power, for example, have effect throughout the states.)

Despite some early lower court opinions (and dicta in more recent cases) suggesting that Commonwealth has fundamentally altered congressional power under the Territory Clause,¹⁶ the Supreme Court and the Executive Branch have rejected the argument.¹⁷ Interestingly, both statehood supporters and *in-*

66 Stat. at 327.

15. Supporters of this view point to language in the preamble of the Puerto Rican Constitution, which provides: "We, the people of Puerto Rico . . . 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. See also P.R. Const. art. I, § 1 ("The Commonwealth of Puerto Rico is hereby constituted. Its political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America."); Colón, 19 *Revista del Colegio de Abogados de Puerto Rico* at 238-58 (cited in note 2). Consider *id.* at 254: "The legal status of the Commonwealth . . . [rests] on the sovereignty of the people of Puerto Rico. They created it, they empowered it, they made it sovereign. . . . Congress surrendered those powers which had traditionally been exercised by the territory of Puerto Rico." *Id.* at 254.

16. See *Figuroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956); *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953). Consider this dicta in *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985):

Thus, in 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.

See generally Leibowitz, *Defining Status* at 165-85 (cited in note 6).

17. *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam); *Political Status of Puerto Rico, 1991: Hearings on S. 244 Before the Senate Comm. on Energy and Natural Resources*, 102d Cong., 1st Sess. 193-94 (1991) (statement of Hon. Richard Thornburgh, Attorney General); Cabranes, 110 F.R.D. at 483 n.26 (cited in note 1); Peter J. Fliess, *Puerto Rico's Political Status Under Its New Constitution*, 5 W. Pol. Q. 635, 643 n.29 (1952) (concerning position of government lawyers during commonwealth process); *id.* at 644 (concluding that "[t]here can be little question that Congress' legal powers under the

dependentistas have argued that Congress lost nothing by authorizing Puerto Rican self-rule: from either perspective, the conclusion that congressional power has not been limited by Commonwealth supports a move to a legal status that would clearly terminate “plenary power”—either statehood or independence.¹⁸ But to conclude that Congress has not alienated its power under the Territory Clause is not to conclude that that power is plenary in the sense of unlimited. Two sorts of limits are conceivable. First, it might be argued that Congress may not discriminate against Puerto Ricans simply on the basis of residence in the Commonwealth. Second, the Bill of Rights and other explicit limits on congressional power might apply to federal regulation of Puerto Rico.

United States Constitution and Section 9 of the Organic Act are tantamount to unilateral authority over future mainland-island relations”).

For lower court decisions to the same effect, see *United States v. Sanchez*, 992 F.2d 1143, 1148-49 (11th Cir. 1993); *United States v. Rivera Torrez*, 826 F.2d 151, 154 (1st Cir. 1987); *Perez de la Cruz v. Crowley Towing and Transp. Co.*, 807 F.2d 1084, 1088 (1st Cir. 1986). See also *United States v. Lopez Andino*, 831 F.2d 1164, 1173 (1st Cir. 1987) (Toruella, J., concurring):

[T]he legislative history of [P.L. 600] leaves no doubt that even though its passage signaled the grant of internal self-government to Puerto Rico, no change was intended by Congress or Puerto Rico authorities in the territory's constitutional status or in Congress' continuing plenary power over Puerto Rico pursuant to the Territory Clause of the Constitution. (emphasis in original).

See generally David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452 (1985) (“*Helfeld I*”); David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 *Revista Juridica de la Universidad de Puerto Rico* [Rev. Jur. U.P.R.] 255 (1952) (“*Helfeld II*”).

Although Commonwealth status is not deemed to have affected congressional power, the Court views the establishment of Commonwealth as rendering Puerto Rico more “statelike.” See *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976) (“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.”). This characterization may carry weight in matters of statutory interpretation. E.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-76 (1974) (statutes of Puerto Rico are “state statutes” for purposes of invoking three-judge court).

18. See Carlos Romero-Barceló, *Puerto Rico, U.S.A.: The Case for Statehood*, *Foreign Aff.* 60-61 (Fall 1980); Rubén Berríos Martínez, *Independence for Puerto Rico: The Only Solution*, *Foreign Aff.* 566-67 (Apr. 1977).

It should be stressed that Congress has, in fact, rarely purported to intervene in local self-rule. See *United States v. Figueroa Rios*, 140 F. Supp. 376, 380-81 (D.P.R. 1956) (federal statute criminalizing transporting of firearm by person convicted of crime of violence in interstate commerce or within territory held not to apply to intra-Puerto Rico transportation). Most statutes that have an effect in Puerto Rico are exercises of other delegated powers. (For a counter-example, see *Helfeld I* at 467 n.67 (cited in note 17).)

A. DIFFERENTIAL TREATMENT OF RESIDENTS OF PUERTO RICO

For most federal regulatory and criminal statutes, Puerto Rico is treated as if it were a state.¹⁹ There are, however, some important exceptions. First, individuals and corporations in Puerto Rico pay no federal income taxes (although this permits Puerto Rico to set local taxes at significantly higher levels).²⁰ Second, residents of Puerto Rico receive less favorable treatment than mainland residents under a number of major federal benefits programs. For citizens of Puerto Rico, federal payments under Aid to Families with Dependent Children, Medicaid, and the food-stamps program are made at lower levels and are subject to an overall cap.²¹ The Supplemental Security Income Program (aid to the aged, blind, and disabled) does not apply to Puerto Rico; rather, through continuation of an earlier, similar program, benefit levels for Puerto Ricans are capped and made at lower levels than SSI payments made to eligible persons residing in the states.²² According to a 1990 study by the Congressional Budget Office, treating Puerto Rico as a state under these programs would have increased federal transfers to the Commonwealth by some \$1.7 billion in fiscal year 1992, rising to almost \$3 billion in fiscal year 1995.²³ It is also generally agreed that, because of high levels of poverty on the island and a low average income,²⁴ the dollars lost due to unfavorable treatment

19. General Accounting Office, Pub. No. GAO/HRD-89-104FS, *Puerto Rico: Update of Selected Information Contained in a 1981 GAO Report* (1989), reprinted in 3 *Puerto Rico Political Status Referendum* 213, 246-61 (Appendix III) (1992) ("Political Status Referendum") (examining thirty major federal statutes in the areas of income support, health care, taxes, immigration, labor, environment, and trade); *Helpfeld I*, 110 F.R.D. at 460 (cited in note 17).

20. David L. Brumbaugh, *Puerto Rico's Status Options and Federal Taxes* (Congressional Research Service, 1990), reprinted in 2 *Political Status Referendum* at 211, 214 (cited in note 19) ("[i]n a very general sense . . . the effect of Federal and Puerto Rican tax laws is to substitute Puerto Rico's own income tax for the Federal").

21. The federal government funds between 50% and 83% of each state's AFDC program, depending on the state's per capita income. For Puerto Rico, the federal share is fixed at 75%, with a cap on total funding. Puerto Rico is excluded completely from the federal food stamp program. It receives instead a separate grant, capped in advance by Congress. Funding for Medicaid is also capped. S. Rep. No. 481, 101st Cong., 2d Sess. 10-11 (1990).

