

DOUBLE TROUBLE: THE ERRORS OF THE DUAL SOVEREIGNTY DOCTRINE IN LIGHT OF PUERTO RICO V. SANCHEZ VALLE

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I. INTRODUCTION

The Fifth Amendment of the United States Constitution reads, “No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb.”¹ As interpreted by the Supreme Court, this provision bars multiple prosecutions by entities with the same sovereignty, but allows multiple prosecutions when initiated by entities where “the same act may be an offense or transgression of the laws of both[.]”² In other words, these separate sovereigns are free to punish the individual for the same offense; as “it cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act, he has committed two offences, for each of which he is justly punishable.”³ This idea is known as the dual sovereignty doctrine.⁴ Inherent in this doctrine’s functioning is the recognition of the entity as a separate sovereign, which as the Supreme Court has opined, is dependent on a narrow question of “whether the prosecutorial powers of the two jurisdictions have independent origins—or said, conversely, whether those powers derive from the same ‘ultimate source.’”⁵

In later Supreme Court cases challenging multiple prosecutions on the basis of Double Jeopardy, separate sovereign status was

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¹ U.S. CONST. amend. V.

² *United States v. Wheeler*, 435 U.S. 313, 317 (1978) (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852)).

³ *Id.* (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852)).

⁴ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016).

⁵ *Id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

extended to states and tribal nations using the dual sovereignty doctrine.⁶ This allowed those entities, after criminals had already been held accountable by the Federal government, to hold criminals accountable in local courts for the same violations of law which transgress the policies of their immediate society.⁷ In extending this status, the Supreme Court analyzed the history of the states and tribes respectively, and determined that both had an inherent, independent sovereignty pre-dating the creation of the Federal government.⁸ This allowed their “ultimate source” of authority to be traced back to a jurisdiction other than their own, providing the basis for their recognition as a separate sovereign.

Absent from this extension are United States territories, specifically, what is arguably the closest territory, Puerto Rico.⁹ On the basis of derivation of authority, time and time again the United States Supreme Court has excluded Puerto Rico from being recognized as a separate sovereign. The argument advanced by the Supreme Court holds steadfast to a formalist principle of “source of authority” asking the same outcome blind question of where the power to prosecute is derived from.¹⁰ In concluding that Puerto Rico derives its prosecutorial powers from the United States Federal government, thus being a same sovereign, the Supreme Court points to the existence of Puerto Rico as a Spanish colony prior to American acquisition and the authorization of the Puerto Rican Constitution by the United States Congress, among other things.¹¹

In *Puerto Rico v. Sanchez Valle* (hereinafter “*Sanchez Valle*”), the Supreme Court of the United States had the chance to recognize Puerto Rico as a separate entity. However, instead of reconsidering, the Supreme Court erroneously affirmed this formalist “source of authority” approach to Double Jeopardy, enhancing the polarization of separate and same sovereign entities without any substantial basis for their decision. The Supreme

⁶ See *Wheeler*, 435 U.S. at 326 (extending separate sovereign status to tribal nations because of their pre-U.S. sovereignty). See also *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (describing the separate sovereign status of states).

⁷ In this sense of the word local, it means not the law of a municipality, but the laws of the states and tribal nations inferior to Federal law. See *Local Law*, MERRIAM-WEBSTER (11th ed. 2014).

⁸ See *Wheeler*, 435 U.S. at 323–24; *Heath*, 474 U.S. at 90.

⁹ See *Sanchez Valle*, 136 S. Ct. at 1876 (noting “Puerto Rico boasts a relationship to the United States that has no parallel in our history.”).

¹⁰ *Id.* at 1871.

¹¹ *Id.* at 1868, 1874–75.

Court blindly adhered to the same principle without blinking an eye, stating “our test hinges on a single criterion: the ‘ultimate source’ of the power undergirding the respective prosecutions” noting the “inquiry is . . . historical, not functional[.]”¹²

There is obvious error associated with such decision making. Conforming to this formalist principle undermines the dignity of the Puerto Rican government, essentially deciding that Puerto Rico is incapable of holding individuals accountable on their own.¹³ While some critics may argue that elevating this policy, as opposed to the policy of protecting defendants, is mistaken, this policy is equally important, as Puerto Rico is being robbed of their ability to seek justice for their own citizens, and as a commonwealth, this ability is within their fundamental powers.¹⁴ In addition to this analysis, because of the negative secondary affects the use of the current approach creates, a new approach should be adopted to address Double Jeopardy questions. A functionalist approach which considers these outcomes would be better suited and would allow Puerto Rico to ensure justice for its citizens, just the same as states and tribal nations are enabled to do. In determining that Double Jeopardy should not apply to Puerto Rico, the Supreme Court should have used this functionalist reasoning, instead of rigidly conforming to a black-letter principle which produces unreasonable results.

