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*Fifth Amendment — Double Jeopardy — Dual-Sovereignty  
Doctrine — Puerto Rico v. Sanchez Valle*

The inaugural words of America’s Constitution make plain that “We the People” are the nation’s wellspring of sovereign authority,<sup>1</sup> yet the doctrines of our “one supreme Court”<sup>2</sup> often suggest that ultimate power resides in polities alone. One area of constitutional jurisprudence that exhibits this ironic turn is the dual-sovereignty doctrine, a formalist inquiry that tests whether two political entities are separate sovereigns for double jeopardy purposes.<sup>3</sup> Last Term, in *Puerto Rico v. Sanchez Valle*,<sup>4</sup> the Supreme Court applied this longstanding doctrine to the Commonwealth of Puerto Rico<sup>5</sup> and held that it did not constitute a “sovereign” for double jeopardy purposes.<sup>6</sup> Although Justice Kagan applied the Court’s dual-sovereignty precedent — an unsurprising approach from a jurist committed to *stare decisis* — she seemed to have done so with great reluctance. And such hesitancy made sense: despite the virtues that rules-oriented formalism holds within the nation’s courts, such an approach can appear particularly vice ridden outside of them. Such is the case with the dual-sovereignty doctrine, whose brand of sovereignty seems to diverge sharply from that lived out by citizens in the process of democratic self-rule — a self-rule exercised by Puerto Ricans, according to the Court, only by congressional grace, not by natural right.

Puerto Rico became a Spanish colony in 1493 and remained so until 1898, when Spain ceded the island to the United States following the Spanish-American War.<sup>7</sup> After five decades of legislative and executive power devolving from Washington to San Juan in fits and starts,<sup>8</sup> “Congress enabled Puerto Rico to embark on the project of

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<sup>1</sup> U.S. CONST. pmbi.; *see also id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”) (emphasis added); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that “true sovereignty in [the U.S.] system [of government] lies only in the People of the United States”).

<sup>2</sup> U.S. CONST. art. III, § 1.

<sup>3</sup> *See* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992).

<sup>4</sup> 136 S. Ct. 1863 (2016).

<sup>5</sup> This comment uses the terms “Commonwealth” and “Puerto Rico” to refer to the Commonwealth of Puerto Rico.

<sup>6</sup> *Sanchez Valle*, 136 S. Ct. at 1876–77.

<sup>7</sup> Treaty of Paris, U.S.–Spain, art. II, Dec. 10, 1898, 30 Stat. 1754; Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 12, 23 (2000).

<sup>8</sup> Congress first allowed Puerto Ricans to elect the lower house of their legislature, *see* Organic Act of 1900 (Foraker Act), ch. 191, §§ 27, 29, 31 Stat. 77, then their upper house, *see* Organic Act of 1917 (Jones Act), ch. 145, § 26, 39 Stat. 951, and finally their governor, *see* Act of Aug. 5, 1947 (Elective Governor Act), Pub. L. No. 80–362, 61 Stat. 770.

constitutional self-governance”<sup>9</sup> — Puerto Ricans’ most significant assertion of sovereignty in centuries.<sup>10</sup> In 1950, Congress enacted Public Law 600,<sup>11</sup> which “authorized the island’s people to ‘organize a government pursuant to a constitution of their own adoption.’”<sup>12</sup> The island’s voters accepted Congress’s invitation, and within two years a constitutional convention produced, and the Puerto Rican people approved, a draft constitution.<sup>13</sup> Then, Congress “took its turn on the document,” both excising and adding language.<sup>14</sup> Puerto Rico’s constitutional convention promptly assented to the revisions.<sup>15</sup> Following a final proclamation by the island’s governor, the constitution — and its newly formed Commonwealth of Puerto Rico — was endowed with the force and effect of law.<sup>16</sup>

The Commonwealth’s legislature subsequently exercised its constitutional authority to enact the Puerto Rico Arms Act of 2000<sup>17</sup> (the Act), which regulates firearms sales on the island.<sup>18</sup> In 2008, Commonwealth prosecutors charged Luis Sánchez Valle and Jaime Gómez Vázquez with violating the Act’s prohibition against selling firearms without permits.<sup>19</sup> With those charges pending, federal grand juries likewise indicted both men for violations of analogous federal laws “based on the same transactions.”<sup>20</sup>

Both Sánchez Valle and Gómez Vázquez pleaded guilty to the federal charges — which were subject to significantly more lenient sen-

<sup>9</sup> *Sanchez Valle*, 136 S. Ct. at 1868.