22. *Id.* at 10.

23. *Potential Economic Impacts of Changes in Puerto Rico's Status Under S. 712* (Congressional Budget Office, 1990), reprinted in 2 *Political Status Referendum* 1, 23 (1992) (cited in note 19).

24. According to 1990 Census data, per capita income in Puerto Rico was \$4,177, compared to a national average of \$14,420. The figure for Mississippi, the state with the lowest per capita income, is \$9,648. U.S. Dep't of Commerce, *1990 Census of Population and Housing, Summary Social, Economic, and Housing Characteristics: Puerto Rico, 1990*

under the federal benefit programs substantially exceed the dollars lost to the U.S. Treasury because of the tax exemption on Puerto Rican taxpayers.²⁵

The Supreme Court has given short shrift to claims that the disadvantageous treatment of Puerto Rico violates the Fifth Amendment's equal protection guarantee. In *Harris v. Rosario*,²⁶ the Court upheld the disparate treatment of Puerto Ricans under ADFC in a page and a half per curiam opinion issued without full briefing or oral argument. The summary disposition, joined by six members of the Court, stated that under the Territory Clause Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."²⁷ Referring to an earlier per curiam opinion upholding the exclusion of Puerto Rico from the federal Supplemental Security Income program,²⁸ the Court identified three grounds for concluding that the differential treatment of Puerto Rico was rational: "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."²⁹

Harris is a startling and troubling example of the Court's unwillingness to give any serious scrutiny—indeed, any serious thought—to congressional exercises of power over the territories. The Court's summary treatment of the complex issues is no doubt aided by its general unwillingness to scrutinize federal welfare programs.³⁰ But the reasons assigned by the Court for finding the statute rational (which are simply lifted verbatim from an earlier case and would seem to authorize virtually any discrimination against Puerto Rico residents in federal programs) suggest

CPH-5-53, at 191 (Feb. 1993); U.S. Dep't of Commerce, *1990 Census of Population and Housing, Summary Social, Economic, and Housing Characteristics: United States, 1990* CPH-5-1, at 228 (Nov. 1992).

25. Carolyn L. Merck, *Welfare and Taxes Under Alternative Status Options for Puerto Rico*, (Congressional Research Service, 1991), reprinted in *2 Political Status Referendum* 291, 302-03 (cited in note 19). (This figure does not include gains to the federal budget that would accrue from statehood due to the repeal of tax credits to mainland corporations doing business in Puerto Rico.)

26. 446 U.S. 651 (1980), *reh'g denied*, 448 U.S. 912 (1980).

27. 446 U.S. at 651-52.

28. 446 U.S. at 652 (citing *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam)).

29. *Id.*

30. Cf. *Dandridge v. Williams*, 397 U.S. 471 (1970), *reh'g denied*, 398 U.S. 914 (1970) (upholding regulation capping AFDC payment regardless of family size). The Court has made exceptions where a protected class is involved. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977) (gender); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (aliens).

that something else is at work other than the Court's usual hostility to constitutional claims brought by poor people.

The Court is surely correct that residents of Puerto Rico pay no federal income tax and that funding Puerto Rico at the level of the states would cost the federal treasury more. Moreover, it is certainly arguable that higher welfare payments "could disrupt the Puerto Rican economy." To this extent, the arguments supplied in support of the statute are rational by not being crazy.

But the Court's finding of a rational means-end relationship is not unassailable. The second and third justifications would seem to apply equally to every state, rather than distinguishing the Commonwealth from the states: welfare payments cost money and may affect local economies by influencing decisions to work; and the more AFDC recipients in a state, the higher the costs. Yet Congress has not provided for reduced reimbursement levels or overall caps for states with large numbers of AFDC recipients.³¹ Nor does the first justification—that Puerto Ricans pay no federal taxes—take us very far.³² The AFDC program does not in any way link federal subventions to states to the amount that state taxpayers contribute to federal tax coffers. And the fact of tax exemption says little about the fairness of reduced benefits to island residents, since the would-be taxpayers and recipients of federal aid are largely distinct classes of Puerto Ricans.³³

Doctrinally, one might expose the thinness of the justifications through the imposition of a higher level of judicial scrutiny. This was Justice Marshall's suggestion in his dissent from the

31. In 1991, California (with a population a bit more than eight times the size of Puerto Rico) had 12 times the number of families receiving AFDC (the average family size was the same for both jurisdictions). (Cal.: 729,170; Puerto Rico: 60,842). U.S. Dep't of Health and Human Services, *Administration for Children and Families, Office of Family Assistance, Characteristics and Financial Circumstances of AFDC Recipients* 19, table 1 (FY 1991). The federal dollar contributions show a far larger disparity (due to the higher level of welfare payments in California). In 1992, the federal contribution to the California AFDC program totalled about \$3 billion; federal payments to the Puerto Rican program totalled about \$63 million. House Ways and Means Committee, *1993 Green Book* 674-75 (1993).

32. Why might not it be just as reasonable to link welfare participation with service in the Armed Forces? Puerto Ricans, as U.S. citizens, have been subject to the draft and fought in Operation Desert Storm as part of the volunteer Armed Forces.

33. Moreover, the tax exemption is not necessarily a windfall to residents of Puerto Rico. Because of the lack of a federal income tax, Commonwealth tax rates may be set higher. They are currently at about the level that would obtain if the federal income tax applied to Puerto Rico.

Furthermore, the benefits of the federal tax exemption are not limited to island residents. Mainland corporations have earned millions of dollars of federal tax-free profits through operations in Puerto Rico.

summary disposition in *Harris*.³⁴ But it is not clear, under prevailing equal protection doctrine, how heightened scrutiny might be triggered. Rather, *Harris* exposes a deeper issue. Even assuming that the justifications provided by Congress are “rational” (as we understand that term in constitutional analysis), what is not explained is why they are *permissible*. The distinction drawn by Congress is one based simply on residence in a territory; it is grounded, when all is said and done, not on different facts, but on status of place.³⁵ If Congress were truly interested in saving money or not unduly interfering in local economies, it could draft legislation accomplishing those ends with classifications that do not distinguish territories from states. Furthermore, it is curious that under federal welfare laws *place of residence* should count for more than *citizenship*: permanent resident aliens residing in the states receive the same level of payments as U.S. citizens residing there; U.S. citizen residents of Puerto Rico do not.

In short, the “reasoning” of *Harris* is that Puerto Rico is not a state, and that Congress is entitled to draw lines between territories and states in the disbursement of federal funds. But constitutional law ought to demand more than judgment by definition. It seems to me that some set of justifications beyond those currently indulged in by the Court are demanded when Congress acts to disadvantage a class of the poorest American citizens who, by place of residence, are not entitled to participate in the federal political system.³⁶

B. THE SUBSTANTIVE CONSTITUTIONAL RIGHTS OF PUERTO RICANS

The *Insular Cases* focused national attention on the question of the constitutional status of the territories. Although there was little doubt that Congress possessed broad power to establish governments for the new acquisitions, a question sparking heated political and legal controversy was whether the residents of the new “possessions” were entitled to the protections of the federal Constitution. Some argued that direct application of the Consti-

34. 446 U.S. at 654 (Marshall, J., dissenting).