Before we dive into the facts of *Sanchez Valle*, it is important to understand the difference between functionalist and formalist reasoning, as the distinction between the two demonstrates the reason why this comment diverges from the reasoning of the Supreme Court. In essence, legal formalism is “[a] theory that legal rules stand separate from other social and political institutions. According to this theory, once lawmakers produce rules, judges apply them to the facts of a case without regard to social interests and public policy.”¹⁵ On the other hand, persons who reason using a functionalist perspective, “are concerned with law’s operative role in society. They emphasize the social effect of its operations (including the fulfillment of any existing *ideals* of

¹² *Id.* at 1871.

¹³ See Colin Miller, *Sovereign Impunity: Why Double Jeopardy Should Apply in Puerto Rico*, 73 WASH. & LEE L. REV. 174, 177 (2016).

¹⁴ Magaly Rivera, *Government*, WELCOME TO PUERTO RICO, <https://welcome.to.puertorico.org/government.shtml> (last visited Nov. 6, 2016).

¹⁵ Cornell Univ. Law Sch., *Legal Formalism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/legal_formalism (last visited Nov. 6, 2016).

the society, and including interactions of causes and effects).”¹⁶

To make this principle clearer, picture a mother’s directive to her children, “never play with fire.” Now, imagine a situation where the children were lost in the woods, and the only way to survive was to start a fire to keep warm. Under a formalist perspective, because the mother instructed her children to never play with fire, regardless of the consequence of the children not surviving, the children would be bound to comply with the order. However, using a functional perspective, even though the mother told her children to never play with fire, if the effect of such instruction would result in the unreasonable result of death, the children could depart from the mother’s instructions and start a fire to survive. While this example may be a bit extreme, it articulates the point that formalism clings to the words of the rule-maker, regardless of the outcome, but functionalism will take into account the result of the rule-maker’s order in determining how the order will be interpreted. Additionally, while it may be easier to simply comply with the instructions, thus using a formalist perspective, when this ease is weighed against the irrational outcome, the functionalist perspective clearly produces the better result.

A. *Facts of the Case*

The dispute in *Sanchez Valle* centers around the illegal sale of a firearm. Luis Sanchez Valle and Jaime Gomez Vazquez (hereinafter “Respondents”) sold a firearm to an undercover cop in violation of the Puerto Rican Arms Act of 2000, and in violation of U.S. federal gun trafficking statutes.¹⁷ Although this transaction took place in Puerto Rico, involving Puerto Rican citizens and a Puerto Rican law enforcement officer, respondents were charged with violations of both United States and Puerto Rican laws.¹⁸ Understanding that the penalties associated with the U.S. federal charge was lesser, namely a shorter sentence, the respondents pled guilty to federal charges, before Puerto Rico had a chance to prosecute.¹⁹ In response to the pleas being entered, respondents

¹⁶ Samuel Mermin, *Legal Functionalism in American Jurisprudence*, WORLD CONGRESS ON PHILOSOPHY OF L. & SOC. PHILOSOPHY 6 (1973), <https://dialnet.uniri.oja.es/descarga/articulo/2064852.pdf>.

¹⁷ *Sanchez Valle*, 136 S. Ct. at 1865.

¹⁸ *Id.*

¹⁹ *See* *People of Puerto Rico v. Sanchez Valle*, 2015 TSPR 25, 192 D.P.R. 594,

requested dismissal of the Puerto Rican charges on the basis of Double Jeopardy barring the subsequent prosecution.²⁰

Although both respondents were charged with the same violation around the same time, the respondents' cases were originally separate, which is the manner in which they were presented to the Court of First Instance, the preliminary trial court in Puerto Rico. In both cases, the Court of First Instance rejected the view that Puerto Rico and the United States are separate sovereigns for Double Jeopardy, instead stating their source of authority is derived from the United States Congress.²¹ Thus, in both cases, the charges were dismissed on the basis that they had already been charged by the U.S. Federal government.²² Dissatisfied with the decision, the government appealed each decision separately, but for ease of decision, the Court of Appeals of Puerto Rico again consolidated the cases into one.²³ The Court of Appeals of Puerto Rico reversed the decisions of the Court of First Instance.²⁴ Likening Puerto Rico to that of a state, this court noted that a subsequent prosecution in federal court and state court does not offend Double Jeopardy.²⁵ The charges were reinstated against respondents.²⁶ Again, this decision was appealed, and respondents separately petitioned for certiorari, which the Supreme Court of Puerto Rico granted.²⁷

Again consolidating the cases because of their similar question of law, the Supreme Court of Puerto Rico seemed to adhere to the same principle that the United States Supreme Court relied on, despite this decision being rendered before the United States Supreme Court heard the case. This court reasoned that Puerto Rico's source of authority to prosecute was "a delegation of powers and not based on a transfer of sovereignty by the United States Congress."²⁸ Thus, the Supreme Court of Puerto Rico found that Double Jeopardy would bar the prosecution of Puerto Rico on these facts because the jurisdictions are the same sovereign.²⁹ The

600–01 (2015).