<sup>10</sup> See Malavet, *supra* note 7, at 12–32 (describing Puerto Rico’s history as a Spanish and U.S. colony).

<sup>11</sup> Act of July 3, 1950 (Public Law 600), Pub. L. No. 81–600, 64 Stat. 319.

<sup>12</sup> *Sanchez Valle*, 136 S. Ct. at 1868 (quoting Public Law 600 § 1).

<sup>13</sup> *Id.* at 1868–69; see also Public Law 600 § 3; Resolution 23: Final Declarations of the Constitutional Convention of Puerto Rico (Feb. 4, 1952), reprinted in OFFICE OF THE COMMONWEALTH OF P.R., DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 166 (2d ed. 1964) [hereinafter DOCUMENTS].

<sup>14</sup> *Sanchez Valle*, 136 S. Ct. at 1869 (citing Act of July 3, 1952 (Public Law 447), Pub. L. No. 82–447, 66 Stat. 327).

<sup>15</sup> See Resolution 34: To Accept, in Behalf of the People of Puerto Rico, the Conditions of Approval of the Constitution of the Commonwealth of Puerto Rico Proposed by the Eighty-Second Congress of the United States Through Public Law 447 Approved July 3, 1952 (July 10, 1952), reprinted in DOCUMENTS, *supra* note 13, at 196.

<sup>16</sup> *Sanchez Valle*, 136 S. Ct. at 1869; see also Public Law 447; Proclamation by the Governor of Puerto Rico, Establishment of the Commonwealth of Puerto Rico (July 25, 1952), reprinted in DOCUMENTS, *supra* note 13, at 198.

<sup>17</sup> P.R. LAWS ANN. tit. 25, §§ 455–460(k) (2008).

<sup>18</sup> *Id.*

<sup>19</sup> *Sanchez Valle*, 136 S. Ct. at 1869 (citing P.R. LAWS ANN. tit. 25, § 458); see also *People v. Sánchez Valle*, Nos. CC-2013–0068 & CC-2013–0072, at 2a, 4a (P.R. Mar. 20, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/10/SanchezValleEnglish.pdf> [<https://perma.cc/5WHE-BKHP>] (certified English translation).

<sup>20</sup> *Sanchez Valle*, 136 S. Ct. at 1869 (citing 18 U.S.C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2) (2012)).

tences relative to Puerto Rican law<sup>21</sup> — and moved to dismiss the Commonwealth’s charges, arguing that successive prosecutions “on like charges for the same conduct” by both governments was unconstitutional.<sup>22</sup> The men’s respective trial courts accepted their argument, but the Court of Appeals of Puerto Rico reversed based on the law at the time.<sup>23</sup> Weighing in, the Supreme Court of Puerto Rico reversed, holding that “because Puerto Rico is not a federal state, a person who has been acquitted, convicted or prosecuted in federal court cannot be prosecuted for the same offense” by Puerto Rico.<sup>24</sup>

The Supreme Court affirmed.<sup>25</sup> Writing for a six-Justice majority, Justice Kagan<sup>26</sup> held that the Double Jeopardy Clause bars the federal government and Puerto Rico from “twice put[ting]” a defendant “in jeopardy” for the “same offence.”<sup>27</sup> Justice Kagan began her analysis with a summary of the doctrinal framework controlling in the case: the Fifth Amendment’s “dual-sovereignty carve-out.”<sup>28</sup> Although the Double Jeopardy Clause ordinarily protects a defendant from two prosecutions for the same offense, the “carve-out” provides that “two prosecutions . . . are *not* for the same offense *if* brought by different sovereigns — even when those actions target the identical criminal conduct through equivalent criminal laws.”<sup>29</sup>