35. And we should not lose track of the obvious “Footnote 4” point that residents of Puerto Rico cannot vote in presidential elections or elect members of Congress.

36. This raises the interesting question whether the federal tax exemption enjoyed by Puerto Ricans should be constitutionally suspect—a topic omitted from most commentaries criticizing the Court’s conceptualization of the constitutional status of Puerto Rico. Favorable treatment may well be problematic, unless it is justified as some form of a remedy for colonial treatment and absence of political rights.

tution would needlessly hinder congressional flexibility in carrying out the Empire project. Others thought that the Constitution must apply wherever the federal government acts—in the phrase of the day, “the Constitution followed the flag.”³⁷ Interestingly, this latter claim was sometimes pressed by anti-imperialists, not with the intent of ensuring that Filipinos or Puerto Ricans in fact possessed U.S. constitutional rights, but rather to put obstacles in the way of Empire. Few Americans thought that the residents in the newly acquired territories were “civilized” enough to participate in American political institutions. Thus, a conclusion that they were entitled to full constitutional protections (and perhaps representation in Congress) would provide Congress with a strong incentive to cast off the territories.³⁸

In the *Insular Cases*, the Court compromised. Unwilling to throw water on the imperialist fires burning in the nation, the Court ensured that the Constitution would not be read to unduly limit congressional options.³⁹ The doctrinal innovation here was the newly minted distinction between “incorporated” and “unin-

37. It is usually forgotten that one of our most famous constitutional aphorisms arises from the controversies of this time. In full, Mr. Dooley's observation was: “no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' ilection returns.” Finley Peter Dunne, *Mr. Dooley's Opinions* 26 (Harper & Brothers, 1906).

To the dismay of its advocates, the idea that the Constitution applied in the territories echoed Justice Taney's opinion in *Dred Scott*—an irony of which members of the Court were painfully aware. See *Downes v. Bidwell*, 182 U.S. 244, 287-92 (1901) (White, Shiras, and McKenna, JJ., concurring).

38. See Hon. José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 Harv. L. Rev. 450, 455 (1986) (book review).

39. This view is stated most directly by Justice Brown's opinion in *Downes v. Bidwell*. Because the language is extraordinarily revealing, I quote it at length:

Patriotic and intelligent men may differ widely as to the desirability of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

182 U.S. 244, 286-87 (1901). The kind of language used here is similar to other plenary power cases of the day involving federal regulation of Indians and aliens. See T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (unpublished manuscript).

corporated” territories. For those territories “incorporated” into the United States by congressional and executive branch action and deemed to be on the road to statehood (such as Alaska), the Constitution applied in full. “Unincorporated” territories, such as Puerto Rico, Guam, and the Philippines, faced different constitutional rules. In the possessions, the Constitution was “operative,” but this did not mean that every provision was “applicable.”⁴⁰ For example, because unincorporated territories were held not to be a part of the United States in a constitutional sense, the requirement that taxes “be uniform throughout the United States”⁴¹ did not apply. More important, residents of the “unincorporated” territories were guaranteed only those rights held by the Court to be “fundamental.”⁴² This latter rule held whether or not the territorial population had been granted U.S. citizenship.⁴³

The *Insular Cases* concluded that Puerto Rico was not an “incorporated” territory of the United States, a holding that lasts to this day. Accordingly, application of the Bill of Rights to the laws governing the island was not automatic, as made clear by Chief Justice Taft’s opinion for a unanimous Court in *Balzac v. Porto Rico*.⁴⁴ In *Balzac*, a newspaper editor was charged with criminal libel, a misdemeanor under Puerto Rican law. The island’s code of criminal procedure did not provide for jury trial in such cases, and Balzac claimed that the law violated his rights under the Sixth Amendment. Taft concluded that, absent evidence of clear congressional intent, the Court would not hold that Puerto Rico had been incorporated into the United States; accordingly, the Sixth Amendment did not automatically apply to criminal proceedings in Puerto Rico. And under the particular circumstances of the territory, application of the jury right would be inappropriate:

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial

40. *Downes v. Bidwell*, 182 U.S. 244, 292 (1901) (White, J., concurring), adopted by the Court in *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The Court thus rejected polar positions urged in the course of the debate over the status of the territories: (1) that it was fully up to Congress to determine which rights would be extended to the territories, and (2) that the Constitution applies in full wherever the government of the United States acts. For a detailed description and analysis of these arguments, see Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991).

41. U.S. Const. art. I, § 8, cl. 1.

42. *Dorr*, 195 U.S. at 146.

43. *Balzac*, 258 U.S. at 308-10.

44. 258 U.S. 298 (1922).

attitude jurors must assume. The jury system postulates a conscientious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.⁴⁵

Balzac is a curious decision for a number of reasons. First, the Court's holding was not affected by the fact that citizens of Puerto Rico had been granted U.S. citizenship in 1917. Arguably, the earlier cases might have been distinguished on such a ground; or, the granting of citizenship might have suggested that Puerto Rico had been "incorporated" into the United States.⁴⁶ Second, Puerto Rican legislation had provided for a jury trial in felony cases since 1901.⁴⁷ Thus, the subtext of the opinion—that Puerto Ricans were not prepared to operate Anglo-Saxon institutions—appears weak.⁴⁸ Finally, because Puerto Ricans were citizens of the United States, they could freely travel to the mainland and be called to serve on juries in the state or federal courts—despite being "trained to a complete judicial system that knows no juries."

45. *Id.* at 310. Would Taft's reasoning support exclusion of naturalized U.S. citizens from juries if they grew up in legal systems without juries?

46. "[U]nder the circumstances," wrote the Chief Justice, "[U.S. citizenship is] entirely consistent with non-incorporation." The granting of citizenship ensured Puerto Ricans the protection of a sovereign, but it did not automatically demonstrate a congressional intent to incorporate the territory. *Id.* at 308.

47. See Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* 99-100 (Editorial de la Universidad de Puerto Rico, 1985).

48. Taft's words here appear carefully chosen. He seems unwilling to join the generally held opinion of the day that Puerto Ricans simply were not "civilized" enough to understand or operate under Anglo-Saxon traditions. (Other Justices in the *Insular Cases* were less restrained. See, e.g., *Downes*, 182 U.S. at 279-80: ("[I]t is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States.")) Rather, Taft sounds a note of deference in *Balzac* to local decisionmakers, which helps him conclude that the availability of jury trials for felonies is not determinative.

Although *Balzac* has never been overturned,⁴⁹ it is of little consequence today. By statute, Puerto Ricans enjoy a right to jury trial in both Commonwealth and federal prosecutions consistent with prevailing constitutional rules.⁵⁰ In addition, by a process that approximates incorporation of the Bill of Rights through the Fourteenth Amendment against the states, the Court has consistently concluded that the protections of the Bill of Rights apply to the territories.⁵¹ In recent cases, the Court has analyzed First⁵² and Fourth Amendment⁵³ claims in cases arising in the Commonwealth just as it would if the case had challenged conduct of one of the fifty states.

