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Dual Sovereignty in the U.S. Territories

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DUAL SOVEREIGNTY IN THE U.S. TERRITORIES

*Emmanuel Hiram Arnaud**

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INTRODUCTION

The people of the U.S. territories embody “the very essence of a politically powerless group.”¹ They cannot vote for the president or vice president of the United States, and they cannot elect a voting representative to Congress—the same Congress that enjoys plenary power to legislate over them.² Indeed,

* Assistant Professor of Law, Benjamin N. Cardozo School of Law. I would like to thank Christina D. Ponsa-Kraus, Sam Erman, Luis Fuentes-Rohwer, Rafael Cox Alomar, Ediberto Román, Ngozi Okidegbe, Alexis Hoag-Fordjour, Alma Magaña, Evelyn Malave, Kyron Huigens, and Adam Kurland. Further thanks to the participants of the University of Connecticut School of Law’s Faculty Workshop, the Cardozo School of Law Junior Faculty Workshop, and the Michael A. Olivas Writing Institute for their comments and suggestions. Thanks also to the editors of the *Fordham Law Review* for their excellent work. I am especially indebted to the many attorneys who shared their personal experiences about working within the territorial criminal legal system. This Essay was prepared for the Symposium entitled *An Anomalous Status: Rights and Wrongs in America’s Territories*, hosted by the *Fordham Law Review* on October 27–28, 2022, at Fordham University School of Law.

1. *United States v. Montijo-Maysonet*, 974 F.3d 34, 45 (1st Cir. 2020) (quoting *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 214 (D.P.R. 2019)).

2. *See, e.g., De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (noting that Congress “has full and complete legislative authority over the people of the territories and all the departments of the territorial governments”).

the lack of representative democracy in the territories manifests in some of the most underexamined ways in the arena of criminal law and procedure.

Take, for example, the case of former boxer Félix Verdejo. On May 1, 2021, a young woman was found dead in La Laguna San José, located in Puerto Rico between San Juan and Carolina. It was a grisly scene. The young woman was severely beaten and her feet were tied to concrete blocks before her captors threw her into the lake. Local authorities, working with the Federal Bureau of Investigation, uncovered a digital trail. The victim, Keishla Rodríguez Ortiz, who was pregnant, had been kidnapped, beaten, and killed. The number one suspects were an accomplice and acclaimed boxer Félix Verdejo, who had been having an affair with Ortiz.³ The weeks that followed were full of tension as federal and Puerto Rican prosecutors conferred as to which entity would prosecute the case. The matter fit squarely within the parameters of a state prosecution since it involved a criminal action within a single jurisdiction. But earlier that year, the Puerto Rico Department of Justice (PRDOJ) signed a memorandum of understanding⁴ (MOU) whereby it ceded jurisdiction over carjackings resulting in death and certain kinds of kidnappings to the U.S. Attorney's Office.⁵ Although the matter fell under federal jurisdiction by the terms of the MOU, pressure was mounting on Domingo Emanuelli Hernández, the head of PRDOJ, to file murder charges against the suspects. He explained that he could not. The federal government decided to file charges against Verdejo,⁶ and “based on the case of *Sanchez Valle* . . . [PRDOJ] made the determination that the charges against [the suspects] should be processed

3. Jennifer A. Marcial Ocasio, *Puerto Rican Boxer Félix Verdejo Arrested in Connection with Death of Lover, Keishla Rodríguez Ortiz*, ORLANDO SENTINEL (May 3, 2021, 8:54 AM), <https://www.orlandosentinel.com/espanol/el-sentinel-in-english/os-ex-english-boxer-felix-verdejo-arrested-killing-pregnant-woman-20210503-75lqhrrxdveynpec7dxou6o7aq-story.html> [https://perma.cc/4VDB-739W].

4. The PRDOJ and U.S. Attorney's Office for the District of Puerto Rico have entered into MOUs that delineate the types of offenses that the federal government gets the first opportunity to prosecute, despite the offense also falling within the PRDOJ's jurisdiction. For more on the MOU, see *infra* Part IV; Emmanuel Hiram Arnaud, *Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico*, 53 COLUM. HUM. RTS. L. REV. 882, 891–92 (2022).

5. Sylvia Verónica Camacho, *Justicia No Radicará Cargos a Félix Verdejo a Nivel Local [Justice Will Not File Charges Against Félix Verdejo at the Local Level]*, WAPA, https://www.wapa.tv/noticias/locales/justicia-no-radicara-cargos-a-felix-verdejo-a-nivel-local_20131122506277.html (last visited Mar. 6, 2023) [https://perma.cc/UXP2-WQZ4].

6. Press Release, U.S. Att'y's Off. Dist. of P.R., Félix Verdejo-Sánchez and Luis Antonio Cádiz-Martínez Indicted for Carjacking and Kidnapping Resulting in Death, and Intentionally Killing an Unborn Child (May 6, 2021), <https://www.justice.gov/usao-pr/pr-felix-verdejo-s-nchez-and-luis-antonio-c-diz-mart-nez-indicted-carjacking-and-kidnapping> [https://perma.cc/43VQ-GWPD]. Under federal law, Verdejo is facing up to life imprisonment or the death penalty on the kidnapping and carjacking charges, a life sentence for the intentional killing of an unborn child, and a life sentence to be imposed consecutively to other sentences for the firearm violation. *Id.* In contrast, the death penalty is unavailable under Puerto Rican law. P.R. CONST. art. II, § 7. A murder conviction carries a sentence of ninety-nine years with the possibility of parole after twenty-five years, and a carjacking conviction carries a sentence of fifteen to twenty-five years with the possibility of parole after serving 80 percent of the sentence. P.R. LAWS ANN. tit. 33, §§ 4735, 4826, 4694(a) (2011).

through the federal forum.”⁷ In the face of one of the most brutal high-profile murders in recent Puerto Rican history, and in the midst of a rise in femicides on the island,⁸ local prosecutors simply could not act.

What rule did Hernández refer to that stopped local prosecutors from filing appropriate charges once the federal government decided to prosecute the case? It was the dual sovereign doctrine. In 2016, the U.S. Supreme Court held that Puerto Rico is not a separate sovereign for purposes of the Fifth Amendment’s double jeopardy clause in *Puerto Rico v. Sanchez Valle*.⁹ That ruling sent shock waves throughout Puerto Rico. Since 1987, Puerto Rico and the federal government were considered to be dual sovereigns for double jeopardy purposes, meaning that both governments could prosecute a defendant for the same action, exactly like any state of the union can.¹⁰ But *Sanchez Valle* turned that practice on its head. Justice Kagan, writing for the majority, expressed her discomfort with the applicable test. She explained that “[f]or whatever reason the test we have devised” for identifying separate sovereigns does not rest on common indicia of sovereignty, but rather “on a single criterion: the ‘ultimate source’ of the power undergirding the respective prosecutions.”¹¹ Since the ultimate source of Puerto Rico’s prosecutorial power rested with Congress, a federal acquittal or conviction could foreclose a charge under Puerto Rican law for the same action (and vice versa).¹²

The *Sanchez Valle* decision was derided by scholars and activists alike.¹³ But others believed that the decision was doctrinally correct. Over a hundred years earlier, the Court had made a similar determination concerning the then territory of the Philippines in *Grafton v. United States*¹⁴ and the same determination with respect to Puerto Rico in *Puerto Rico v. Shell Co.*¹⁵ Only an intervention by the U.S. Court of Appeals for the First Circuit in the 1980s briefly changed that practice, after Puerto Rico attained commonwealth

7. Camacho, *supra* note 5 (quoting Domingo Emanuelli Hernández, the Puerto Rican secretary of justice) (translated by author). According to Hernández, “the rule . . . cautions against presenting state charges that could compromise the effective adjudication of this case.” *Id.* (quoting Domingo Emanuelli Hernández, the Puerto Rican secretary of justice) (translated by author).

8. Nicole Acevedo, *Puerto Rico’s New Tipping Point: Horrific Femicides Reignite Fight Against Gender Violence*, NBC NEWS (May 16, 2021, 6:30 AM), <https://www.nbcnews.com/news/latino/puerto-rico-s-new-tipping-point-horrific-femicides-reignite-fight-n1267354> [<https://perma.cc/9PKU-VUGH>].

9. 136 S. Ct. 1863 (2016).