In the process, Justice Kagan pointed out the counterintuitive nature of the Court’s doctrinal formulation. “Truth be told,” Justice Kagan observed, “‘sovereignty’ in [the dual-sovereignty] context does not bear its ordinary meaning.”<sup>30</sup> To the contrary, and “[f]or whatever reason,” the doctrine “overtly disregards common indicia of sovereignty,”<sup>31</sup> all but ignoring a political entity’s degree of independent prose-

<sup>21</sup> *Sánchez Valle*, Nos. CC-2013-0068 & CC-2013-0072, at 197a n.5 (Rodríguez Rodríguez, J., dissenting).

<sup>22</sup> *Sanchez Valle*, 136 S. Ct. at 1870; *see also id.* at 1869–70.

<sup>23</sup> *Id.* at 1869; *Sánchez Valle*, Nos. CC-2013-0068 & CC-2013-0072, at 3a, 5a–6a.

<sup>24</sup> *Sánchez Valle*, Nos. CC-2013-0068, CC-2013-0072, at 2a; *see also Sanchez Valle*, 136 S. Ct. at 1869–70. In the process, the Commonwealth’s highest court overruled a nearly three-decade-old precedent that had embraced the First Circuit’s view that successive prosecutions by Puerto Rico and the federal government were constitutional. *See Pueblo v. Castro García*, 120 P.R. Dec. 740, 772–73 (1988) (citing *United States v. Lopez Andino*, 831 F.2d 1164, 1167–68 (1st Cir. 1987)). Three justices disagreed. *See Sanchez Valle*, 136 S. Ct. at 1870; *Sánchez Valle*, Nos. CC-2013-0068 & CC-2013-0072, at 71a–72a (Fiol Matta, C.J., concurring, joined by Oronoz Rodríguez, J.); *id.* at 192a–94a (Rodríguez Rodríguez, J., dissenting).

<sup>25</sup> *Sanchez Valle*, 136 S. Ct. at 1877.

<sup>26</sup> Justice Kagan was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, and Alito. Justice Thomas concurred in part and concurred in the judgment.

<sup>27</sup> *Sanchez Valle*, 136 S. Ct. at 1876–77 (quoting U.S. CONST. amend. V).

<sup>28</sup> *Id.* at 1870.

<sup>29</sup> *Id.* (emphasis added) (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* According to Justice Kagan, the Court has never explained its reasoning. *Id.* at 1871 n.3.

curatorial authority,<sup>32</sup> the extent of local self-governance,<sup>33</sup> or the capacity for imposing punishment.<sup>34</sup>

Rather, the relevant inquiry “hinges on a single criterion: the ‘ultimate source’ of the power undergirding the respective prosecutions.”<sup>35</sup> The Court’s test is therefore a historically oriented rule that “look[s] at the deepest wellsprings, not the current exercise, of prosecutorial authority” — an authority that precedes the existence of federal power itself.<sup>36</sup> Within this framework, the Court has determined that the states and Indian tribes qualify as distinct and separate sovereigns from the federal government for Fifth Amendment purposes.<sup>37</sup> On the other hand, municipalities and U.S. territories — “including an earlier incarnation of Puerto Rico itself”<sup>38</sup> — do not qualify.<sup>39</sup>

Justice Kagan acknowledged that Puerto Rico had transformed into a “new kind of political entity” as a result of the “great[ly] significant[t]” events of 1950–1952,<sup>40</sup> which had endowed the island with “the degree of autonomy and independence normally associated with States of the Union”<sup>41</sup> and necessitated renewed evaluation of the applicability of the earlier U.S. territory-related Double Jeopardy Clause cases to Puerto Rico.<sup>42</sup> Yet because the dual-sovereignty doctrine focuses “not on the fact of self-rule, but on where it came from”<sup>43</sup> — and because, as Justice Kagan put it, “the oldest roots of

<sup>32</sup> *Id.* at 1870 (citing *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

<sup>33</sup> *Id.* (citing *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 261–62, 264–66 (1937)).