The *Insular Cases*, then, held forth the possibility that residents (including U.S. citizens) in the possessions would enjoy a lesser degree of constitutional protection than citizens (and permanent resident aliens!)⁵⁴ in the states. But both by statute and by judicial expansion of the notion of "fundamental rights" that apply in "unincorporated" territories, the Bill of Rights applies with full force in the Commonwealth.⁵⁵

A deeper puzzle remains, however. The *Insular Cases* concerned constitutional limits on *federal* powers. How is it, then, that the Constitution applies to acts of the *Commonwealth* government? Prior to Commonwealth, it could be argued that the acts of the Puerto Rican government constituted federal action in a federal territory; hence, constitutional norms limiting federal action could be imposed on the conduct of the island's officials.

49. See *Reid v. Covert*, 354 U.S. 1, 8-9 (1957) (opinion of Black, J.); *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring) (suggesting that *Insular Cases* represent the views of an earlier age).

50. P.R. Const. art. II, § 11. For explanation of the statutory background, see *Helfeld I* at 458 (cited in note 17). Not all territories, however, are bound by the jury trial right. Compare *King v. Andrus*, 452 F. Supp. 11 (D. D.C. 1977) (Sixth Amendment jury trial right applies in American Samoa) with *Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984) (jury trial not required as matter of federal constitutional law).

51. See, e.g., *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (First Amendment); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (voting rights); *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (Fourth Amendment); *Examining Bd. of Eng'rs, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 599-601 (1976) (equal protection).

52. *Posadas*, 478 U.S. at 339.

53. *Torres*, 442 U.S. at 470-71.

54. See *Harris v. Rosario*, 446 U.S. 651, 652 (1980). There is an interesting analogy here to the Court's treatment of aliens in the United States. Resident aliens are entitled to the individual constitutional rights guaranteed citizens, but Congress has broad authority to exclude them from benefit programs made available to citizens.

55. Of course, some significant gaps in protection remain: residents of Puerto Rico do not participate in federal elections and, as described above, suffer unfavorable treatment under federal benefit programs.

But, as a number of lower court cases have suggested, the coming of Commonwealth seems to undermine the position that the Puerto Rican government may be viewed as exercising federal power.⁵⁶ Nor is it clear how the Bill of Rights could be brought to bear against the Puerto Rican government by virtue of the Due Process Clause of the Fourteenth Amendment, which applies only to the actions of a "state."⁵⁷ (And to conclude that Puerto Rico is a "state" within the terms of the Due Process Clause would be difficult to square with the Amendment's subsequent references to "states" regarding representation in Congress.)

The Supreme Court has been unwilling to designate the route by which constitutional norms bind the Commonwealth government. In *Examining Board v. Flores de Otero*,⁵⁸ for example, it held unconstitutional a Puerto Rican statute establishing a citizenship requirement for the private practice of civil engineering. Although the Court applied the constitutional standards by which state discrimination against aliens is judged, it studiously avoided deciding from whence the equal protection norm came:

It is clear now . . . 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, however, thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection. . . . Once again, we need not resolve that pre-

56. *Figuroa v. Puerto Rico*, 232 F.2d 615 (1st Cir. 1956) (Puerto Rican Constitution is not an act of Congress); *Mora v. Torres*, 113 F. Supp. 309 (D. P.R. 1953) (Fifth Amendment no longer applicable to acts of Puerto Rican government; "The [Puerto Rican] government is no longer an agency of the Government of the United States nor does it exercise any longer its powers by way of delegation of the Federal Government."). Cf. *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987) ("dual sovereignty" doctrine applies to criminal prosecutions by Puerto Rico; no double jeopardy problem). But see *United States v. Sanchez*, 992 F.2d 1143, 1150 (11th Cir. 1993) ("Punitive authority in a territory of the United States flows directly from this plenary power. Every exercise of authority which does not proceed under a direct Congressional enactment proceeds, at least, at the sufferance of the Congress, which may override disfavored rules or institutions at will. The United States Congress is the source of prosecutorial authority for . . . the courts of United States territories.") (footnote omitted).

57. The Supreme Court has, at times, been willing to conclude that Puerto Rico constitutes a "state" under a particular federal statute. E.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-76 (1974) (Puerto Rico constitutes "state" for purposes of three-judge court statute). But see *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970) (Puerto Rican statute not a "state statute" within 28 U.S.C. § 1254(2) (permitting appeals from federal courts of appeals' decisions holding state statutes unconstitutional)).

58. 426 U.S. 572 (1976).

cise question because, irrespective of which Amendment applies, the statutory restriction . . . is plainly unconstitutional.⁵⁹

This reasoning begs the question more than it seems to realize. The issue is not whether the statute could be sustained under any equal protection norm; the question is why any equal protection norm applies at all.⁶⁰

One answer may be provided by positive law. Under the Organic Act of 1917, Congress applied most of the Bill of Rights to the acts of the colonial legislature.⁶¹ (The most significant exceptions, it should not surprise, were the constitutional grand jury and petit jury protections.) Section 2 of the Act declared that “no law shall be enacted in Puerto Rico which shall . . . deny to any person therein the equal protection of the laws.”⁶²

The 1950 legislation initiating the Commonwealth process specifically mandated that any constitution drafted by Puerto Rico “shall include a bill of rights”;⁶³ and the bill of rights subsequently included in the 1952 Constitution includes all the federal guarantees that apply to the states⁶⁴ (and more⁶⁵). Again, equal protection receives explicit mention.⁶⁶ Finally, the congressional legislation approving the Constitution required the Commonwealth to amend the Constitution to include a guarantee that subsequent amendments be “consistent . . . with the applicable provisions of the Constitution of the United States.”⁶⁷ As explained by the Senate Report:

59. *Id.* at 600-01.

60. Justice Rehnquist’s dissent makes this point with concise clarity. *Id.* at 606-09. He also raises an additional intriguing question: if the equal protection norm comes by way of the Fifth Amendment’s limits on federal power, why cannot Puerto Rico assert the broad federal power to draw lines between citizens and aliens. See, e.g., *Mathews v. Diaz*, 426 U.S. 67 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

61. Act of March 2, 1917, Pub. L. No. 368, ch. 145, 39 Stat. 951.

62. 39 Stat. at 951.

63. Public Law 600 § 2 (cited in note 11).

64. See P.R. Const. art. II.

65. E.g. *id.* § 7 (prohibiting the death penalty); *id.* § 8 (“Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life.”); *id.* § 10 (prohibiting wiretapping). Section 19, in looking two ways at once, shows an acute awareness of U.S. constitutional development:

The foregoing enumeration of rights shall not be construed restrictively nor does it contemplate the exclusion of other rights not specifically mentioned which belong to the people in a democracy. The power of the Legislative Assembly to enact laws for the protection of life, health and general welfare of the people shall likewise not be construed restrictively.

Id. § 19.

66. Section 7 provides: “No person in Puerto Rico shall be denied the equal protection of the laws.” *Id.* § 7.

67. Act of July 3, 1952, ch. 567, 66 Stat. 327 (1952). The Puerto Rican Constitutional Convention formally accepted the congressionally mandated amendment to the Constitu-

Applicable provisions of the United States Constitution and the Federal Relations Act will have the same effect as the Constitution of the United States has with respect to State Constitutions or State laws. . . . Any act of the Puerto Rican Legislature in conflict with . . . the Constitution of the United States or United States laws not locally inapplicable would be null and void.