²⁰ *Id.*

²¹ *Id.* at 599.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 601–02.

²⁵ *Sanchez Valle*, 2015 TSPR 25, 601–02 (2015).

²⁶ *Id.*

²⁷ *Id.* at 602.

²⁸ *Id.* at 645.

²⁹ *Id.* at 647–48.

charges were once again dismissed.³⁰

Seeking to reinstate the charges, the government of Puerto Rico petitioned the Supreme Court of the United States for certiorari, which was granted on October 1, 2015.³¹ On January 13, 2016, oral arguments were held before the Supreme Court and a final decision was rendered on June 9, 2016. In this opinion, written by Justice Kagan, the Supreme Court of the United States affirmed the decision of the Supreme Court of Puerto Rico, dismissing the charges as they were barred by Double Jeopardy.³² This decision confirmed that Puerto Rico and the United States Federal government are same sovereigns without regard to any countervailing considerations which, if considered, demonstrates the United States Supreme Court's error.

B. Discussion of Prior Law

Before assessing the application of the “source of authority” test to Puerto Rico in the current decision, it is important to note how case law has applied this test to states and tribal nations as well as Puerto Rico in the past. Such basis can help distinguish or remedy the treatment of Puerto Rico in the application of this same test in the case at hand.

1. Puerto Rico

In one of the earliest cases regarding sovereignty required for Double Jeopardy, the Supreme Court of the United States held that territories do not possess inherent sovereignty, but owe their existence wholly to the United States.³³ Building upon this, in 1937, the Supreme Court of the United States decided *Puerto Rico v. Shell Co.*,³⁴ holding that prosecuting a criminal defendant under a local anti-trust law and under the Sherman and Clayton Federal Anti-trust acts would be barred by Double Jeopardy as both entities prosecute under the same sovereignty.³⁵ This was the precedent relied upon for the greater part of the 20th century to

³⁰ *Id.*

³¹ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016).

³² *Id.*

³³ *Grafton v. United States*, 206 U.S. 333, 354 (1907) (using the Philippines as an example for all territories and holding that territories generally are dependent on the United States for existence).

³⁴ *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937).

³⁵ *Id.* at 264.

allow the United States Federal government to exclude territories from constitutional protections or from acts passed by the United States legislature.³⁶

In 1950, Puerto Rico created a constitution and after being submitted to the United States for approval, was ratified in 1952.³⁷ Beginning in 1987, the First Circuit Court of the United States held the transformative event of creating a constitution changed the relationship of the United States and Puerto Rico, and was the turning point in allowing Puerto Rico to be regarded as sovereign for purposes of the dual sovereignty doctrine underlying Double Jeopardy.³⁸ In other words, at this point in time, the First Circuit regarded Puerto Rico as a separate sovereign and did not apply Double Jeopardy to criminal defendants. Time and time again, the First Circuit reiterated this finding, until the case at hand, which the United States Supreme Court saw as their chance to clarify the issue of sovereignty. While the United States Supreme Court understood that this same issue had previously been addressed in regards to territories in prior case law, the Court felt the need to reconsider this question due to the passing of the Puerto Rican Constitution.³⁹

2. States

Stepping back in time, in 1959, two landmark sovereignty cases were decided, which created an exception for states, to allow state and federal prosecutions on the same grounds without offending Double Jeopardy.⁴⁰ The decision in *Bartkus* upheld a state conviction after a federal acquittal of charges, and the decision in *Abbate* upheld the flip of the coin, a federal conviction after a state conviction.⁴¹ These two cases engrained dual sovereignty into Double Jeopardy case law, making further questions on this topic

³⁶ *Id.* at 253 (Although this case is not good law as it has been superseded in statutes, it still controlled until the 1980's making this an important case for the historical analysis of the treatment of Puerto Rico.).

³⁷ PUERTO RICO, U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE HISTORIAN, <http://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Separate-Interests/Puerto-Rico/> (last visited Jan. 29, 2017).

³⁸ *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987) (noting that Puerto Rico is to be treated as a state for Double Jeopardy purposes).

³⁹ *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016).

⁴⁰ *See Bartkus v. Illinois*, 359 U.S. 121, 150 (1959); *Abbate v. United States*, 359 U.S. 187, 194 (1959).

⁴¹ *See Bartkus*, 359 U.S. at 150; *Abbate*, 359 U.S. at 194, 196.

widely debated.