10. *United States v. Lopez Andino*, 831 F.2d 1164, 1164 (1st Cir. 1987); *accord* *Pueblo v. Castro Garcia*, 120 P.R. 740 (1988).

11. *Sanchez Valle*, 136 S. Ct. at 1865 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

12. *Id.* at 1874–76.

13. See, e.g., Luis Enrique Romero Nieves, *Puerto Rico v. Sánchez Valle: Apuntes Desde el Derecho Internacional Público* [Puerto Rico v. Sánchez Valle: *Notes on Public International Law*], 51 REVISTA JURÍDICA DE LA UNIVERSIDAD INTERAMERICANA DE P.R. 59 (2017).

14. 206 U.S. 333 (1907).

15. 302 U.S. 253 (1937).

status.¹⁶ Relatedly, federal courts had not considered the District of Columbia, which has similar legal characteristics to U.S. territories, to be a separate sovereign.¹⁷ Further, the Court had long signaled that Puerto Rico was still a territory¹⁸ of the United States, subject to the federal constitution's Territorial Clause.¹⁹

For the other U.S. territories, *Sanchez Valle* was not exactly groundbreaking. A court had never found Guam, the U.S. Virgin Islands, American Samoa, or the Northern Mariana Islands to be dual sovereigns with the United States, and those jurisdictions would be hard-pressed to make a convincing argument to the contrary. Specifically, 48 U.S.C. § 1704(a) codified the relationship, providing that a

judgment of conviction or acquittal on the merits under the laws of Guam, the Virgin Islands, or American Samoa shall be a bar to any prosecution under the criminal laws of the United States for the same act or acts, and a judgment of conviction or acquittal on the merits under the laws of the United States shall be a bar to any prosecution under the laws of Guam, the Virgin Islands, or American Samoa for the same act or acts.²⁰

Notwithstanding Puerto Rico's situation, the local prosecutorial authorities in other territories had coexisted with the federal government without the dual sovereign doctrine for quite some time.

Sanchez Valle and the Court's interpretation of the Double Jeopardy Clause garnered considerable attention. Some scholars framed the decision as "naked . . . colonialism."²¹ The late Judge Juan R. Torruella argued that the opinion was further proof that Puerto Rico's "commonwealth status" was meaningless²² and, similarly, commentators argued that the opinion was the final nail in the island's pro-commonwealth party's coffin.²³ Other commentators saw the decision as an opportunity, with some using it as a call for self-determination on the international stage²⁴ or as opening the door to creative arrangements between the territories and the federal government.²⁵

16. See *infra* Part II.

17. *United States v. Sumler*, 136 F.3d 188, 191 (D.C. Cir. 1998).

18. The United States's unincorporated territories include the territorial acquisitions after 1898: American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

19. *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980); U.S. CONST. art. IV, § 3 ("The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

20. 48 U.S.C. § 1704(a).

21. José Enrico Valenzuela-Alvarado, *P.R.O.M.E.S.A.'s Stay in Civil Rights Cases*, 52 REVISTA JURÍDICA DE LA UNIVERSIDAD INTERAMERICANA DE P.R. 411, 415 (2018).

22. Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future*, 131 HARV. L. REV. F. 65, 88–89 (2018).

23. Gustavo A. Quiñones Pérez, *Derecho y Nacionalismo de Estado: El Tribunal Supremo de Puerto Rico y la Identidad Nacional* [Law and Nationalism of the State: The Supreme Court of Puerto Rico and National Identity], 13 REVISTA DE ESTUDIOS CRÍTICOS DEL DERECHO 167, 192 (2017).

24. See Nieves, *supra* note 13, at 67–69.

25. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U. L. REV. 587 (2017).

Although I have written before about the federal government's ability to, in effect, prosecute local criminal offenses in the territories, scholars have not interrogated the manner in which the dual sovereign doctrine affects criminal prosecutions in the U.S. territories. I begin to do so here.²⁶

In this Essay, I confront two underexamined questions arising from *Sanchez Valle*. First, I focus on Justice Kagan's discomfort concerning the "ultimate source" test: what was the reason for the "ultimate source" criterion's emergence? I posit that part of the ultimate source test can be traced to the federal government's tightening grip on the U.S. territories in the aftermath of the Spanish-American War. In denying the U.S. territories dual sovereignty, the Court projected its view of total federal control over the territories into the criminal sphere.²⁷ Second, I explore, for the first time, the general contours of how the Court's dual sovereign jurisprudence affected local prosecutions in the U.S. territories.²⁸ Specifically, I begin to shed light on the dual sovereign doctrine's patently colonial framework, particularly highlighting the paternalistic relationship it has produced between federal and territorial prosecutorial authorities.

Part I briefly describes the origins and doctrinal framework of the dual sovereign doctrine. In Part II, I describe how the ultimate source test slowly emerged as a conceptual framework to accommodate varying prosecutorial entities like the federal government, states, territories, and tribal authorities. I then explain that, although the Court initially suggested that territories were separate sovereigns, that inclination changed in the early nineteenth century in two cases involving recently acquired territories—the Philippines and Puerto Rico. That divergence and the ultimate source test were in part influenced by the era's colonial jurisprudence. In Part III, I describe how the internal governance of the territories that were acquired after the Spanish-American War developed in ways akin to those of the states. Nevertheless, they remained part of a single sovereign as made patently clear by the Court's decision in *Sanchez Valle*. In Part IV, I describe how the dual sovereign doctrine produced paternalistic prosecutorial arrangements between the territories and the federal government while simultaneously providing broader constitutional protections to criminal defendants in the U.S. territories under the Double Jeopardy Clause as compared to statesiders.²⁹

26. I continue exploring how local and federal prosecutors negotiate prosecutorial priorities and navigate the double jeopardy clause, and how these agreements affect federal and local prosecutions in two forthcoming works entitled *De Facto State Criminal Courts: Puerto Rico* and *De Facto State Criminal Courts: The Forgotten Territories*. Manuscripts are on file with the author.

27. See *infra* notes 9–11 and accompanying text.

28. See *infra* notes 19–22 and accompanying text.

29. There is a palpable tension between those arrangements and broader protections for defendants. The relationship between prosecutorial entities is a product of the territorial condition. I take a position against the current colonial arrangements while acknowledging the expanded rights that it produces for defendants.

I. THE DUAL SOVEREIGN DOCTRINE

The dual sovereign doctrine finds its home in the language of the Double Jeopardy Clause of the Fifth Amendment. The Fifth Amendment to the U.S. Constitution provides, in part, that “no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”³⁰ This right “is one of the oldest ideas found in western civilization,” tracing as far back as ancient Greek and Roman times and representing the founders’ “[f]ear and abhorrence of governmental power to try people twice for the same conduct.”³¹ The double jeopardy principle became firmly established in England by the thirteenth century and was brought over to North America by English colonizers.³² The text plainly “means that those acquitted or convicted of a particular ‘offence’ cannot be tried a second time for the same ‘offence.’”³³ The meaning of the word “offence” has determined the breadth of this constitutional protection.

Early in our nation’s history, the Supreme Court came to read the word “offence” as having a specific legal meaning: “the transgression of a law.”³⁴ That definition had the effect of foreclosing a broader, and quite natural, reading of the Double Jeopardy Clause that would prohibit prosecutions by two sovereigns for the same actions.

Although not clearly pronounced at first, the Court’s definition of “offence” set the stage for what would become the dual sovereignty doctrine. In 1852, the Court in *Moore v. Illinois*³⁵ continued building on the meaning of “transgression of a law” and explained:

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.³⁶

The Court reaffirmed this principle in several cases over the next hundred years, doing so most clearly in *United States v. Lanza*.³⁷ In that case, a defendant challenged a federal prosecution after a state prosecution for the same action.³⁸ The Court, relying on its early double jeopardy precedent, concluded that a “conviction and punishment in a state court under a state law . . . is not a bar to a prosecution in a court of the United States under the

30. U.S. CONST. amend. V.

31. *Bartkus v. Illinois*, 359 U.S. 121, 151–52 (1959) (Black, J., dissenting).

32. *Id.*

33. *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019).

34. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19 (1852).

35. 55 U.S. (14 How.) 13 (1852).

36. *Id.* at 20; *see also* *Fox v. Ohio*, 46 U.S. 410 (1847); *United States v. Marigold*, 50 U.S. 560 (1850).

37. 260 U.S. 377 (1922).