Within this framework, the people of Puerto Rico will exercise self-government. As regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union.⁶⁸

This legislative history provides a rather firm foundation for concluding that acts of the Puerto Rican government are subject to federal constitutional strictures. Indeed, can it be possible that in recognizing Commonwealth status in 1952 Congress sought to abandon the constitutional limits applicable to the Puerto Rican government prior to that time?

The legal materials, however, might be viewed as taking us only half the way. The requirement that the Puerto Rican Constitution include a Bill of Rights might be described as internalizing federal constitutional norms; that is, the federal norms might become rules for the Commonwealth under Puerto Rican law. Accordingly, such norms would not be enforceable in federal court as a matter of federal law—much as state constitutional provisions, even if they mirror federal guarantees, are not subject to federal enforcement. But this interpretation runs counter to the express congressional statements in the 1952 statute and its supporting legislative history that acts of the Puerto Rican legislature and amendments to the Constitution comport with the federal Constitution's standards—just as state acts and constitutions must.

In short, the positivist response to why the federal Constitution applies to the acts of the Puerto Rican government is because Congress, in exercise of its unsundered plenary power to regulate the territories, has said so. But it seems unsatisfactory to stop here. The Court has not relied on this reasoning in its steadfast refusal to ascertain the source of constitutional limits on Puerto Rico. Indeed, its hazy language seems to point to something in the constitutional atmosphere, to principles lying

tion's amending provision. It is interesting that the congressional proviso demands adherence to "applicable provisions of the Constitution"—suggesting continued fidelity to the principle of the *Insular Cases* that not all constitutional rights automatically apply in Puerto Rico.

68. S. Rep. 1720, 82d Cong., 2d Sess. 6 (1952).

above and behind our pen-on-paper texts.⁶⁹ Thus the Court has quoted favorably First Circuit Chief Judge Magruder's conclusion in an early case after Commonwealth that it is not necessary to determine whether it is the Due Process Clause of the Fifth Amendment or of the Fourteenth Amendment that applies to Puerto Rico: the important point is that "there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law as guaranteed by the Constitution of the United States."⁷⁰

The declaration here echoes the famous non-argument (but inescapable conclusion) of *Bolling v. Sharpe*.⁷¹ And it suggests something quite telling about our constitutional system. Constitutional norms may be free-floating not only in the sense that they are not rooted in a text, but also in the sense that they provide background principles for the entire system. The textual mentions of equal protection or due process become merely local instantiations of systemic norms.

The one major stumbling block to the theory—leaving aside the usual litany of complaints against non-textualism—is that the Court's statement is incorrect. There in fact exists "under the American flag [a] governmental authority" not constrained by the federal Constitution: Indian tribes. In the 1896 case of *Talton v. Mayes*, the Court held that:

[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.⁷²

The holding of *Talton* has been undercut by the 1968 enactment of the "Indian Bill of Rights," which extends most of the federal Bill of Rights—again pursuant to federal "plenary

69. Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Court unwilling to ascribe source of right to travel to particular constitutional provision).

70. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974), quoting *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953).

71. 347 U.S. 497 (1954).

72. 163 U.S. 376, 384 (1896).

power" over Native Americans—to tribal governments.⁷³ But the case has not been overturned. Arguably, *Talton* can be distinguished, if the Court wishes to conceptualize the tribes as political bodies approximating foreign nations while considering Puerto Rico a quasi- (or proto-) state. But the Court's recent cases on the powers of Indian tribes seem to cut precisely in the other direction, threatening to erode a century of doctrine according weight to inherent tribal sovereignty.⁷⁴

Can *Talton* and *Flores de Otero* logically coexist in our constitutional system? Does *Talton* suggest broader possibilities for Puerto Rican self-rule than is usually assumed? Does *Flores de Otero* put pressure on century-old assumptions about the applicability of the Constitution to Native American tribal governments? Whether a unified theory of sovereignty under the Constitution can be worked out remains to be seen.⁷⁵ But these generally ignored corners of constitutional law may provide far more fertile ground for theoretical work than has been heretofore appreciated.

II. THE CONSTITUTIONALITY OF ENHANCED COMMONWEALTH STATUS

Frequently labeled "colonialism by consent," the 1952 Commonwealth solution to the status question has satisfied few. The advocates of statehood and independence argue that Puerto Rican self-determination cannot be fully realized while federal plenary power exists. Although some Commonwealth proponents have maintained that Commonwealth status terminated Congress' plenary power, the argument seems a loser.⁷⁶ Accordingly, the Commonwealthers over the years have supported various proposals to increase Puerto Rican autonomy vis-à-vis the federal government.⁷⁷ These "enhanced Commonwealth" plans run

73. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, § 202, 82 Stat. 77, as amended by Act of October 27, 1986, Pub. L. 99-570, tit. IV, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302 (1988)). The Act did not extend the guarantees of the Establishment Clause or grand jury indictment.

74. E.g., *Duro v. Reina*, 110 S. Ct. 2053 (1990); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). See Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1 (1991).

75. I am currently at work on a book-length treatment of these issues. See Aleinikoff, *Semblances of Sovereignty* (cited in note 39).

76. But see Leibowitz, *Defining Status* at 172 (cited in note 6) (legislative history may be read to establish "an irrevocable grant of authority in local affairs with an understanding of mutual consent being required before Congress would resolve the ultimate status question or change the status of the Commonwealth").

77. A noteworthy study, issued in 1975, was conducted by the Ad Hoc Advisory Group on Puerto Rico appointed by the President of the United States and the Governor

from the powerful (declaring an end to federal plenary power, granting Puerto Rico a veto over the application of federal laws to the island, and authorizing a vote in Presidential elections and representation in Congress) to the supplemental (requiring a "clear statement" by Congress that general legislation is to apply to Puerto Rico).

Legislation introduced in the 102nd Congress provided a fairly mild version of "Commonwealth-plus" status. S. 244 authorized a referendum on status and spelled out the three options in some detail (raising interesting questions about how a ballot simply listing the status options could accurately inform the electorate of the consequences of their vote). Regarding a new Commonwealth status, the bill declared:

The Commonwealth of Puerto Rico is a unique juridical status, created as a compact between the People of Puerto Rico and the United States, under which Puerto Rico enjoys sovereignty, like a State, to the extent provided by the Tenth Amendment to the United States Constitution and in addition with autonomy consistent with its character, culture and location. This relationship is permanent unless revoked by mutual consent.⁷⁸

The legislation would have strengthened Puerto Rico's hand in federal decisionmaking regarding the Commonwealth in several respects. It provided that, should the legislature of Puerto Rico pass a resolution recommending that a particular federal law no longer apply to Puerto Rico, the recommendation could be adopted by a joint resolution of the Congress.⁷⁹ In addition, it

of Puerto Rico. Charged with submitting recommendations on how to "develop the maximum of self-government and self-determination within the framework of Commonwealth," the Group proposed a new compact "of permanent union" which would have, *inter alia*, (1) ended disfavorable treatment of Puerto Rican residents in federal benefit programs (§ 6); (2) granted Puerto Rico some degree of control over immigration to the island (§ 10); (3) provided for a Puerto Rican delegate in the U.S. Senate (§ 11); (4) provided that future federal laws would not apply in Puerto Rico unless a statute specifically referred to the island; and such laws, when objected to by Puerto Rico as inconsistent with Compact, must be essential to the interests of the United States (§ 12); (5) authorized amendments to the Compact only upon the mutual consent of both parties (§ 21). Ad Hoc Advisory Group on Puerto Rico, *Compact of Permanent Union between Puerto Rico and the United States* (October 1975).