In 1985, the United States Supreme Court decided *Heath v. Alabama*⁴² which held that states are separate sovereigns from each other, as well as the Federal government.⁴³ This was one of the first cases to frame the question not as a question of the level of distinguishing the differences between the entities, but as one which explained that states are separate sovereigns under the Double Jeopardy clause because “their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.”⁴⁴ In addition, this was a clear example of a case expressly articulating, but extending the *Bartkus* exception, that prosecutions under the laws of separate sovereigns did not, for Double Jeopardy purposes, improperly subject an accused twice to prosecutions for the same offense.⁴⁵

3. Tribal Nations

Around this same time, in 1978, the Supreme Court of the United States decided *United States v. Wheeler*⁴⁶, which held that Native American tribes exercise sovereignty distinct from that of the United States.⁴⁷ In reaching this conclusion, the Court highlighted that although the United States “has plenary authority to legislate on behalf of the tribes in all matters, including their form of government”⁴⁸ that the Native American community remains “a separate people, with the power of regulating their internal and social relations.”⁴⁹ Although contested as “merely an arm of the government”⁵⁰ because of the plenary authority retained by Congress, the Court determined that the power to prosecute its members for tribal offenses did not fall into the category of powers lost when prosecutorial power converged with the United States.⁵¹ Thus, the *Bartkus* exception

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

⁴³ *Id.* at 86.

⁴⁴ *Id.* at 89.

⁴⁵ *Id.* at 86.

⁴⁶ *United States v. Wheeler*, 435 U.S. 313 (1978).

⁴⁷ *Id.* at 322–23.

⁴⁸ *Id.* at 319.

⁴⁹ *Id.* at 322.

⁵⁰ *Id.* at 319.

⁵¹ *See id.* at 326.

was extended to tribal nations.⁵²

Sanchez Valle, was the chance at re-evaluating sovereignty using the source of authority language in relation to territories post-*Bartkus*. Although the “ultimate source of authority” approach seemed to produce the same favorable result when applied to states and tribal nations, when considered in light of Puerto Rico’s special relationship with the United States, the rigid adherence to the source of authority language that worked above is no longer a viable solution to sovereignty issues underlying Double Jeopardy. Unfortunately for territories, the United States Supreme Court incorrectly decided this case, erroneously affirming the prior precedent that Puerto Rico is the same sovereign as the United States for Double Jeopardy purposes. Failing to extend the *Bartkus* exception to territories because of such rigid adherence to words deprives Puerto Rico of the ability to seek justice for its own citizens. This is a major injustice which must be fixed.

II. OPINION ANALYSIS

The opinion of the United States Supreme Court clings to three basic principles, which each stem from the rigid adherence to the actual words “ultimate source of authority.” There are critical flaws with each principle, which lead to the unreasonable result produced in this opinion. Because the Court must first determine that the jurisdictions do not prosecute under the same authority before applying the *Bartkus* exception, the Supreme Court’s reasoning on this matter must undergo critical review.

A. *First Rationale: Approval Authority for the Puerto Rican Constitution Was Always with the United States*

The first rationale the Court advances is that the ultimate approval authority for the Puerto Rican Constitution was always with the United States Congress, such that Puerto Rico never had absolute authority to make their laws since the authority to do so flows from the United States.⁵³ This is a critical component to establishing separate sovereign status, as in previous cases, the United States Supreme Court looked to the independent prosecutorial powers of states and tribes as evidence of separate

⁵² *Wheeler*, 435 U.S. at 332.

⁵³ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875–76 (2016).

sovereignty to determine that the *Bartkus* exception would apply.⁵⁴ In this case, the Court clarifies its meaning of “ultimate” adhering to the narrowest definition of the law, meaning final or fundamental principle, or coming to an end.⁵⁵ To illustrate this point, the Supreme Court asks the reader to “imagine . . . a pair of parallel lines.”⁵⁶ These parallel lines never touched nor will they touch in the future. Because they never converged, this is the example of separate sovereigns, who draw their authority from separate places and may bring successive prosecutions without offending Double Jeopardy.⁵⁷ To illustrate the category that Puerto Rico falls into, the Court asks the reader to “imagine . . . two lines emerging from a common point, even if later diverging.”⁵⁸ This common point is the United States, which suggests that Puerto Rico will never be able to be free from the United States authority to prosecute since there is a common point which subsequent divergence will not negate. By looking at the narrowest meaning of ultimate and undertaking such a deep historical inquiry, the Court determines that Puerto Rico and the United States are nothing more than diverging lines from a common point, making them same sovereigns.⁵⁹

The petitioner, Puerto Rico, attempted to advance an argument that even if we follow this interpretation of “ultimate,” such fundamental authority is derived from the Puerto Rican Constitution, and thus the Puerto Rican people through the notion of popular sovereignty.⁶⁰ Although the Court accepted the notion of popular sovereignty, and accepted that Puerto Rico’s authority to prosecute has diverged since the passing of the Puerto Rican Constitution, which prompted them to reconsider this question, the Court held steadfast to their original illustration. In the eyes of the Supreme Court, so long as there is a common point, any subsequent divergence will not affect such “ultimate authority.”⁶¹

The argument advanced by petitioner to dispute this point attempted to conform with the formalist test the Supreme Court

⁵⁴ See *Heath v. Alabama*, 474 U.S. 82, 89–90 (1985) (exemplifying the inquiry into prosecutorial authority post-*Bartkus*).