38. *Id.* at 382.

federal law for the same acts.”³⁹ This holding remains undisturbed to this day.⁴⁰

Not everyone has agreed with the Court’s holding. Criminal defendants, some scholars, and Supreme Court justices have made compelling arguments that the *Lanza* Court misunderstood the original understanding of the Double Jeopardy Clause and that the dual sovereign doctrine should have no place in our constitutional canon.⁴¹ Some of these arguments suggest that the Court misinterpreted key early English court decisions and early North American sources on the subject,⁴² while others have suggested that the doctrine emerged as an antebellum response designed to prevent free states from blocking the recapture of fugitive slaves.⁴³ Another compelling argument centered on the meaning of “a sovereign” within our federalist system. According to this latter view, in “the system established by the Federal Constitution, . . . ‘ultimate sovereignty’ resides in the *governed*.”⁴⁴ Because the sovereign are “the people, the ‘original fountain of all legitimate authority,’”⁴⁵ “the federal and state governments are but two expressions of a single and sovereign people.”⁴⁶ Therefore, the argument goes, a state and federal prosecution are necessarily carried out by the same sovereign—the people. Ultimately, despite their appeal, these arguments were rejected by the Supreme Court on several occasions.⁴⁷

II. THE ULTIMATE SOURCE OF POWER

As the name implies, the dual sovereign doctrine presumes the existence of two separate prosecutorial powers. The classic example involves a U.S.

39. *Id.* at 385.

40. *See, e.g.*, *Abbate v. United States*, 359 U.S. 187, 195 (1959) (declining to overrule the dual sovereign doctrine); *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (same).

41. *See, e.g.*, Brief of Amici Curiae Law Professors in Support of Petitioner, *Gamble v. United States*, 139 S. Ct. 1960 (2019) (No. 17-646), 2018 WL 4381222. *But see* ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS 2 (2001) (“The [dual sovereignty] doctrine [was] almost certainly consistent with the original intent of the framers, although dual sovereignty issues arose infrequently during the nation’s first century because of the then limited scope of federal criminal jurisdiction.”).

42. *Gamble*, 139 S. Ct. at 1969–70.

43. *See* Brief of Amici Curiae Law Professors in Support of Petitioners, *supra* note 41.

44. *Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting).

45. *Id.* (quoting THE FEDERALIST NO. 22, at 108 (Alexander Hamilton) (Coventry House Publ’g 2015)).

46. *Gamble*, 139 S. Ct. at 1999 (Gorsuch, J., dissenting); *see* THE FEDERALIST NO. 82, at 404–05 (Alexander Hamilton) (Coventry House Publ’g 2015) (explaining that the state and federal governments are “kindred systems” and “are to be regarded as *one whole*”); Stephen E. Henderson & Dean A. Strang, *Double Jeopardy’s Dual Sovereignty: A Tragic (and Implausible) Lack of Humility*, 18 OHIO ST. J. CRIM. L. 365, 383 (2020). *But see* *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (“The Framers split the atom of sovereignty The resulting Constitution establish[ed] two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”).

47. *See Gamble*, 139 S. Ct. at 1960; *Abbate v. United States*, 359 U.S. 187, 195 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 136 (1959).

court and a foreign tribunal, like an English court of law. Perhaps a bit less obvious, our federalist structure produces several instances wherein seemingly sovereign entities may have conflicting prosecutorial interests. In this regard, the Supreme Court has always respected the primeval prosecutorial power of the states while continuously excluding the U.S. territories from enjoying that privilege. Sovereignty in this context most clearly follows lines readily drawn by the colonial project. States and the federal government are considered separate sovereigns because a state's "power[] to undertake criminal prosecutions derive[s] from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."⁴⁸ In other words, the states preserved their prosecutorial power that predated the formation of the federal government, and the equal footing doctrine⁴⁹ guaranteed the same outcome for those states entering the union after the American Revolution.

In contrast, territories of the United States are not separate sovereigns because they do not have independent prosecutorial power. The Supreme Court first explained this outcome in *Grafton v. United States*.⁵⁰ There, it held that the Philippines (which had been acquired as a territory following the Spanish-American War) could not prosecute a defendant for murder after he was acquitted by a federal tribunal for the same crime.⁵¹ The reason? The "two tribunals that tried the accused exert all their powers under and by authority of the same government,—that of the United States."⁵² To make matters even clearer, the Court reiterated this position three decades later in *Puerto Rico v. Shell Co.*⁵³ In that case, the Court found that the "risk of double jeopardy does not exist" if duplicative statutes under Puerto Rican and federal law criminalize the same action because "territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty," and, therefore, "[p]rosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court."⁵⁴ As opposed to the states, which entered the union with a distinct source of prosecutorial power, the territories owed their existence (and therefore their power to prosecute) to their colonial overseers. Because their prosecutorial power emanated from the same source, there could only be one sovereign: the U.S. federal government.

In 1978, the Court provided the clearest conceptual framework for determining which entities are separate sovereigns in *United States v.*

48. *Heath v. Alabama*, 474 U.S. 82, 89 (1985).

49. *See Alaska v. United States*, 545 U.S. 75, 79 (2005) ("Under the established rule known as the equal-footing doctrine, new States enter the Union on an 'equal footing' with the original 13 Colonies.").

50. 206 U.S. 333 (1907).

51. *Id.* at 355.

52. *Id.*

53. 302 U.S. 253 (1937).

54. *Id.* at 264.

Wheeler,⁵⁵ explaining that the central inquiry focuses on what “the ultimate source of the power under which the respective prosecutions were undertaken” is.⁵⁶ In that case, the Court wrestled with whether the successful prosecution of a tribal member in tribal court for an act against another tribal member barred a subsequent federal prosecution for the same actions.⁵⁷ Wheeler argued, in part, that Native American tribes were not separate sovereigns because “the Indian tribes are not themselves sovereigns, but derive their power to punish crimes from the Federal Government.”⁵⁸ But the Court insisted that Wheeler had it wrong. It was true that the Court’s precedent included cases like *Grafton* in which territorial entities were subject to the control of another power. But that fact was not dispositive. The key distinction here was the source of prosecutorial power.

In *Wheeler*, the Court relied on three of its decisions that highlight this distinction. In *Bartkus v. Illinois*,⁵⁹ and its companion case *Abbate v. United States*,⁶⁰ the Court firmly established that the successive prosecution of a defendant by the state or federal government for the same action does not offend the Double Jeopardy Clause. The Court emphasized that each sovereign had a separate source of prosecutorial power. In *Waller v. Florida*,⁶¹ the Court explained that municipalities and states are not separate sovereigns because, like the U.S. territories, “the judicial power to try petitioner on the first charges in municipal court springs from the same organic law[—the state constitution—]that created the state court of general jurisdiction in which petitioner was tried and convicted for a felony.”⁶²

The Court claimed that Wheeler’s situation was distinguishable from that of territories and municipalities because of the special relationship between tribal lands and the federal government. On one hand, cities and municipalities are “nothing more than ‘an agency of the State,’”⁶³ and territorial tribunals, which are “entirely the creation of Congress,” exert “all their powers by authority of the United States.”⁶⁴ Territories and municipalities “are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone.”⁶⁵ “Indian tribes have power to enforce their criminal laws against tribe members,” on the other hand, because “[a]lthough physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain ‘a

55. 435 U.S. 313 (1978).

56. *Id.* at 320.

57. *See id.*

58. *Id.* at 319. This argument rested on the “undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.” *Id.*

59. 359 U.S. 121 (1959).

60. 359 U.S. 187 (1959).

61. 397 U.S. 387 (1970).

62. *Id.* at 393.

63. *United States v. Wheeler*, 435 U.S. 313, 320–21 (1978) (quoting *Williams v. Eggleston*, 170 U.S. 304, 310 (1898)).

64. *Id.* at 321.

65. *Id.*

separate people, with the power of regulating their internal and social relations.”⁶⁶ Because Indian tribes retained “inherent powers of a limited sovereignty which has never been extinguished,” including the power to punish tribal offenders under tribal codes, they are considered separate sovereigns for purposes of the Double Jeopardy Clause.⁶⁷ In other words, the ultimate source of tribal prosecutorial power, like with the states, is the sovereignty of indigenous nations that predates the colonization of North America; a sovereignty that has, according to the Supreme Court, never been fully extinguished.