The enhanced commonwealth proposal at issue in the recent plebiscites included four measures: restoring and making permanent favorable federal tax treatment of corporate profits earned in Puerto Rico, extending SSI to the island, removing the cap on food assistance funds, and protecting Puerto Rican agriculture through federal tariffs. Robert Friedman, *PDP expected to move cautiously in D.C.*, San Juan Star, Nov. 15, 1993, at 9.

78. S. 244, 102d Cong., 1st Sess. § 401(a) (1991).

79. S. 244, § 403(a). Exempted from the procedures of the bill were statutes relating to citizenship, foreign relations, defense or national security, or legislative matters under

mandated that federal agencies promulgating regulations pay appropriate respect to the special status of Puerto Rico and to respond specifically to objections raised by the Governor of Puerto Rico that a proposed regulation is inconsistent with that status.⁸⁰ The bill also included a number of other minor "enhancements," including provisions aimed at increasing federal consultation with the Commonwealth on matters of interest to Puerto Rico and bringing Puerto Rican participation in federal benefit programs closer in line with that of the states.⁸¹

The legislation did not purport to provide the Commonwealth with a veto over the application of federal law to the island. Nor did it permit Puerto Rican constitutional guarantees to trump federal statutes.⁸² It did not conceptualize Commonwealth as a status with more autonomy from federal intervention than states enjoy. The thrust of the legislation was, in effect, to make Puerto Rican home rule similar to that of the States of the Union (including a guarantee—currently applicable to the States—that that status could not change without consent of the People of Puerto Rico). Arguably, the provisions requiring Congress and the federal agencies to take notice of Puerto Rican claims that federal law impinged on Commonwealth status put Puerto Rico in a favored position vis-à-vis the states. But these measures may also be viewed as modest attempts to remedy what states have but Puerto Rico does not: representation in Congress and votes in the electoral college.⁸³

the jurisdiction of the Senate Committees on Finance (i.e., tax legislation) and Agriculture, Nutrition and Forestry. S. 244, § 403(c).

80. The agency had to respond by finding (a) that it had no discretion not to make the rule applicable to Puerto Rico; (b) that the national interest demanded that the rule apply; or (c) that the rule was not consistent with Commonwealth status and therefore should not apply. S. 244, § 404.

81. These included: § 403(d) (authorizing Governor of Puerto Rico to enter into international agreements "as authorized by the President of the United States and consistent with the laws and international obligations of the United States"); § 405 (federal Department of Transportation to seek advice of Commonwealth when negotiating air transportation agreements that would affect air traffic to or from Puerto Rico); §§ 407, 415 (aiming at parity for Puerto Rico under federal benefits programs); § 408 (requiring federal officials to consult with the Commonwealth on appointments to federal positions in Puerto Rico); § 411 (entitling "community values" by exempting from antitrust laws agreements by Puerto Rican broadcasters to develop guidelines to "alleviate the negative impact" of violence, drugs, and sexually explicit material on television).

82. Cf. *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985) (federal statute authorizing wiretapping permits introduction of wiretap evidence in federal prosecution in Puerto Rico, despite provision in Puerto Rico Constitution prohibiting wiretaps).

83. If Congress were to accept the Commonwealth's suggestion that a particular federal law not apply to the island, then it could be seen as giving the Commonwealth preferred treatment (and not simply establishing Puerto Rican parity with the states). For example, it has sometimes been argued that federal environmental standards might be

It is thus somewhat surprising that the Attorney General of the United States told Congress that the “enhanced Commonwealth” status established by S. 244 was unconstitutional.⁸⁴ Testifying before the Senate in 1991, Attorney General Thornburgh stated that the legislation’s provisions declaring (a) that Puerto Rico “enjoys sovereignty, like a State, to the extent provided by the Tenth Amendment,” and (b) that the relationship could only be revoked “by mutual consent,” were “totally inconsistent with the Constitution.” He elaborated as follows:

Under the Territory Clause of the Constitution . . . an area within the sovereignty of the United States that is not included in a State must necessarily be governed by or under the authority of Congress. Congress cannot escape this constitutional command by extending to Puerto Rico the provisions of the Tenth Amendment, which by its terms provides only [for] the relationship between the Federal Government and states.

We also doubt that Congress may effectively limit, by a statutory mutual consent requirement, its constitutional power under the Territory Clause to alter Puerto Rico’s status in some respect in the future. Not even the so-called “enhanced commonwealth” can ever hope to be outside of this constitutional provision.⁸⁵

The Attorney General offered little support for his rather wooden interpretation of the Territory Clause, a reading that conflicted with an opinion of the Department of Justice issued by an earlier Republican administration concluding that Congress

relaxed in Puerto Rico so as not to hinder economic development. But, under S. 244, this would be a federal decision, not the exercise of a power to “opt out” by Puerto Rico.

84. Others have wondered whether the Republican Party’s official support for statehood colored its constitutional conclusions regarding “enhanced Commonwealth.” See *Puerto Rico Self-Determination Act, 1990: Hearings on H.R. 4765 Before the Subcomm. on Insular and Int’l Affairs of the House Comm. on Interior and Insular Affairs*, 101st Cong., 2d Sess. pt. 2, 112-17 (1990) (statement of Jaime B. Fuster, Delegate from Puerto Rico).

85. *Puerto Rico Status Referendum Act, 1991: Hearings on S. 244 Before the Senate Comm. on Energy and Natural Resources*, 102d Cong., 1st Sess. 190 (1991) (statement of Richard Thornburgh, Attorney General) (“*Hearings on S. 244*”). In section-by-section comments attached to the Attorney General’s testimony, the Department of Justice also objected to the power granted the Governor of Puerto Rico to force reconsideration of federal regulations. It argued that such action would constitute “significant governmental authority under the laws of the United States” and therefore could be carried out only by a federal official appointed under the Appointments Clause of the Constitution. *Id.* at 212 (citing *Buckley v. Valeo*, 424 U.S. 1, 126-41 (1976)). It also opined that the requirement that the President consult with the Puerto Rican government before appointing federal officials in Puerto Rico would be an unconstitutional intrusion upon the President’s appointment power. *Id.* at 213.

had the power to enter into an irrevocable compact.⁸⁶ And it is somewhat peculiar to see the Executive Branch more concerned about protecting congressional prerogatives than the Congress.⁸⁷