⁵⁵ *Ultimate*, CAMBRIDGE ACADEMIC CONTENT DICTIONARY (2008).

⁵⁶ *Sanchez Valle*, 136 S. Ct. at 1871.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *id.* at 1873.

⁶⁰ Brief for Petitioner-Appellant at 10, *United States v. Puerto Rico*, 136 S. Ct. 1863 (2016) (No. 15-108).

⁶¹ *Sanchez Valle*, 136 S. Ct. at 1871.

has created, while seeking to distinguish Puerto Rico from its history. Although this was a valid litigation strategy, advocating for functionalist reform to this precedent may have been more successful. For example, there are many historical considerations which may help to better explain the sovereignty lineage other than the limited question which the Court has relied upon. However, because the question the Supreme Court asks is formalist based, such considerations are disregarded, lending support to an argument to move away from such a rigid test.

In articulating this position, one could point to the time period in which the Puerto Rican Constitution was passed.⁶² The Court considered this point in *Sanchez Valle*, but determined that because the United States retained approval authority for the Puerto Rican Constitution, the entities are the same sovereign because the “ultimate source of authority” question looks to the “deepest wellsprings” of prosecutorial authority.⁶³ However, despite the emphasis on history throughout the opinion, the Court fails to take into account other reasons why the United States may have retained the approval power other than continuing U.S. sovereignty, such as communist protection. It is entirely possible that the U.S. retained the power to prevent Puerto Rico from adopting communist-like provisions in their Constitution, which would allow the Soviet Union to exploit a country so close to mainland United States. This is supported through historical analysis of the Constitution’s ratification process, because the only provision Congress forced Puerto Rico to change before ratifying the document was removing provisions allocating for social welfare, and barring the country from introducing provisions which have the same effect after the Constitution was approved.⁶⁴

While the Court will likely say, regardless of the reason for retaining authority, the source is still the same because we do not take into consideration any other influences, switching to a functionalist approach would look at the purpose of the authorization of the Puerto Rican Constitution in deciding the same or separate sovereign question.⁶⁵ As a result, the Court may

⁶² See U.S. HOUSE OF REPRESENTATIVES, *supra* note 37 (noting that the Puerto Rican Constitution was authorized and approved in the 1950’s).

⁶³ *Sanchez Valle*, 136 S. Ct. at 1871.

⁶⁴ *Id.* at 1868–69.

⁶⁵ See Mermin, *supra* note 16, at 85, 87 (explaining the concerns underlying functionalist theory).

have come to a different conclusion regarding the ultimate source of authority for Puerto Rico, and in deciding this question may have found the *Bartkus* exception to apply.

*B. Second Rationale: Puerto Rico Did Not have Inherent
Sovereignty Prior to the Establishment of the United States
Federal Government*

A second reason the Court decided that Puerto Rico's ultimate source of authority is the United States is because Puerto Rico did not enter relations with the United States as a territory with its sovereignty intact.⁶⁶ Thus, unlike states and tribal nations which had independent prosecutorial authority prior to the existence of the United States Federal government, Puerto Rico does not have the same inherent sovereignty required to be its own "source of authority."⁶⁷ This is the basis for why the United States Supreme Court argued that Puerto Rico is different from states and tribal nations and is a second point on which the United States Supreme Court decided that Puerto Rico would not be included in the *Bartkus* exception.

Initially, the United States Supreme Court distinguishes tribal nations from territories such as Puerto Rico on the basis that tribal nations had inherent sovereignty pre-dating the establishment of the Federal government.⁶⁸ While there is nothing to dispute regarding such initial power, the Court noted that tribal nations later became "domestic dependent nations" which are subject to limited plenary control by the United States Congress.⁶⁹ Additionally, the Court states, "Congress has plenary authority to limit, modify, or eliminate the tribes' powers of local self-government . . . [b]ut unless and until Congress withdraws a tribal power — including such power to prosecute — the Indian community retains that authority in its earliest form."⁷⁰

The reasoning the Supreme Court gave in distinguishing Puerto Rico from tribal nations, who the Court has consistently recognized as a separate sovereign, is in error. Using the Supreme Court's own parallel and converging lines illustration from above, tribal nations should also be regarded as converging lines, as their

⁶⁶ *Sanchez Valle*, 136 S. Ct. at 1873.