A. Territorial Sovereign

In *Sanchez Valle*, Justice Kagan expressed some discomfort with the Court’s conclusion that Puerto Rico was not a dual sovereign. Specifically, Justice Kagan questioned the reason why the ultimate source test existed in the first place. Her unease was likely well placed. A look at early turn-of-the-century opinions suggests that the creation of the ultimate source test was influenced, at least in part, by the high court’s early twentieth-century colonial jurisprudence.

That the territories were predestined to be part of a single sovereign for double jeopardy purposes was not a foregone conclusion. Indeed, territories were not always considered to be part of a single sovereign for double jeopardy purposes. Prior to 1898,⁶⁸ the supreme courts of at least three territories—Oregon, Utah, and Wyoming—had commented on whether the Double Jeopardy Clause foreclosed successive prosecutions for territorial and federal offenses.⁶⁹ In each of those cases, the territorial supreme courts answered in the negative. The territories, they explained, were no different than the states for double jeopardy purposes.

66. *Id.* at 322 (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)).

67. *Id.* at 322–29.

68. It bears noting that long before 1898, the most important debate concerning the territories was whether slavery extended to, or could be prohibited in, them. The debate largely focused on whether Congress had the power to prohibit slavery in the territories. If the constitution applied to the territories, then Congress could not act to forbid slavery. If, on the other hand, the constitution did not apply to the territories, Congress could act, thereby infringing on the territories’ purported sovereignty. See Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 824–25 (2005). Although important, that debate exceeds the scope of this Essay. The Double Jeopardy Clause jurisprudence, however, is concerned with the much more specific question about prosecutorial power, as opposed to other characteristics of sovereignty.

69. *Territory v. Coleman*, 1 Or. 191, 192 (Terr. 1855); *In re Murphy*, 40 P. 398, 399–402 (Wyo. 1895); *State v. Norman*, 52 P. 986, 988–89 (Utah 1898); see also *Territory v. Guyott*, 22 P. 134 (Mont. Terr. 1889) (rejecting the contention that a local criminal statute could not cover the same crime as a federal statute). At least one territorial court continued abiding by the rule in *Moore* even after *Grafton*. See *Territory v. Long Bell Lumber Co.*, 99 P. 911, 916 (Okla. 1908). The Supreme Court for the Territory of Arizona disagreed with those decisions and struck down a local bigamy statute because it contradicted a federal statute. See *Territory v. Alexander*, 89 P. 514 (Ariz. Terr. 1907). But see *Davis v. Beason*, 133 U.S. 333 (1890) (finding that a federal bigamy law did not preempt Idaho’s bigamy law).

There are some reasonable explanations for why those outcomes conflicted with later Supreme Court decisions like *Grafton*. Perhaps the Supreme Court never cared enough to answer this question. Or, because there were significantly fewer federal criminal laws during the nineteenth and early twentieth century, the problem simply did not arise as frequently. But those explanations do not cut it. In 1852, while the Court was fine-tuning its dual sovereignty doctrine, it explained in *Moore*: “Every citizen of the United States is also a citizen of a State *or territory*. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either.”⁷⁰ The Court had suggested that territories, like states, were separate sovereigns under the Double Jeopardy Clause. Soon thereafter, several territorial high courts seized on the Court’s reference to “territory” and cited to *Moore* in the double jeopardy context. The Oregon Supreme Court most explicitly seized onto that language when explaining that a defendant could be convicted under analogous territorial and federal laws, noting that “this case clearly falls within the rule . . . laid down [in *Moore*]”⁷¹

Territorial supreme courts were not alone in their opinions. The twenty-third U.S. attorney general, Caleb Cushing, to whom military court-martial cases were appealed, similarly believed that territories were a separate sovereign for double jeopardy purposes. Cushing made this point most clearly in *Howe’s Case*.⁷² There, an army officer, Major Marshall S. Howe, was accused of violating certain military codes and, separately, of related crimes under the territory of Florida’s penal code.⁷³ After being acquitted by the territory of Florida’s courts, Howe was court-martialed for similar conduct. He argued that since he was acquitted by the Florida court, he could not be court-martialed for similar conduct.⁷⁴ Attorney General Cushing disagreed. He explained that “assault and battery, and homicide, are violations . . . to be tried and punished by the proper tribunal of the State or Territory whose peace was broken and laws offended.”⁷⁵ But, he continued, “the same acts being done by an officer or soldier of the Army of the United States . . . is a breach, also, of the laws of the United States.”⁷⁶ Accordingly, “a double offence is thereby committed,” one against the territory and the other against the federal government.⁷⁷ This doctrine, Cushing maintained, was “settled” by the Supreme Court’s decision in *Moore*.⁷⁸

70. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) (emphasis added).

71. *Coleman*, 1. Or. at 192.

72. *Howe’s Case*—Proceedings of Courts Martial, 6 Op. Att’y’s Gen. 506 (1856).

73. *Id.* at 507–08.

74. *Id.* at 511.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

B. Colonial Jurisprudence

So, what changed in the time between *Moore* and *Grafton*? A clear line of demarcation is the Spanish-American War, when the United States acquired noncontiguous territories with nonwhite populations and little U.S. influence—namely, Guam, Puerto Rico, and the Philippines. After 1898, the Supreme Court and the rest of the country debated what to do with the new territories. This debate prompted all three federal branches to more firmly control the nation’s new possessions’ constitutional status. The executive branch refused to extend U.S. citizenship to those in the territories under the Treaty of Paris of 1898,⁷⁹ and Congress only did so once it became clear that citizenship was meaningless to people living in the territories.⁸⁰

The Supreme Court eventually sanctioned absolute colonial rule in the infamous *Insular Cases*⁸¹ of the early twentieth century. In those cases, the Court explained, with no shortage of xenophobic and racist language, that the newly acquired territories were “unincorporated” ones, that not all parts of the federal constitution applied to them, and by virtue of being “unincorporated territories,” they could be held by Congress indefinitely without obtaining statehood, or, alternatively, be deannexed.⁸² Taken together, Congress’s xenophobia and its power to control the United States’s relationship with, and the internal governance of, the territories permeated the narrative and posture of the *Insular Cases* and post-1898 double jeopardy jurisprudence. For example, one of the ways in which Congress controls territories is through its plenary power, which Congress has enjoyed since the nation’s Founding.⁸³ Plenary power over federal territories stems from the Territorial Clause of the U.S. Constitution, which provides Congress with the ability to “make all needful Rules and Regulations respecting the territor[ies]” of the United States.⁸⁴ Courts have interpreted the Territorial Clause as providing Congress with “plenary power” to legislate over the

79. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

80. See Christina D. Ponsa-Kraus, *A Perfectly Empty Gift*, 119 MICH. L. REV. 1223 (2021).

81. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). “The issue of exactly which decisions belong under the rubric of the *Insular Cases* has been the subject of some disagreement, but there is consensus that the series begins with nine decisions handed down in 1901 and that the most important one was *Downes*.” Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2452 n.1 (2002).

82. See *id.* at 2453.

83. See *id.* Although plenary power suggests that there is only one sovereign because Congress sits in for the territories’ legislatures, the opinions of several territorial courts and one U.S. Attorney General suggests that perhaps Congress’s ability to legislate for the territories was not particularly relevant to the double jeopardy clause. See also Anthony M. Ciolli, *United States Territories at the Founding*, 35 REGENT U. L. REV. 73, 87–89 (2022) (explaining that, according to the U.S. Supreme Court, “territorial courts were not exercising the judicial power of the United States even though they had been created by Congress and were tasked with adjudicating claims arising under federal law”).

84. U.S. CONST. art. IV, § 3.

territories,⁸⁵ meaning that Congress has broad latitude and nearly unfettered ability. Congress can, for example, create the internal governmental structures for territories, called organic acts, and even create fiscal control boards that are authorized to control a territory's budget over the will of locally elected officials.⁸⁶ Further, Congress can also treat territories differently from states so long as there is a rational basis for doing so.⁸⁷ The Court has relied on this power—both explicitly and implicitly—in sanctioning Congress's encroachment into intraterritorial activities. Just as plenary power had meant, from the nation's inception, that Congress can act as the territories' legislature, the *Insular Cases* instructed that Congress could also treat the new territories differently than those of the past.