<sup>34</sup> *Id.* (citing *Waller v. Florida*, 397 U.S. 387, 391–95 (1970)).

<sup>35</sup> *Id.* at 1871 (quoting *Wheeler*, 435 U.S. at 320).

<sup>36</sup> *Id.* Justice Kagan conceptualized the rule by means of analogy to a pair of lines: Where “two entities derive their power to punish from wholly independent sources” — where the two lines run parallel — successive prosecutions for the same offense are constitutionally permissible. *Id.* However, where “[two] entities draw their power from the same ultimate source” — where the two lines share an origin — multiple prosecutions offend the Fifth Amendment. *Id.*

<sup>37</sup> See *id.* at 1871–72; see also *Heath v. Alabama*, 474 U.S. 82 (1985) (two states); *Wheeler*, 435 U.S. 313 (Indian tribes and the federal government); *United States v. Lanza*, 260 U.S. 377 (1922) (states and the federal government). While it is an “undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters,” *Wheeler*, 435 U.S. at 319, the Court has held that “unless and until Congress withdraws a tribal power — including the power to prosecute — the Indian community retains that authority *in its earliest form*,” a form predating the federal government. *Sanchez Valle*, 136 S. Ct. at 1872 (emphasis added) (quoting *Wheeler*, 435 U.S. at 323).

<sup>38</sup> *Sanchez Valle*, 136 S. Ct. at 1873; see also *Shell Co.*, 302 U.S. 253.

<sup>39</sup> See *Sanchez Valle*, 136 S. Ct. at 1872–73; see also *Waller*, 397 U.S. 387 (municipalities); *Grafton v. United States*, 206 U.S. 333 (1907) (U.S. territories). As Justice Kagan explained in the context of municipalities, “[b]ecause the municipality, *in the first instance*, had received its power from the State, those two entities could not bring successive prosecutions for a like offense.” *Sanchez Valle*, 136 S. Ct. at 1872 (emphasis added).

<sup>40</sup> *Sanchez Valle*, 136 S. Ct. at 1874.

<sup>41</sup> *Id.* (quoting *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Puerto Rico’s power to prosecute lie in federal soil”<sup>44</sup> — the result was the same. The doctrine required the Court to “go[] . . . beyond the immediate, or even an intermediate, locus of power to . . . the ‘ultimate source.’”<sup>45</sup> With Puerto Rico, that “ultimate source” is Congress, via Public Law 600 — a “historical fact” that proves “dispositive.”<sup>46</sup>

Although joining Justice Kagan’s opinion in full, Justice Ginsburg filed a concurrence<sup>47</sup> to question the dual-sovereignty doctrine’s continued viability.<sup>48</sup> In a similar vein, Justice Thomas concurred to note his disagreement with the Court’s treatment of the Indian tribes in its double jeopardy jurisprudence.<sup>49</sup>

Justice Breyer dissented.<sup>50</sup> While accepting the pertinent inquiry as locating the source of Puerto Rico’s prosecutorial power, he disagreed with Justice Kagan’s conclusion. Conceptually, Justice Breyer rejected the contention that the dual-sovereignty doctrine required the Court to “seek the ‘*furthest-back* source of . . . power’”;<sup>51</sup> for instance, the Court does not “trace the Federal Government’s source of power back . . . to King Arthur.”<sup>52</sup> Instead, in his view, the doctrine directs the Court to “trace the source of power back to a time when . . . a previously dependent entity” such as Puerto Rico became “sufficiently independent” to constitute a “sovereign.”<sup>53</sup> Justice Breyer then examined the historical significance of Public Law 600, and the creation and adoption of the Commonwealth’s Constitution.<sup>54</sup> Undertaking a multifactor analysis that weighed the “history of statutes, language, organic acts, traditions, statements, and other actions, taken by all three branches of the Federal Government and by Puerto Rico,”<sup>55</sup> Justice Breyer concluded that the events of 1950–1952 shifted the source of Puerto Rico’s criminal law from Congress to “Puerto Rico itself, its people, and its constitution.”<sup>56</sup>

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<sup>44</sup> *Id.* at 1868.