⁶⁷ *Id.* at 1871, 1872–73.

⁶⁸ *Id.* at 1872.

⁶⁹ *Id.*

⁷⁰ *Id.*

prosecutorial power has since converged with the United States.⁷¹ The only difference between tribal nations and Puerto Rico is the point of convergence. In regards to tribal nations, the point of convergence of authority to prosecute came after the independent sovereignty of the community, when the nations became “domestic dependent nations” subject to plenary control by Congress.⁷² In regards to Puerto Rico, the convergence came from the initial territorial acquisition of Puerto Rico by the United States, of which Congressional power was extended.⁷³ In its most basic structure, the conclusion reached by the Court conveys that because tribal nations were in existence before the United States was established (which gives them pre-existing prosecutorial authority), and regardless of the fact that such inherent sovereignty was subsequently forfeited and conferred to the United States, until an action is taken to limit the power, the tribal nations will retain such power to prosecute.⁷⁴ Allowing tribal nations prosecutorial authority to converge with the United States government while keeping their separate sovereign status, but disallowing Puerto Rico separate sovereign status creates a double standard, since both entities are in the same converging position. While it may not be possible to remove separate sovereign status from tribal nations, as this would take away prosecutorial power that these communities have relied on for decades, the same status should be given to Puerto Rico. Again, the Court rejects this suggestion by clinging to its aforementioned test.⁷⁵ Because Puerto Rico converged with the United States after its founding, but the tribes converged before, they are different. Although the Court is free to decide this way, limiting the question to only prosecutorial authority pre-dating the foundation of the U.S. Federal government presents an internal conflict when the Supreme Court seeks to distinguish states from Puerto Rico.

Moreover, the Court’s initial comments on the difference between Puerto Rico and the states echoes the same pre-existing rationale as with the tribal nations. The Court asserts that “[p]rior to forming the Union, the States possessed ‘separate and

⁷¹ *See id.* (discussing the relinquishment of control by tribal nations, thus converging with the United States).

⁷² *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016).

⁷³ *Id.* at 1873.

⁷⁴ *See id.* at 1872 (discussing the plenary control of tribal nations and tribal nations separate sovereign status).

⁷⁵ *Id.* at 1874.

independent sources of power and authority,' which they continue to draw upon in enacting and enforcing criminal laws."⁷⁶ While it cannot be argued that Puerto Rico was autonomous prior to United States control,⁷⁷ the Supreme Court is placing so much emphasis on whether the entity had sovereignty intact prior to the existence of Congress, that they are misremembering the origination and fundamental principles of how the United States was established. If the question is truly whether there is pre-existing independent prosecutorial authority, then shouldn't only some states have such ultimate power? The United States Supreme Court has never held this way. Instead, this opinion adds to a piecemeal framework, carving out exceptions for states other than the thirteen original colonies.

Under the Court's formalist theory, the thirteen colonies may not have inherent sovereignty, as they were a colony of England originally and whether there is such "inherent sovereignty" would depend on how far back the Court feels the questioning should go.⁷⁸ Nevertheless, when the colonies became independent, they *gained* inherent sovereignty, by creating their own Constitution, allowing the authority to create laws to emanate from the people.⁷⁹ This established the thirteen colonies independent prosecutorial authority, eventually allowing the Court to conclude that states are separate sovereigns from the United States Federal government, allowing Double Jeopardy to not apply via the *Bartkus* exception. Additionally, once the thirteen colonies were created and the Federal government was established, by the United States Supreme Court's own reasoning, anything founded after this point would not have the ability to be a separate sovereign as the entity's power to prosecute could not possibly pre-date the U.S. Federal government. Because the United States has more states than the original thirteen colonies, only the pre-existing regions would be separate sovereigns and the remaining thirty-seven states would be same sovereigns with the United States.

Clearly, this presents a logistical nightmare. It would be

⁷⁶ *Id.* at 1871.

⁷⁷ *Id.* at 1868.

⁷⁸ See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting) (noting that the question of source does not go all the way back to William the Conqueror for the Federal Government, but just to the point where the entity can have said to become "sovereign," which for the Federal Government, was the point at which the Constitution took effect).