The Attorney General's reasoning seems to be this: the United States Constitution knows only the mutually exclusive categories of "State" and "Territory"; States are full and equal members of the Union, but Territories are subject to plenary federal power; such plenary power may be surrendered only by moving outside the Territory Clause by granting statehood or independence; to recognize congressional power to create new categories—like enhanced Commonwealth—violates the structure of the Constitution and potentially weakens the position of the States (if a Commonwealth can be granted powers not available to States).⁸⁸

But the Territory Clause provides no blueprint for territorial government. In perfectly plain language, it empowers Congress to make "all needful Rules and Regulations." John Marshall described this power in the broadest terms: under the Territory Clause, "we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the [territories]."⁸⁹ There may well be structural limits on this broad power. For example, I assume it would be unconstitutional for Congress to give territories voting representation in the Senate. But nothing in "enhanced Commonwealth" threatens the power of the states. Congressional practice in the creation and regulation of territories is populated with novel arrangements. The infamous *Insular Cases* recognized the need for congressional flexibility in handling the unanticipated situation of Empire. When that flexibility is now, by mutual consent of metropole and

86. Letter of A. Mitchell McConnell, Jr., Acting Assistant Attorney General for Legislative Affairs, to Marlow W. Cook, Co-Chairman, Ad Hoc Advisory Group on Puerto Rico, May 12, 1975. The section-by-section analysis of the Justice Department submitted with Attorney General Thornburgh's testimony stated that the earlier opinion of the Department was "subject to serious question." *Hearings on S. 244* at 211 (cited in note 85).

87. Perhaps such vigilance might be explained as protecting future Congresses from the current Congress.

88. There is an interesting analogy here to constitutional norms regarding congressional regulation of aliens. States, like citizens, are full and equal members of the U.S. polity; aliens, like territories, are not members, and are subject to plenary congressional power. See T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const. Comm. 9 (1990).

89. *Sere and Laralde v. Pitot*, 10 U.S. (6 Cranch) 332, 337 (1810).

colony, exercised to restore dignity and self-government, why should congressional power suddenly be read narrowly?⁹⁰

The Attorney General's answer to the question is oblique. It is that the territory power may not be alienated. Or, to put the point in the form of an old constitutional chestnut, a sitting Congress may not bind a future Congress.⁹¹ But, of course, this is hardly an absolute rule. Neither the granting of statehood nor independence may be revoked; nor may land grants or other "vested interests" be called back by a subsequent Congress.⁹²

To my mind, it is not the "inalienability" point that is really doing the theoretical work in the Attorney General's testimony. Rather it is an undisclosed and unanalyzed set of assumptions about the nature of sovereignty. We have inherited constitutional understandings of sovereignty that demand neat boxes and hierarchies. To be a sovereign nation means to exercise full and final authority over a piece of territory—authority that may not be challenged from without or within. Were it otherwise, the nation would run the risk of anarchy or external domination.⁹³ In this tidy nineteenth century conceptual world,⁹⁴ there is no room for "enhanced" Commonwealth if it bestows a form of sovereignty that takes away from congressional plenary power.

Is this notion of sovereignty appropriate for our late twentieth century world? In an insightful recent essay, Neil MacCormick examines strongly expressed concerns in the United Kingdom that membership in the European community threatens traditional conceptions of Parliamentary sovereignty.⁹⁵ "A different view," he suggests, "would be that sovereignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means regrettable, and that

90. Cf. *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937) (upholding transfer to the Philippine Treasury of federal taxes collected on coconut oil produced in the Philippines; Court recognizes broad congressional power to structure territorial relations as it deems appropriate).

91. Even if the Attorney General is correct on this point as a matter of law, it does not follow that it is wrong for Congress to state its commitment not to alter Puerto Rican status without the consent of the people of Puerto Rico. Such a congressional commitment would have strong moral and political force, and would not likely be ignored by a subsequent Congress, whether or not it is legally binding.

92. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

93. See *Cooper v. Aaron*, 358 U.S. 1 (1958) for the domestic claim; the *Chinese Exclusion Case*, 130 U.S. 581 (1889), for the foreign claim.

94. But see Aleinikoff, *Semblances of Sovereignty* (cited in note 39) (suggesting categories were not, in fact, so neat).

95. Neil MacCormick, *Beyond the Sovereign State*, 56 Mod. L. Rev. 1 (1993).

current developments in Europe exhibit the possibility of going beyond all that."⁹⁶ MacCormick argues "it seems obvious" that today no state in Western Europe is, in a classical sense, sovereign; "[n]one is in a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal sources."⁹⁷ But to say that no state is sovereign is not to say that there must therefore be a sovereign super-state (such as the European Community):

We must not envisage sovereignty as the object of some kind of zero sum game, such that the moment X loses it Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it.⁹⁸

The challenge is to imagine a world in which "our normative existence and our practical life" exist in various institutional systems, "each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap."⁹⁹

Consideration of the status of Puerto Rico brings these issues stateside. If, as MacCormick argues, "from a jurisprudential point of view, there is no compulsion to regard 'sovereignty,' or even hierarchical relationships of superordination and subordination, as necessary to our understanding of legal order,"¹⁰⁰ the question is whether we can think ourselves into notions of sovereignty that permit overlapping and flexible arrangements attuned to the complex demands of enhanced autonomy within a broader regulative system of generally applicable constitutional norms. Under the "enhanced Commonwealth" of S. 244, Congress may have lost a bit of its sovereignty (although certainly less than it loses whenever it admits a State to the Union); but Puerto Rico did not thereby become "sovereign" over the United States.

96. *Id.* at 1.

97. *Id.* at 16.

98. *Id.*

99. *Id.* at 17.

100. *Id.* at 10. MacCormick elaborates:

To escape the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of law. The alternative approach is system-oriented in the sense that it stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law. It is a view of law that allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system.

Id. at 8 (footnote omitted).

Federal law would still be supreme over Puerto Rican law, and the U.S. Constitution would remain supreme over both. The only significant change in sovereign relations would be that amendment of the compact establishing Commonwealth would require consent of both parties.

MacCormick acknowledges that successful practical application of his understanding of sovereignty would “depend on a high degree of relatively willing co-operation and a relatively low degree of coercion in its direct and naked forms.”¹⁰¹ These background conditions appear satisfied in the case of Puerto Rico. There are strong economic links between the island and the mainland (approximately 40% of Puerto Ricans live in the states), and travel between the states and the Commonwealth is unfettered. Enhanced Commonwealth, should it come to pass, would be established with the consent of both Congress and the people of Puerto Rico and would operate within a larger legal culture of shared constitutional values.

A new understanding of sovereignty—as overlapping rather than hierarchical, as lost but not necessarily found—may appear to be precisely the wrong move in a world currently being torn apart by violent assertions of self-determination and nationalism. Yet it is rarely recognized that it is largely the older understandings of sovereignty (and not more “post-modern” conceptions) that are contributing to instability and bloodshed. “Nations” are demanding “states”; “states” are fighting for more territory over which to exercise “sovereignty.” It may in fact be arrangements that finesse the issue of sovereignty that present the best chance for peace (the “autonomy” granted the Palestinians in Gaza and Jericho being only the most recent example). If both the Congress and the people of Puerto Rico seek to establish a new relationship that recognizes space within the American constitutional system for “autonomous” entities, it ill behooves either the Executive Branch or the Judiciary to now call a halt to plenary power in the name of nineteenth century conceptions of sovereignty.