<sup>45</sup> *Id.* at 1875 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

<sup>46</sup> *Id.* at 1876.

<sup>47</sup> Justice Ginsburg was joined by Justice Thomas.

<sup>48</sup> See *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring).

<sup>49</sup> See *id.* at 1877 (Thomas, J., concurring in part and concurring in the judgment).

<sup>50</sup> Justice Breyer was joined by Justice Sotomayor.

<sup>51</sup> *Sanchez Valle*, 136 S. Ct. at 1878 (Breyer, J., dissenting) (quoting *id.* at 1875 (majority opinion)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1880–84.

<sup>55</sup> *Id.* at 1884. Justice Breyer enumerated seven considerations: Public Law 600’s timing; its language; its substance; the ratification of Puerto Rico’s Constitution by both Puerto Rico’s people and the U.S. Congress; the treatment of Puerto Rico by the federal government post-ratification; the Puerto Rico Supreme Court’s jurisprudence post-ratification; and Puerto Rico’s criminal law tradition and its implications for understanding the events of 1950–1952. *Id.* at 1880–84.

<sup>56</sup> *Id.* at 1884.

When unpacked, Justices Kagan and Breyer's dueling opinions both adopted a precedent-based framework that directs the Court to identify the "ultimate source" of the Commonwealth's prosecutorial power. The Justices' divergence occurs at a more granular level: whether to understand "ultimate source" in formal or functional terms. Yet even here, the two jurists seem separated by inches, not miles. When one reads between Justice Kagan's lines, a discernible unease with formalism's consequences vis-à-vis Puerto Rico and a sympathetic ear for a functionalist alternative seem to emerge. In fact, Justice Kagan seemed to suggest that while functionalism's allure could not outweigh its drawbacks and the dictates of stare decisis, she recognized how the formalist-grounded dual-sovereignty doctrine denies the Constitution's promise of democratic self-rule in its focus on classifications of political entities over the people who created them. If indeed "the People" control their government and not vice versa, then *Sanchez Valle* results in nothing short of a figurative coup, consigning Puerto Rico's sovereignty to the whims of the very Congress "ordain[ed] and establish[ed]" by their power and in their name.<sup>57</sup>

*Sanchez Valle* turned on constitutional doctrine, or "the rules courts create to make the meaning of constitutional provisions or requirements applicable in concrete cases."<sup>58</sup> Two recurrent — and divergent — forms of doctrine are rules and standards.<sup>59</sup> The debate over rules versus standards turns on "whether to cast legal directives in more or less discretionary form."<sup>60</sup> Rules are formulae that aim to "leav[e] irreducibly arbitrary and subjective value choices to be worked out elsewhere," while standards "collapse decisionmaking back into the direct application of the background principle or policy to a fact situation."<sup>61</sup>

The rules-standards dichotomy bears close resemblance, and is indeed closely tied to, a second enduring jurisprudential struggle — not over doctrine, but over constitutional meaning itself. This struggle pits "strict formalism" against "permissive functionalism,"<sup>62</sup> rival theories

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<sup>57</sup> U.S. CONST. pmbl.

<sup>58</sup> Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 501 (2012); see also Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994). In crafting doctrine, courts may individually weigh and aggregately consider myriad factors. See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1658–67 (2005).

<sup>59</sup> Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992). Nevertheless, the rules-standards distinction should not be overblown; the two ultimately "mark a continuum, not a divide." *Id.* at 61.

<sup>60</sup> *Id.* at 26. For a discussion of the relative efficacies of rules and standards, see *id.* at 62–69.

<sup>61</sup> *Id.* at 58.