⁷⁹ Brief for Petitioner-Appellant, *supra* note 60 at 11, 19.

impossible for our courts to function if Double Jeopardy only applied to limit subsequent prosecutions in thirty-seven of our fifty states. Thus, the Court had to carve out an exception for the remainder of the states to also have separate sovereign status, and for Double Jeopardy not to apply to the entirety. In response, the Court decided that the thirteen original states acted as representatives of all future states when they pre-dated the Federal government, giving every state, even if not actually founded prior to the establishment of the Federal government, separate sovereign status and allowing Double Jeopardy to not apply.⁸⁰

Creating this exception demonstrates the United States Supreme Court's unwillingness to look beyond words. Puerto Rico has taken the same path as the thirteen colonies, simply after the establishment of the U.S. Federal government. When Puerto Rico created their Constitution in 1952, they *gained* sovereignty, just like the U.S. colonies, vesting such authority to create and enforce laws with the people of Puerto Rico.⁸¹ Using the Supreme Court's reasoning in regards to the thirteen original colonies, this same attainment of prosecutorial power post-colonization should establish inherent sovereignty, allowing Puerto Rico to be the "ultimate source of authority" for itself and rendering the question of Double Jeopardy moot. Even if this is not convincing, Puerto Rico can also be viewed as being in the same position as one of the thirty-seven subsequently added states. All of these entities did not pre-date the existence of the Federal government, but one word, "state," separates the status of each. While there may not be as many procedural concerns as the thirty-seven states, Puerto Rico is robbed of its ability to seek justice for its own citizens based on the lack of the word "state" in its title, further demonstrating the pitfalls of the formalist approach.

Under a functionalist approach, the entire idea of inherent sovereignty would be discarded mainly for its lack of utility. Based on the above formalist reasoning, with the exception of truly indigenous populations who have never relinquished control to the United States, every type of entity's inherent sovereignty could be questioned which may result in congestion of the court since with every entity, there would need to be a new analysis of that nation's

⁸⁰ *Id.* at 71 n.6.

⁸¹ *Id.* at 72.

sovereignty.⁸² While the Supreme Court has articulated a bright line rule to aid in reduction of any possible case-by-case analysis, the rule they have chosen relies on whether the United States was in existence at the time of the creation of the entity's prosecutorial power. If so, Double Jeopardy would apply. If not, Double Jeopardy would not apply. This certainly includes a broader range of nations than intended, and thus, is not an effective solution.

C. Third Rationale: Puerto Rico Is the Immediate Authority, But It Is Not the Ultimate Authority

A final rationale the Court advances in holding that Puerto Rico is not a separate sovereign relates back to the idea of ultimate authority, but evokes different considerations as the Court responded to the petitioner's argument that the Puerto Rican Constitution was such a profound and transformative event that the Court must reconsider separate sovereignty. In its response, the Court held consistent with its prior decision, that even though Puerto Rico may be the immediate authority for the laws of their country, they are not the ultimate authority.⁸³ The Court concluded the same way as it did in its first look, recognizing a divergence in the prosecutorial power, without discrediting the current authority of the Puerto Rican government to enforce criminal laws.

Although this result may not seem generally problematic, if the "source of authority" approach is followed as strictly as the Court applies it in the case at hand, any Puerto Rican defendant will be trapped by ultimate U.S. power until and unless a new constitution emanating from their own nation is created. While in this case the shorter sentence allowed by the U.S. federal charges benefitted the criminal defendant, in other situations, the same result may not be achieved.⁸⁴ Additionally, territories are barred from making a constitution without the approval of Congress, which according to the interpretation of "ultimate" adhered to by the Supreme Court, would again make Puerto Rico a same sovereign because the Federal government retains approval authority, just as the initial Puerto Rican Constitution did.⁸⁵ As a result, we have put Puerto

⁸² Is there truly a nation that would fit within this category?

⁸³ *Sanchez Valle*, 136 S. Ct. at 1875.

⁸⁴ *See* *People of Puerto Rico v. Sanchez Valle*, 2015 TSPR 25, 192 D.P.R. 594, 598–99 (2015).

⁸⁵ *Sanchez Valle*, 136 S. Ct. at 1881–82 (Breyer, J., dissenting).

Rico in a catch twenty-two, where they cannot make a new constitution without congressional approval⁸⁶, but in order to be recognized as a separate sovereign for the purposes of Double Jeopardy, they must make one.

Unless the approach the Supreme Court uses is changed, Puerto Rico only has two options for becoming a separate sovereign: (1) declaring independence, which they will not do since Puerto Rican citizens already are citizens and get important protections from the United States, or (2) becoming a state, which is unlikely since Puerto Rico wishes to remain autonomous. Applying a functionalist rule would take into consideration the impracticality of such a result, and would free Puerto Rico from its dire situation.