These concepts were on full display when the Supreme Court made its first significant break from *Moore*. In *Grafton*, the Court explained, for the first time, that territories were not dual sovereigns because Congress had ultimate control over them. As previously noted, that conclusion contradicted the positions of territorial supreme courts, the decisions of at least one attorney general, and the Court's own statement in *Moore*.⁸⁸ The federal government, naturally, made this point clear in their briefing, arguing that it was well settled that the territories were separate sovereigns under the Double Jeopardy Clause.⁸⁹

The petitioner, on the other hand, argued that he could not have been subject to successive prosecution by the Philippines.⁹⁰ *Grafton* argued that the Philippines and the federal military tribunal derived their power from the same source—the U.S. government—and that as a result a violation of military or Philippine law was a transgression against only one sovereign—the United States.⁹¹ *Moore* simply stood for the proposition that state and federal governments were separate sovereigns, and nothing in the opinion disturbed that truth.⁹² Moreover, echoing the racism and xenophobia of the time, *Grafton's* briefing laid bare what a decision affirming the Supreme Court of the Philippine Islands would mean. While advancing an unrelated point, counsel explained that *Grafton* was a mere soldier who followed his orders to a distant land.⁹³ There, under the specter of aggression from alien people, he acted as a rational person would have in service of his country. His conviction was upheld because “one American judge with three of his Filipino brethren joined against their American associates.”⁹⁴ Is this, counsel

85. *United States v. Rivera Torres*, 826 F.2d 151, 154 (1st Cir. 1987) (citing *Harris v. Rosario*, 446 U.S. 651 (1980)).

86. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649 (2020).

87. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1542–43 (2022).

88. *See supra* Part II.

89. *See* Brief for the United States at 15–18, *Grafton v. United States*, 206 U.S. 333 (1907) (No. 358).

90. Brief for Petitioner at 17–18, *Grafton v. United States*, 206 U.S. 333 (1907) (No. 358).

91. *See id.*

92. *See id.*

93. Reply Brief for Petitioner at 19, *Grafton v. United States*, 206 U.S. 333 (1907) (No. 358).

94. *See id.*

posited, “a tale that can be told with pride by any American or thought of with satisfaction by any American judge?”⁹⁵ Counsel’s xenophobia was on full display.

And the Supreme Court took the bait. *Moore* was limited to the facts of the case, and the clear language concerning the territories was cast aside. *Grafton*, which happened to be one of the *Insular Cases*, was the first double jeopardy decision concerning the territories following the Spanish-American War. Further still, the Court would directly repudiate the territorial courts’ readings of *Moore* in a 1937 case involving another post-1898 possession: *Puerto Rico v. Shell Co.*⁹⁶ There, relying on *Grafton*, the Court called out the Utah and Wyoming courts’ decisions, stating that although they “thought that prosecution and punishment could be had under both statutes, and attempted to justify that view by invoking the rule applicable to state and federal statutes denouncing the same criminal acts” from *Moore*, that view “is now seen to be erroneous.”⁹⁷ At the moment when the new territorial possessions attempted to exert the same power as previous territories, the Supreme Court clamped down. Instead of justifying this rule through the territorial incorporation doctrine (i.e., that some parts of the U.S. Constitution did not apply in the territories), the Court articulated a rule for all territories, regardless of incorporation status. The federal government could not be seen as ceding any sense of control to the newly acquired territories, and that remains the rule to this day.

The departure from *Moore* adds more color to the apologetic narrative in *Sanchez Valle*. The ultimate source criterion is simply a conceptualization of the high court’s dual sovereignty jurisprudence as it stood in 1978. In *Wheeler*, the Court formally announced the “ultimate source” test for the first time and, as previously discussed,⁹⁸ the Court produced a conceptual distinction between *Bartkus* and *Abbate* on one hand, and *Grafton* and *Shell Co.* on the other. The reason for that conceptualization was—as the break from *Moore* highlights—colored by the colonial ethos of the Court’s post-1898 jurisprudence.⁹⁹

95. *Id.* at 20.

96. 302 U.S. 253 (1937).

97. *Id.* at 267.

98. See *infra* notes 55–58 and accompanying text.

99. In the end, the “ultimate source” criterion is an ambiguous one. Justice Stephen Breyer protested:

[Surely] the Court does not mean literally that to find the “source” of an entity’s criminal law, we must seek the “*furthest-back* source of . . . power.” We do not trace Puerto Rico’s source of power back to Spain or to Rome or to Justinian, nor do we trace the Federal Government’s source of power back to the English Parliament or to William the Conqueror or to King Arthur.

Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1878 (2018) (Breyer, J., dissenting) (alteration in original) (citation omitted). Where the ultimate source rests is not always clearly defined. This ambiguous test compliments the continuously undefined existence of the territories within the U.S. constitutional framework. By manipulating the status of territories with respect to the Constitution, the federal government is able to simultaneously perpetuate empire while dangling the promise of complete sovereignty. See Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813, 821 (2022).

III. GOVERNANCE AND SOVEREIGNTY

Over time, the Court's dual sovereign jurisprudence and the evolving governmental characteristics of the U.S. territories came to a head. The internal governance of the territories developed in ways that made them more akin to states of the union and the continued validity of cases like *Grafton* and *Shell Co.* was questioned.

The conflict was due, in part, to the fact that the United States still held territories, some for over 100 years, without admitting them as states. Long before the Spanish-American War, all U.S. territories had been considered destined for statehood. The Articles of Confederation and the U.S. Constitution both provided general procedures for admitting new states into the union that were directly tied to the nascent nation's thirst for territorial expansion.¹⁰⁰ The Northwest Ordinance of 1787¹⁰¹ provided the blueprint for future organic acts—congressional statutes that organized territories—and set certain evolutionary markers required for the admission of a territory into the union, such as minimum white population and general governmental structures.¹⁰² Territorial expansion was tied to the creation of new states out of what would become the continental United States, and the acquisition of far-off colonial possessions was not entirely contemplated and was even considered antithetical to the Constitution.¹⁰³ But following the Spanish-American War, the United States managed to keep its new “unincorporated” territorial possessions in territorial purgatory. It soon became clear that these new territories were not destined for statehood but rather were to be kept “like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period.”¹⁰⁴

A. Sovereign Approximations

Political and juridical struggles spurred the more democratic evolution of the internal structures of the U.S. territories at different paces. For example, Guam, which was acquired by the United States immediately after the Spanish-American War in 1898, was initially controlled by the U.S. Navy, “with vast authority wielded by an appointed governor.”¹⁰⁵ In 1950, Congress passed an organic act that fundamentally changed Guam's internal governance. The organic act not only established a bill of rights, but also created a judicial branch, a popularly elected executive branch, and a

100. See Juan F. Perrea, *Denying the Violence: The Missing Constitutional Law of Conquest*, U. PA. J. CONST. L. (forthcoming) (on file with author).

101. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (no longer in force).

102. Ponsa-Kraus, *supra* note 81, at 2505.

103. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 447 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* (2018); Emmanuel Hiram Arnaud, *A More Perfect Union for Whom?*, COLUM. L. REV. F. (forthcoming 2023).

104. *Downes v. Bidwell*, 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting).

105. *Guam v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002).

unicameral legislative branch.¹⁰⁶ The criminal legal system in Guam looks much like that of any state. Prosecutorial authority under the local penal code rests within the Office of the Attorney General of Guam, which, along with local police, investigates and prosecutes crimes in local court.¹⁰⁷ Just like in the states, there is a U.S. Attorney for the District of Guam, who also oversees the U.S. Attorney's Office for the District of the Northern Mariana Islands.¹⁰⁸

In 1990, American Samoa became a territory of the United States after the cession of sovereignty to the United States.¹⁰⁹ Unlike the other territories, Congress did not pass an organic act for American Samoa. Nevertheless, the territory's governmental structure resembles that of other territories. They enjoy a bicameral legislature (called the Fono), an elected governor, and a local court system. Notably, as opposed to all other territories, American Samoa does not have a federal district court. As a consequence, people accused of federal crimes in American Samoa are tried either in the U.S. District Courts for the District of Hawaii or the District of Columbia.¹¹⁰

Similarly, the U.S. Virgin Islands (USVI), acquired by purchase in 1917, initially had a governor appointed by the president of the United States who retained military, civil, and judicial power over the territory.¹¹¹ But in 1936, Congress passed an organic act—later revised in 1954—establishing a local government and providing a local judicial branch, executive branch, and popularly elected unicameral legislature for the entirety of the territory.¹¹² In 1968, Congress finally legislated for the popular election of the governor and lieutenant governor.¹¹³ Prosecutorial authority rests with the U.S. Virgin Islands Department of Justice and is executed by local attorneys general (AG).¹¹⁴ The AGs file all charges in the Superior Court of the Virgin Islands, which is the trial court, and appeals are taken directly to the Supreme Court of the U.S. Virgin Islands. Since 2012, appeals from the USVI's high court are heard by the U.S. Supreme Court, just like those from the high court of any state.¹¹⁵ Like Guam, the USVI has a federal district court and a U.S. Attorney for the district.¹¹⁶

106. See 48 U.S.C. § 1421; see also *id.* § 1421b(u) (extending certain constitutional rights to residents of Guam).

107. See *Divisions of the Office of the Attorney General*, OFF. OF THE ATT'Y GEN. OF GUAM, <http://oagguam.org/divisions/> [<https://perma.cc/97ZZ-S65W>] (last visited Mar. 6, 2023).