CONCLUSION

“‘Colonialism,’” writes federal district judge Jose Cabranes, “is a harsh word to American ears.”¹⁰² It is also a word that seems anachronistic. With the end of empire in Africa several decades ago and in the Soviet Union several years ago, claims of

101. *Id.* at 17.

102. Cabranes, 110 F.R.D. at 481 (cited in note 1).

self-determination more frequently involve dissolution of multinational states than the liberation of a homeland from a distant and alien power. Yet, according to Cabranes, “no word other than ‘colonialism’ adequately describes the relationship between a powerful metropolitan state and an impoverished overseas dependency disenfranchised from the formal lawmaking processes that shape its people’s daily lives.”¹⁰³

Decolonization is both a political and economic process. It is also a symbolic process. Supporters of each of the three status options, though they define it differently, all seek a more perfect realization of *dignidad* for the people of Puerto Rico.¹⁰⁴

It has been the independence movement that has pushed the “decolonization” claim with the most vigor and conviction.¹⁰⁵ But in the recent plebescite, the independence option garnered

103. *Id.* at 480.

104. See Berríos Martínez, *Foreign Aff.* at 583 (Apr. 1977) (cited in note 18) (“Our people cannot live without freedom and dignity. Independence is the only solution.”); *Political Status of Puerto Rico, Hearings before the Senate Committee on Energy and Natural Resources*, 101st Cong., 1st Sess. pt 1 at 171 (1989) (statement of Hon. Rafael Hernández Colón, Governor of Puerto Rico) (enhanced Commonwealth “will go a long way towards updating what was a brilliant solution to the dilemma of a people seeking their place in dignity within the American constitutional system—a people unwilling to give up their identity and culture.”)); Romero-Barceló, *Foreign Aff.* at 81 (Fall 1980) (cited in note 18) (advocating statehood: “A people’s quest for dignity is nearing its goal. . . . The goal of the Puerto Rican people is political equality within a framework which will permit our island and our nation to prosper together.”).

105. Independence supporters have made yearly trips to the United Nations, arguing that Puerto Rico remains a colony and that international pressure should be brought to bear on the United States for decolonization. Following establishment of the Commonwealth, the United Nations—at the request of the United States—removed Puerto Rico from the list of non-self-governing territories. G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25-26, U.N. Doc. A/64 (1953). The resolution removed the requirement that the United States report to the United Nations on conditions on the territory and efforts being taken to promote self-government. In 1972, the United Nations Decolonization Committee (officially, the Special Committee on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and People) put the Puerto Rican question on its agenda and has continued discussion of the island’s status up to the present. The Committee has regularly adopted resolutions “[reaffirming] the inalienable right of the people of Puerto Rico to self-determination and independence.” In 1993, the Committee appeared to be ready to close up shop. It has, however, put over the Puerto Rico question for another year. United Nations, Special Committee on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples [hereinafter *Decolonization Committee*]; *Verbatim Record of the 1424th Meeting at 50, U.N. Doc. A/AC.109/PV.1424* (Aug. 15, 1993) (unedited transcript). Pro-decolonization groups have asked the Committee to recommend to the General Assembly that it seek an opinion from the International Court of Justice defining the status of Puerto Rico under international law. *Decolonization Committee, supra*; *Verbatim Record of the 1422nd Meeting at 28, U.N. Doc. A/AC.109/PV.1422* (Aug. 9, 1993) (statement of Puerto Rican Bar Association).

little support.¹⁰⁶ More than 90% of those who voted expressed a preference for some kind of continued association with the United States. The fact of the plebescite itself weakens the *independentista* claim, to the extent the vote represents an exercise of the right of self-determination for which the movement stands.¹⁰⁷

Advocates of statehood promise to push forward, despite the results of the recent plebescite. Commonwealth proponents scored points in the referendum debate by arguing that statehood would require abandonment of cultural distinctiveness. Indeed, as part of their campaign, the commonwealthers solicited and broadcast statements of conservative Republican members of Congress suggesting that it would be difficult to obtain congressional approval of statehood if Puerto Rico sought to “come in the Union with two official languages.”¹⁰⁸ The statehood forces were quick to challenge these assertions, knowing that maintenance of Spanish is both a practical necessity and a non-negotiable aspect of cultural self-determination for the people of Puerto Rico.¹⁰⁹ While the prospects of statehood appear dimmed for the present (surely Congress will not take up the cause in light of the plebescite results), the argument for equality implicit in the statehood drive will not disappear. Should support for statehood attain majority status in years ahead, it will force the nation to confront directly deep questions of assimila-

106. That the independence option received only 4.4% of the vote in the plebescite did not stop Independence Party President Rubén Berríos from calling the result “the biggest triumph for the independence movement in the last forty years.” According to Berríos, it was the independence vote that prevented either commonwealth or statehood from attaining majority support: “Now, neither of the two defeated parties can speak in the name of the island,” he told supporters in a post-referendum rally. Jennifer McKim, *Berríos claims victory for independence*, San Juan Star, Nov. 15, 1993, at 14.

107. Independence supporters have attempted to answer this argument by asserting that the referendum cannot constitute a genuine act of self-determination because (1) some two million Puerto Rican nationals living on the mainland were not allowed to participate while non-nationals living on the island were permitted to vote; (2) its results are not binding on the Congress; (3) it took place within a context of that subverted free exercise of the right of self-determination, namely the exercise of U.S. authority and the presence of the U.S. military in Puerto Rico; and (4) by including the Commonwealth option, the plebescite did not guarantee an end to colonialism. *Decolonization Committee*, supra note 99, A/JAC.109/PV.1422, at 23-24 (Aug. 9, 1993) (statement of Puerto Rican Bar Association).

108. Robert Friedman, *Congressman says Spanish remains barrier for statehood*, San Juan Star, Oct. 29, 1993, at 14 (quoting Rep. Gerald B. Solomon (R.-N.Y.)). See Robert Friedman, *N.Y. congressman joins status ad blitz*, San Juan Star, Oct. 28, 1993, at 16.

109. See generally Edgardo Meléndez, *Colonialism, Citizenship and Contemporary Statehood*, in E. Meléndez and E. Meléndez, eds., *Colonial Dilemma: Critical Perspectives on Contemporary Puerto Rico* at 41-52 (cited in note 3) (describing “creole statehood”—i.e., protection of cultural and linguistic identity of Puerto Rico within the structure of U.S. federalism—as dominant conception of statehood movement).

tion and multiculturalism. In these times of divisive and deadly ethnic nationalism, it would be an important statement for the United States to welcome as a full and equal member in the Union a polity that cherishes its cultural and linguistic difference from the mainland majority.

Commonwealth, as always, represents a place between statehood and independence. It promises, as its supporters claimed in the plebescite debate, "the best of both worlds": maintaining U.S.-Puerto Rican political bonds while recognizing Puerto Rico as a distinct political and cultural society. The narrow victory of the "enhanced" commonwealth option in the referendum provides an opportunity for constitutional scholars to do some serious thinking about the nature of sovereignty in a world that puts pressure on older conceptions of state sovereignty both from without and within.