<sup>62</sup> Keith Werhan, *Checking Congress and Balancing Federalism: A Lesson from Separation-of-Powers Jurisprudence*, 57 WASH. & LEE L. REV. 1213, 1216 (2000).

of structural constitutionalism.<sup>63</sup> To deduce the nature and allocation of government powers and prohibitions, formalists look almost exclusively to the Constitution’s “literal language and the drafters’ original intent regarding [its] application.”<sup>64</sup> By contrast, functionalists view changed circumstances, normative values, and practical effects as crucial inputs into an individualized, case-by-case calculus.<sup>65</sup> These schools intersect with rules and standards in the formation of doctrine from meaning: formalism aligns with “bright-line rules that seek to place determinate, readily enforceable limits on public actors,” and functionalism with “standards or balancing tests that seek to provide public actors with greater flexibility.”<sup>66</sup>

These distinctions and the dynamics among them — rules and standards, formalism and functionalism — provide a window through which to understand the quarrel that lies at the heart of *Sanchez Valle*. The dual-sovereignty doctrine articulated in the Court’s precedents and reaffirmed in Justice Kagan’s opinion rests on a formalist interpretation — on a sharp divide between the types of polities that can and cannot possess Fifth Amendment–sufficient sovereign authority.<sup>67</sup> It is thus unsurprising that the pertinent test boiled down to discrete categories distinguished by a rule.<sup>68</sup>

In dissent, by contrast, Justice Breyer sought to reinvent<sup>69</sup> the doctrine on functionalist grounds, changing the content of the “ultimate

<sup>63</sup> See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522 (1991). Although generally employed in the separation of powers context, the formalism-functionalism dichotomy has also been used to explain the Court’s federalism jurisprudence. See, e.g., Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191 (2003).

<sup>64</sup> Brown, *supra* note 63, at 1523.

<sup>65</sup> See William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 475 (1989); see also Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988).

<sup>66</sup> William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998); see also Schauer, *supra* note 65, at 510 (“At the heart of the word ‘formalism’ . . . lies the concept of decisionmaking according to rule.”).

<sup>67</sup> See, e.g., *Heath v. Alabama*, 474 U.S. 82, 88–91 (1985) (deconstructing the relevant precedent and articulating the doctrine); *United States v. Wheeler*, 435 U.S. 313, 320–22 (1978) (same); see also, e.g., *id.* at 321 (“City and State, or Territory and Nation, are not two separate sovereigns . . .”).

<sup>68</sup> See *Sanchez Valle*, 136 S. Ct. at 1871–73 (describing the test).

<sup>69</sup> Although Justice Breyer contended that his approach to the dual-sovereignty doctrine “explains the Court’s decisions fairly well,” *Sanchez Valle*, 136 S. Ct. at 1878 (Breyer, J., dissenting), his survey of the dual-sovereignty precedent zeroed in on the Court’s holdings without crediting the nonfunctionalist reasoning supporting them, see, e.g., *Heath*, 474 U.S. at 92 (stating in no uncertain terms that “[the petitioner’s proposed] balancing of interests approach . . . cannot be reconciled with the dual sovereignty principle”). Despite its holding-level fit with past dual-sovereignty opinions, then, Justice Breyer’s approach — by dispensing with the reasoning undergirding the holdings in those opinions — would have substantially transformed the dual-sovereignty doctrine.

source” inquiry into one that asks whether a government has “gained *sufficient* sovereign authority to become the ‘source’ of power behind its own criminal laws.”<sup>70</sup> Because his understanding of structural constitutionalism diverged from precedent, he cut a different path forward. Whereas precedent supplied a bright-line rule — states in, territories out — Justice Breyer preferred a standard that would measure a political entity’s functional autonomy.

Yet despite simply enforcing the Court’s precedent in *Sanchez Valle*, Justice Kagan seemed to reveal a discernible degree of unease with the case’s ultimate result and the doctrine that got her there.<sup>71</sup> She went out of her way to acknowledge that the events of 1950–1952 were of “great significance,”<sup>72</sup> creating for Puerto Rico “a relationship to the United States that has no parallel in our history”<sup>73</sup> — a status for San Juan that seemed more akin to a state capital than a seat of territorial administration.<sup>74</sup> She likewise emphasized her own vexation with the dual-sovereignty doctrine’s construction,<sup>75</sup> seeming to go so far as to entertain an approach similar to Justice Breyer’s; as she acknowledged, the Court’s bright-line formalist rule may seem “counter-intuitive, even legalistic,” when compared to a standard that measures a political entity’s practical autonomy.<sup>76</sup>

In the end, Justice Kagan seemed to find herself jammed between a rock and a hard place. On the one hand, she appeared to recognize a formalist rule’s merit and a functionalist standard’s shortcomings,<sup>77</sup> as

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<sup>70</sup> *Sanchez Valle*, 136 S. Ct. at 1880 (Breyer, J., dissenting) (emphasis added).