108. See *id.*

109. *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

110. See *id.*

111. Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 496 (2002).

112. See *id.*

113. See *id.*

114. See *id.*

115. See *History of the V.I. Judiciary*, JUD. BRANCH OF THE U.S. V.I., <https://www.vicourts.org/cms/One.aspx?portalId=9784302&pageId=15590121> [<https://perma.cc/KYH4-L8WJ>] (last visited Mar. 6, 2023).

116. Importantly, American Samoa, Guam, and the USVI are considered non-self-governing territories by the United Nations. See *Eleven Non-Self-Governing Territories Enjoy 'Historic' Representation, as 2022 Pacific Regional Seminar on*

In the USVI, the U.S. Supreme Court's dual sovereign jurisprudence produced unique prosecutorial arrangements between local and federal prosecutors. One peculiarity of the USVI's criminal legal structure is the active role the U.S. Attorney for the District of the Virgin Islands can play in local prosecutions.¹¹⁷ The organic act provides that the Superior Court of the Virgin Islands has original jurisdiction in all criminal acts "subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by" the USVI's revised organic act.¹¹⁸ That section accomplished several goals. Most relevant here, it took jurisdiction over the vast majority of local criminal matters away from the district court and placed it primarily in the hands of the local courts.¹¹⁹ Further, the section served to "safeguard the rights of criminal defendants in the Virgin Islands to be free from double jeopardy by allowing the federal District Court to adjudicate federal and local criminal charges as part of a single proceeding."¹²⁰ In practice, this structure provides Assistant U.S. Attorneys (AUSA) with the unique ability to prosecute local crimes under local criminal statutes in federal court.

Puerto Rico, like Guam, became a U.S. territory at the conclusion of the Spanish-American War. The island's governance likewise began with military rule, but after the passage of the Foraker Act¹²¹ (Puerto Rico's first organic act), the island's internal governance slowly moved toward home rule.¹²² The U.S. District Court for the District of Puerto Rico, in its varying iterations, has functioned since 1899, and the island is also home to the U.S. Attorney for the District of Puerto Rico.¹²³ The Jones Act of 1917¹²⁴ further expanded representative democracy, and by 1947, Puerto Ricans elected their own governor.¹²⁵ Then in the 1950s, Congress and Puerto Rico made an agreement that the U.S. Supreme Court has described as creating "a relationship to the United States that has no parallel in our history."¹²⁶ Congress, through public law 81-600,¹²⁷ authorized Puerto Rico to create a

Decolonization Opens, UNITED NATIONS (May 11, 2022), <https://press.un.org/en/2022/gacol3355.doc.htm> [<https://perma.cc/CQ4C-MV57>].

117. This is more expansive than the role that federal prosecutors play in prosecuting what otherwise would be local criminal activities under the Mann Act or the Hobbs Act. See Arnaud, *supra* note 4, at 892 n.32.

118. V.I. CODE ANN. tit. 4, § 5-76(b) (2022); see 48 U.S.C. § 1612(c).

119. See *United States v. Gillette*, 738 F.3d 63, 70–71 (3d Cir. 2013).

120. *Rivera-Moreno v. Virgin Islands*, 61 V.I. 279, 308 (V.I. 2014).

121. Ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.).

122. See John R. Hein, Comment, *Born in the U.S.A., but Not Natural Born: How Congressional Territorial Policy Bars Native-Born Puerto Ricans from the Presidency*, 11 U. PA. J. CONST. L. 423, 446–48 (2009).

123. See *id.* The military governor established a provisional federal court by military order in 1899. Congress established a federal district court in the 1900 Foraker Act. See GUILLERMO A. BARALT, HISTORY OF THE FEDERAL COURT IN PUERTO RICO: 1899–1999, at 90–91, 115 (2004).

124. Act of Mar. 2, 1917, ch. 145, 39 Stat. 951 (1917) (codified as amended in scattered sections of 48 U.S.C.).

125. Hein, *supra* note 122, at 448–49.

126. *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 596 (1976).

127. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified as amended in scattered sections of 48 U.S.C.).

constitution of its own and, after making several changes to it, the federal government approved it. Thus was born the Commonwealth of Puerto Rico—an entity that has a judiciary, bicameral legislature, and executive branch much like that of a state’s.¹²⁸

The constitutional significance of this arrangement, commonly referred to as a “compact,” has been debated since its creation. On the one hand, proponents of the “compact theory” argue that public law 81-600 elevated Puerto Rico from its territorial status and fundamentally changed its constitutional relationship with the federal government, making the island akin to a state.¹²⁹ Detractors argue that Congress did no such thing and merely authorized Puerto Ricans to create internal governance structures and no more.¹³⁰ Although the compact theory has been discredited at this point, especially in light of recent U.S. Supreme Court decisions,¹³¹ Justices Stephen Breyer and Sotomayor have voiced their support of the compact theory.¹³² As I will discuss momentarily, the existence of a compact was at the heart of the First Circuit’s decision in *United States v. Lopez Andino*.¹³³

Even before *Sanchez Valle*, federal and local prosecutorial authorities entered into formal agreements through MOUs under which the U.S. Attorney claimed priority over certain types of crimes, even when there is an analogous local criminal statute.¹³⁴ According to the most recent iteration of the MOU, the AUSAs have priority to prosecute, among other things, carjackings resulting in death, certain gun crimes, and kidnappings.¹³⁵ These types of crimes were not picked out of a hat but rather represent some of the most prolific offenses on the island that have come into U.S. Attorney’s crosshairs.

Finally, the Northern Mariana Islands (NMI) came into the U.S. fold at the close of World War II. Following the war, the United Nations authorized the United States to administer the NMI as part of the Trust Territory of the Pacific Islands.¹³⁶ In the 1970s, the people of NMI decided against seeking independence and instead entered into a covenant with the United States. The covenant produced the Commonwealth of the Northern Mariana Islands—

128. *See id.*

129. *See* David A. Rezvani, *The Basis of Puerto Rico’s Constitutional Status: Colony, Compact, or “Federacy”?*, 122 POL. SCI. Q. 115, 123 (2007) (discussing compact theorists and their critics).

130. *See id.*

131. Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101 (2020); *see* Arnaud, *supra* note 4, at 920–41.

132. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1671–73 (2020) (Sotomayor, J., concurring); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting).

133. 831 F.2d 1164 (1st Cir. 1987). For a recent survey of the Puerto Rican constitution’s history, *see* RAFAEL COX ALOMAR, THE PUERTO RICO CONSTITUTION (2022).

134. Arnaud, *supra* note 4, at 891 n.27.

135. Camacho, *supra* note 5.

136. *See Commonwealth of the Northern Mariana Islands*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/oia/islands/cnmi> [https://perma.cc/2QEG-3QBE] (last visited Mar. 6, 2023).

with a local constitution and a federal district court—and officially brought NMI into U.S. jurisdiction in 1986.¹³⁷ The court system, like the USVI's, has two levels: the superior court (trial level) and the supreme court (appellate level).¹³⁸ Although decisions by the Supreme Court of the Commonwealth of the Northern Mariana Islands were originally appealed to the U.S. Court of Appeals for the Ninth Circuit, those decisions have been appealable to the U.S. Supreme Court since 2004. Local criminal laws are prosecuted by the local Office of the Attorney General and, as previously mentioned, the same U.S. Attorney oversees federal criminal prosecutions in Guam and the Northern Mariana Islands.¹³⁹

Taken together, the five U.S. territories have made great strides toward obtaining home rule. In many respects, Puerto Rico and NMI look more like states of the union, having reacquired, at least symbolically, home rule and having entered into agreements—however binding—with the federal government. Although they have less pronounced agreements, the USVI, Guam, and American Samoa have likewise developed governmental structures that are more akin to those of the states than the territories of old, although not as much as Puerto Rico's and NMI's are. The robust criminal legal systems in the territories manifest the level of autonomy and prosecutorial power of a sovereign entity. In light of these developments, different courts began to reconsider the territories' place within the dual sovereign doctrine.

B. Power Deficiencies

This progress toward formal attributes of sovereignty in the territories set the stage for courts to revisit the territories' place within the dual sovereign doctrine. Of the territories, only Puerto Rico enjoyed success—by 1987, it was considered a separate sovereign for double jeopardy purposes in the First Circuit. In *Lopez Andino*, two police officers were charged and convicted under two federal criminal civil rights statutes in connection with the beating of three suspects, one of whom died.¹⁴⁰ On appeal, the defendants explained that they had already been convicted of aggravated assault and pleaded guilty to involuntary manslaughter charges under the Puerto Rican criminal code in connection with the beatings.¹⁴¹ Accordingly, they argued that the convictions under Puerto Rican law necessarily barred a successive federal

137. *See id.*

138. *History of the V.I. Judiciary*, JUD. BRANCH OF THE U.S. V.I., https://www.vicourts.org/about_us/overview_of_judiciary_of_the_virgin_islands/history_of_the_v_i_judiciary [<https://perma.cc/S73P-VMF7>] (last visited Mar. 6, 2023).

139. *See supra* notes 136–37 and accompanying text.

140. 831 F.2d 1164, 1167–68 (1st Cir. 1987); *see also* *United States v. Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981). *But see* *United States v. Sanchez*, 992 F.2d 1143, 1152–153 (11th Cir. 1993) (disagreeing with the First Circuit and concluding that Puerto Rico was not a dual sovereign).

141. *See Lopez Andino*, 831 F.2d at 1167.

prosecution for the same actions.¹⁴² The First Circuit disagreed.¹⁴³ The court noted that in the 1950s, Puerto Rico underwent a significant change in their constitutional relationship with the United States.¹⁴⁴ Channeling the now discredited compact theory, the court explained that although “Puerto Rico’s status is not that of a state in the federal union,” it had achieved the status of “an autonomous political entity” and, therefore, “its criminal laws, like those of a state, emanate from a different source than the federal laws.”¹⁴⁵ For the First Circuit, the source of Puerto Rico’s prosecutorial power was no longer the federal government but rather, Puerto Ricans themselves. Accordingly, the island should be treated as a separate sovereign for double jeopardy purposes.

Judge Torruella, a respected scholar of the *Insular Cases* and the Puerto Rican constitution, filed a concurring opinion. In his view, the majority had gone too far and could have simply found that the federal and state statutes were different under the *Blockburger v. United States*¹⁴⁶ test.¹⁴⁷ But instead, the majority got both the history and meaning of the Constitution of the Commonwealth of Puerto Rico wrong. Looking at the legislative history of public law 81-600 and the Puerto Rican constitution, as well as the text of the U.S. Constitution, Judge Torruella explained that

the legislative history of that Act 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.¹⁴⁸

For Judge Torruella, Puerto Rico was still a territory and part of a single sovereign.

Although it would take decades to do so, the U.S. Supreme Court corrected the First Circuit’s course in *Sanchez Valle*.¹⁴⁹ In that case, two defendants independently sold guns to an undercover police officer.¹⁵⁰ They were originally charged with selling a firearm without a permit under the Puerto Rico penal code, but some time later, they were charged under an analogous federal statute for the same conduct.¹⁵¹ The defendants first pleaded guilty to the federal charges, then moved to dismiss the state charges on double jeopardy grounds.¹⁵² The trial court dismissed the charges over the

142. *See id.*

143. *See id.* at 1167–68.

144. *See id.* at 1168.

145. *Id.*

146. 284 U.S. 299 (1932).

147. *Lopez Andino*, 831 F.2d at 1172 (Torruella, J., concurring). The Double Jeopardy Clause prevents a successive prosecution by the same sovereign if the subsequent charges have similar elements as set out in *Blockburger*.

148. *Lopez Andino*, 831 F.2d at 1173.

149. 136 S. Ct. 1863 (2016).

150. *See id.*

151. *See id.*

152. *See id.*

prosecution's objection, but the Court of Appeals of Puerto Rico reversed.¹⁵³ The Supreme Court of Puerto Rico then held that the charges were properly dismissed.¹⁵⁴ According to that court, “‘what is crucial’ is ‘[t]he ultimate source’ of Puerto Rico’s power to prosecute.”¹⁵⁵ Unlike the First Circuit, the Supreme Court of Puerto Rico found that the ultimate source of power remained the federal government.¹⁵⁶ The U.S. Supreme Court agreed.

The U.S. Supreme Court explained that “sovereignty” for double jeopardy purposes “does not bear its ordinary meaning.”¹⁵⁷ Instead, “[f]or whatever reason,” the Court “decide[s] whether two governments are distinct for double jeopardy purposes” by examining “a single criterion: the ‘ultimate source’ of the power undergirding the respective prosecutions.”¹⁵⁸ This inquiry, the Court added, is historical and rests on “whether [they] draw their authority to punish the offender from distinct sources of power.”¹⁵⁹ If the entities draw their power from the same source, they are not dual sovereigns and may not bring successive prosecutions.¹⁶⁰ The Court explained in *Sanchez Valle* that it was true, as the Puerto Rican government and the First Circuit in *Lopez Andino* explained, that Puerto Rico “underwent a profound change in its political system,” and that the creation of the Puerto Rican constitution and the era of home rule “made Puerto Rico ‘sovereign’ in one commonly understood sense of that term.”¹⁶¹ But not in the sense that mattered—when the United States gained control of the island, Puerto Rico “exercised only such power as was ‘delegated by Congress’ through federal statutes.”¹⁶² Then, when the island became a commonwealth in the 1950s—whatever that means¹⁶³—Puerto Ricans simply became “the most immediate source of such authority.”¹⁶⁴ According to the Court, the ultimate source still rests in Congress: “[Congress] conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico’s

153. *See id.*

154. *See id.*

155. *See id.* at 66 (alteration in original) (quoting *Pueblo v. Sanchez Valle*, 192 P.R. 594, 611 (2015)); *see also* *Pueblo v. Sanchez Valle*, 192 P.R. 594, 611 (2015).

156. *See Sanchez Valle*, 192 P.R. at 611.

157. *Sanchez Valle*, 136 S. Ct. at 1870. The Court’s understanding of the ordinary meaning of “sovereignty” is something akin to the power to govern, which the territories clearly have. But when it comes to sovereignty in the context of double jeopardy, the Court in essence distinguishes sovereignty from autonomy.

158. *Id.* at 1871 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

159. *Id.* (alteration in original) (quoting *Heath v. Alabama*, 474 U.S. 82, 88 (1985)).

160. *Id.*

161. *Id.* at 1874.

162. *Id.* at 1875.

163. Justice Breyer recently quipped at the amorphous meaning of “commonwealth”: “It’s a commonwealth. It’s the *Estado Libre Asociado*, and no one knows exactly what that is.” Oral Argument at 15:49, *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303), <https://www.oyez.org/cases/2021/20-303> [<https://perma.cc/Z9WM-ADXC>] (click on “ORAL ARGUMENT - NOVEMBER 09, 2021”).

164. *Sanchez Valle*, 136 S. Ct. at 1875.

prosecutors.”¹⁶⁵ And with that, the Supreme Court flattened the dual sovereign landscape for the territories, demoting Puerto Rico from its perceived elevated status.¹⁶⁶

IV. COLONIAL EMANATIONS

Sanchez Valle provided a reality check to the territories, and especially Puerto Rico, about their place within the United States. For Puerto Rico, the U.S. Supreme Court eradicated nearly thirty years of sovereign-affirming precedent. For the rest of the territories, it was business as usual. To be sure, one message was clear to all: territorial status does not end in any respect absent statehood.¹⁶⁷ At the heart of that conclusion was the court’s development of the ultimate source criterion, which was influenced by its early twentieth century jurisprudence. The federal government’s tightening grip on the unincorporated territories influenced the U.S. Supreme Court to make an about-face in *Grafton*, and over the course of a hundred years, territorial criminal legal systems adapted to their new realities. For some, the single sovereign arrangement spurred formal agreements between prosecutorial powers. For others, Congress created unique prosecutorial arrangements for the territory.