<sup>71</sup> Previous Courts have similarly showed little love for the dual-sovereignty doctrine. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 138 (1959) (“The greatest self-restraint is necessary when th[e] federal system yields results with which a court is in little sympathy,” such as follows from application of the dual-sovereignty doctrine.).

<sup>72</sup> *Sanchez Valle*, 136 S. Ct. at 1874.

<sup>73</sup> *Id.* at 1876 (quoting Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 596 (1976)).

<sup>74</sup> See *id.* at 1874 (pointing out the degree to which Puerto Rico resembles a sovereign). Justice Kagan’s comments at oral argument also evince an understanding of Puerto Rico’s novel position within the United States. See Transcript of Oral Argument at 36, *Sanchez Valle*, 136 S. Ct. 1863 (No. 15–108), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/15-108\\_5436.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/15-108_5436.pdf) [<https://perma.cc/SGU6-ZJFN>] (“[I]t sure seems as though in the early 1950s, Congress with respect to Puerto Rico, said we want to give it some sovereign authority. We want to give it an enormous amount of Home Rule authority, basically everything, and we also have some idea in our heads that Puerto Rico ought to be a sovereign with all the things sovereigns have like a Constitution and a ‘We the People’ clause . . . [I]t’s an unusual idea, to be sure a — a sovereign territory. But Congress seems to have wanted to do exactly that.”).

<sup>75</sup> See *Sanchez Valle*, 136 S. Ct. at 1870, 1871 n.3 (discussing how the dual-sovereignty doctrine disregards indicia typically associated with sovereignty such as independent prosecutorial authority, the extent of local self-governance, or the capacity for imposing punishment).

<sup>76</sup> *Id.* at 1871 n.3.

<sup>77</sup> To Justice Kagan, a functionalist approach would require a court to first “decid[e] exactly *how much* autonomy is *sufficient* for separate sovereignty,” and then determine “whether a given entity’s exercise of self-rule exceeds that level.” *Id.* (emphasis added). The upshot, Justice Kagan



well as the rule-of-law values served by honoring the age-old doctrine of *stare decisis*.<sup>78</sup> On the other, she seemed acutely cognizant of the doctrine's heavy cost to the people of Puerto Rico. According to the Court, because their polity was not of the "right" kind — because it remains classified as a "Territory . . . belonging to the United States" under the Constitution<sup>79</sup> — their right to democratic self-rule was no right at all; as a constitutional matter, the right to govern Puerto Rico belonged to Congress and Congress alone. What Congress giveth, Congress can taketh away.<sup>80</sup>

However, if "the People" are indeed the fount of constitutional power, then demarcating the metes and bounds of sovereignty by focusing on polities rather than people seems to put the cart before the horse as a matter of theory — and to deny democratic self-rule as a matter of fact. The Puerto Rican people, exercising their power of self-rule through their democratically elected government, have enacted numerous laws for their Commonwealth's benefit, including the Act whose application to Sánchez Valle and Gómez Vázquez underlay the controversy in *Sanchez Valle*. Most immediately, the Court's dual-sovereignty doctrine precluded the men's prosecutions in this case, but its reach went much further: the doctrine rendered moot the very sovereign authority that supposedly belongs to the Puerto Rican people themselves, both under the federal constitution and their own<sup>81</sup> — a sovereignty centuries in the making.