A. Optics and Practice

The effects of the dual sovereign doctrine are palpable throughout the territories. The most evident is an explicit air of paternalism. Although the current prosecutorial structure in the territories resembles those in the states, with parallel local and federal prosecutors, in the territories, federal authorities are king. The opening anecdote of this piece is just one prominent example. Federal prosecutors in Puerto Rico can prevent local prosecutors from filing charges, and now with *Sanchez Valle*, local prosecutors must be even more careful with the charges that they file.

Apart from *Sanchez Valle*’s patronizing language, there is an additional factor at work in Puerto Rico: the MOU. The current MOU explicitly delineates the types of offenses that the federal government gets first “dibs” on. The rest of the overlapping offenses? The AUSAs can prosecute them

165. *Id.* This case was peculiar for several reasons. First, it involved an appeal from a decision by the Supreme Court of Puerto Rico that found that the very place it inhabited was not a separate sovereign. Second, the federal government changed their position from that in *Lopez Andino*, arguing that Puerto Rico was not a separate sovereign. See *United States v. Lopez Andino*, 831 F.2d 1164, 1173 (1st Cir. 1987). Nevertheless, the U.S. Supreme Court told Puerto Rico that it was still just an unincorporated territory of the United States. See *id.*

166. Whether *Sanchez Valle* established a new substantive rule that applies retroactively is still an open question. At least one district court judge found that the rule applied retroactively. See *Núñez Pérez v. Rolon Suarez*, No. 19-cv-01555, 2022 WL 3021472, at *10 (D.P.R. Aug. 1, 2022).

167. This point became patently clear in a series of recent cases confirming Puerto Rico’s subordinate status. See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1539 (2022).

if they want, or they can leave them in the hands of the local prosecutors. To be fair, there is a great deal of informal communication between federal and local investigatory agencies and prosecutors in an effort to avoid double jeopardy issues and the waste of resources. Nevertheless, the MOUs and other informal agreements are not entirely popular throughout the territories. PRDOJ secretary Hernández, for example, expressed his dissatisfaction with the current MOU.¹⁶⁸ Although he found solace in the fact that crimes would still be prosecuted by *some entity*, he hoped to expand the scope of PRDOJ's prosecutorial abilities in the next MOU and to avoid another Verdejo debacle. Further, he hopes that by taking more responsibility over local crimes, he can restore the department to its former glory.¹⁶⁹ Until then, the optics are such that PRDOJ plays second fiddle to the AUSAs.

The situation in the USVI is, in some respects, even more patently paternalistic. Although the USVI Attorney General's Office has not entered into an MOU with the U.S. Department of Justice (USDOJ), the two offices are in constant communication and have set up informal agreements as to which office will prosecute certain offenses. Informal agreements, of course, are also imperfect. For starters, they can lead to inconsistencies in filing decisions. Two defendants can find themselves in two separate courts, facing separate sentencing ranges for similar crimes, not knowing which of the prosecutions will ultimately foreclose the other.¹⁷⁰ What's more, the AUSAs can invoke concurrent jurisdiction, and a federal prosecutor—shielded from local electoral power and influence—can prosecute a person under local law in federal court. Concurrent jurisdiction has also led to district courts having the ability to solely try local offenses. The U.S. Court of Appeals for the Third Circuit has explained that, if federal and local charges are filed in federal district court, and the federal charges are eventually dismissed or dropped, then the court still has jurisdiction over the local charges. In *United States v. Gillette*,¹⁷¹ for example, the Third Circuit dismissed the federal charges at the close of the prosecution's case-in-chief, leaving open several charges under local law in the district court.¹⁷² The court concluded that the federal district court still had jurisdiction to litigate the local claims under the concurrent jurisdiction statute. All that the statute required was "that there be a sufficient nexus between the local charges and an 'offense or offenses against one or more of the statutes over which the District Court of the Virgin Islands has jurisdiction.'"¹⁷³ Once the local charges properly make their way to the district court, they are there to stay.

The criminal legal structure of American Samoa has an added wrinkle. Like other territories, it has prosecutorial offices that work in parallel with the federal government's—the local Office of the Attorney General, American Samoa, and the USDOJ. But because there is no federal court for

168. Camacho, *supra* note 5.

169. *See id.*

170. *See* *People v. Francis*, 74 V.I. 137, 163 (Super. Ct. 2021).

171. 738 F.3d 63 (3d Cir. 2013).

172. *See id.* at 70–71.

173. *Id.* at 71–72 (quoting 48 U.S.C. § 1612(c)).

the territory, federal criminal defendants have a unique path through the criminal legal system. Once they are charged and arrested, they must travel to another jurisdiction for their proceedings. People facing criminal charges are typically sent to the District of Hawaii, with some being sent to main justice in Washington, D.C., for their proceedings.¹⁷⁴ Although justified by practicalities, this arrangement clearly offends basic principles of democratic criminal justice. For a person accused of a federal crime in American Samoa, not only are they tried on the mainland, but they will also never have a jury of their peers.

The USDOJ has also devised policies that are aimed at preventing double jeopardy issues and the wasting of resources generally. One example is the Petite policy, which “precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act or transaction, unless the prior prosecution has left a substantial federal interest demonstrably unvindicated.”¹⁷⁵ The policy requires an AUSA to seek and receive authorization from main justice prior to initiating a federal prosecution for an offense that was prosecuted in local court. Through this policy, the USDOJ ensures that successive prosecutions are limited, although they do happen. Optically, this can be seen as a further promise to the territories that if local authorities prosecuted a person, internal USDOJ policies act as a second line of defense against successive prosecutions. In practice, however, the federal government can easily circumvent the Petite policy by simply filing charges before the state proceedings begin or are completed, preempting local proceedings from occurring. The *Verdejo* case and *Sanchez Valle* provide prime examples of that practice.

B. A Silver Lining

Even considering the arrangements that the dual sovereign doctrine produced, there may still be a silver lining. Despite the clear colonial bent and paternalistic nature of the dual sovereign doctrine and the prosecutorial arrangements it has produced, the U.S. Supreme Court’s interpretation of the dual sovereignty doctrine, oddly enough, grants people in the territories an individual right that is accompanied by a loss of governmental authority for the polity that they elect into office. By being considered part of a single sovereign, the territories sometimes enjoy more robust constitutional protections under the double jeopardy clause than the states do. Unlike people who are charged with crimes in the states, those charged in the territories may be prosecuted only by either local authorities or the federal government for the same crime because a prior acquittal or finding of guilt by one prosecutorial power forecloses a subsequent prosecution by the other.

174. *See* *United States v. Lee*, 159 F. Supp. 2d 1241 (D. Haw. 2001), *aff’d*, 472 F.3d 638 (9th Cir. 2006); U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-1124T, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS (2008).

175. ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS 5 (2002).

Whether this is a normatively desirable result may be an open question for some. For defendants and those who criticize the dual sovereign doctrine, the territories are arguably the only jurisdictions that enjoy the complete and intended protections of the Fifth Amendment.¹⁷⁶ Those on the opposite side of the spectrum can criticize the result as stripping the territories of their power to bring dual prosecutions. For others, *Grafton*, *Shell Co.*, and *Sanchez Valle* represent the perdurance of the colonial project in the United States.

CONCLUSION

Prosecuting and sentencing people of the U.S. territories to prison under laws that they never had a say in creating subverts all notions of democratic accountability and representative democracy. Knowing further that the federal government can preempt local prosecutors in the territories from prosecuting local crimes may be even more alarming. Yet that is exactly the state of the criminal legal system in the territories. The U.S. Attorney's Offices work closely with local prosecutors to maintain federal prosecutorial priorities, leaving the local offices to function within those negotiated parameters. Together with the colonial influences on the U.S. Supreme Court's double jeopardy jurisprudence, prosecutorial arrangements place local prosecutors in a subordinate position, furthering a palpable feeling of paternalism in the territories. The result? Even in the criminal arena, federal power in the territories is king.

176. Indeed, folks in this same camp would likely point to the recent U.S. Supreme Court decisions regarding lands under tribal authority that now potentially expose a person to three separate sets of prosecutorial powers—tribal prosecutors, state prosecutors, and federal prosecutors. See *Denezpi v. United States*, 142 S. Ct. 1838 (2022); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).