And sovereignty matters. Sovereignty, after all, "means freedom, the freedom of a people to choose what their future will be" — includ-

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suspected, would be the introduction and propagation of uncertainty, error, and inconsistency into the Court's double jeopardy jurisprudence. *Id.* Conversely, courts can "easily appl[y]" a formalist rule. *Id.*

<sup>78</sup> As Justice Kagan stated in *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), "[o]verruling precedent is *never* a small matter." *Id.* at 2409 (emphasis added). After all, *stare decisis* serves invaluable rule-of-law ends, including promoting evenhandedness, predictability, and consistency in the law's application, and reliance on and confidence in judicial decisions. *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991)).

<sup>79</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>80</sup> While Justice Kagan does not directly state this proposition, her reasoning can be read to support it. *See, e.g., Sanchez Valle*, 136 S. Ct. at 1876 ("Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government — because when we trace that authority all the way back, we arrive at the doorstep of the U.S. Capitol — the Commonwealth and the United States are not separate sovereigns."). The United States' brief in *Sanchez Valle* goes further, explicitly suggesting that "Congress could 'continue the current system [with Puerto Rico] indefinitely, but it also may revise or revoke it at any time,' and Congress cannot enter into an arrangement with Puerto Rico that 'could not be altered without the "mutual consent" of Puerto Rico . . . ." Brief of the United States as Amicus Curiae Supporting Respondents at 33, *Sanchez Valle*, 136 S. Ct. 1863 (No. 15-108), 2015 WL 9412680 (quoting RUBEN BARRALES ET AL., REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 5–6 (2016), [http://charma.uprm.edu/~angel/Puerto\\_Rico/reporte\\_status.pdf](http://charma.uprm.edu/~angel/Puerto_Rico/reporte_status.pdf) [https://perma.cc/4C9B-SDPV]).

<sup>81</sup> *See* sources cited *supra* note 1; P.R. CONST. pmbl.; *id.* art. I, §§ 1–2.

ing what laws will govern them and their fellow citizens.<sup>82</sup> It is understandable, then, that many Puerto Ricans would come to view *Sanchez Valle* — when joined with the Court’s opinion in *Puerto Rico v. Franklin California Tax-Free Trust*<sup>83</sup> and the enactment of the Puerto Rico Oversight, Management, and Economic Stability Act<sup>84</sup> (PROMESA), all products of June 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>85</sup> In one commentator’s words, “Puerto Rico has been stripped naked and put on show to be shamed.”<sup>86</sup> *Sanchez Valle* makes clear that Puerto Ricans are not free in the sovereign sense: they live under Congress’s shadow, in the end subject to its will. Justice Kagan’s talk of the Commonwealth’s special relationship with the United States does nothing to lessen the sting.

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<sup>82</sup> Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 75 (2002).

<sup>83</sup> 136 S. Ct. 1938 (2016). In 2014, the Commonwealth’s legislature enacted the Puerto Rico Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71, to enable its public utilities to restructure their debts. *Franklin California*, 136 S. Ct. at 1942–43. In *Franklin California*, the Court held that the federal Bankruptcy Code barred the Commonwealth from enacting its own bankruptcy law, although the Code simultaneously precluded the Commonwealth from federal debt restructuring provisions. *Id.* at 1942.

<sup>84</sup> Pub. L. No. 114–187, 130 Stat. 549 (2016). Chief among its provisions, PROMESA creates a federal oversight board to overhaul Puerto Rico’s finances, likely the law’s most consequential — and controversial — feature. *See id.* §§ 101(a)–(b) (1), 201–207; Mary Williams Walsh, *Puerto Rico Debt Relief Law Stirs Colonial Resentment*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/business/dealbook/puerto-rico-debt-relief-law-stirs-colonial-resentment.html> [https://perma.cc/569H-Z89V].

<sup>85</sup> *See, e.g.*, Rafael Matos, Op-Ed., *Puerto Rico’s Rude Awakening*, N.Y. TIMES (July 14, 2016), <http://www.nytimes.com/2016/07/14/opinion/puerto-ricos-rude-awakening.html> [https://perma.cc/D9MD-TJFZ].

<sup>86</sup> *Id.*