In a footnote of the opinion, Justice Kagan notes that the reasons for adopting the formalist “source of authority” approach to the dual sovereignty doctrine have never been explained.⁸⁷ Additionally, Kagan notes that the formalist approach “may appear counterintuitive, even legalistic, as compared to an inquiry focused on a governmental entity’s functional autonomy.”⁸⁸ This statement seems to suggest the Court is understanding of the flaws of the current approach, although the comments do suggest that a functional approach also has its flaws. While the Court points out that application of the functional approach “would require deciding exactly how much autonomy is sufficient for separate sovereignty and whether a given entity’s level of self-rule exceeds that level” producing uncertainty and inconsistency in Double Jeopardy case law, such a rule would allow for a more thorough analysis of the nation’s sovereignty, which would decrease the level of uncertainty suggested.⁸⁹ Nations themselves have an understanding of their level of their historical reliance on the United States Federal government and would be able to generally determine whether their self-governance reaches the level decided upon by the Supreme Court. Only in narrow situations would the level of sovereignty be questioned, which only helps to clarify the standard

⁸⁶ See *Sanchez Valle*, 136 S. Ct. at 1869 (Also, note that Puerto Rico does not have a full voting representative in Congress which may make it even harder to get a new Constitution passed.). See also Luis Gallardo, *Analysis of Puerto Rico’s Potential Federal Representation*, THE HILL (July 31, 2015), <http://thehill.com/blogs/congress-blog/249855-analysis-of-puerto-ricos-potential-federal-representation>.

⁸⁷ *Sanchez Valle*, 136 S. Ct. at 1871 n. 3.

⁸⁸ *Id.*

⁸⁹ *Id.*

set. While this may require additional work by the Supreme Court initially to set the criteria, Double Jeopardy is both a defendant protective principle, and a privilege conferred on nations as an exercise of governmental power ensuring dignity for victims of crimes.⁹⁰ Under our current system, Puerto Rico is robbed of one of these aims.

III. THE EFFECT OF THIS DECISION

Until an overhaul of the ultimate source of authority test is complete, dual sovereignty case law will be flawed. As mentioned above, because this test is critical in extending the *Bartkus* exception to new entities, many territories will be trapped in the status quo although their nations have undergone profound growth, since not even colonial independence and the subsequent passing of a democratic constitution was enough for the Supreme Court to declare Puerto Rico a separate sovereign.⁹¹ Because of this oversight, Puerto Rico will be affected by this decision in three large ways.

A. *Forum Shopping*

First, this decision will encourage criminal defendants in Puerto Rico to forum shop, just as the plaintiffs in this case had the opportunity to do. Whether intentional or not in the case at hand, good lawyering by Puerto Rican attorneys can result in drastic differences in the time of incarceration or even options for parole. As an example, in *Sanchez Valle*, Puerto Rican law would have sentenced the criminal defendants to no less than five years for their actions of carrying and selling a weapon without licensure.⁹² This number could even be increased up to twenty years based on aggravating circumstances.⁹³ However, because the U.S. Federal courts initiated plea deals with the defendants before the Puerto Rican court system had the ability to try the criminals, one of the

⁹⁰ See Devika Agrawal, *The Impulse to Punish: A Critique of Retributive Justice* 12–13, 15 (Apr. 24, 2015) (unpublished B.A. Thesis, Scripps College) (on file with institution) (discussing the principles of retributive justice underlying the U.S. criminal justice system, and noting that punishment as repayment to society is a key element of this theory). (Because Double Jeopardy takes away Puerto Rico's ability to prosecute, its ability to seek repayment for its citizens is lessened.).

⁹¹ See *Sanchez Valle*, 136 S. Ct. at 1876–77.

⁹² Puerto Rico Weapons Act, P.R. LAWS ANN. tit. 25, § 458c (2008).

⁹³ *Id.*

criminal defendants was sentenced to five months' imprisonment, followed by five months' house arrest and three years supervised release and the other to 18 months' imprisonment, followed by three years of supervised release.⁹⁴ Thus, the ability to forum shop enabled these criminal defendants to be released from any supervision approximately one year earlier than a counterpart who only violated Puerto Rican law in their criminal endeavors. As noted by this example, the increased ability to forum shop will not be available to all criminal defendants, only those who commit a crime that violates both U.S. Federal and Puerto Rican law. The criminal defendants who meet that criteria can then search for the venue which has the lesser punishment and plead guilty to those charges before the other court system has the ability or opportunity to prosecute. Ignoring for a moment the fact that forum shopping is sought to be avoided, why should the criminal defendants who commit the most impactful crimes have the advantage of reduced sentencing that forum shopping often provides?

B. Discounts Dignity and Promotes Injustice

Secondly, this decision discounts the dignity of the Puerto Rican population, who may be robbed of their ability to seek justice for their own citizens if lesser sentences are agreed upon by wholly foreign judiciaries. By concluding that Puerto Rico and the United States are the same sovereign, it is essentially presumed that Puerto Rican citizens and U.S. citizens have the same interest in punishing individuals in every situation where an individual violates both U.S. Federal and Puerto Rican law. While there may be a similar interest in some cases, in this case, defendants were charged with selling guns to an undercover police officer in violation of the Puerto Rico Weapons Act.⁹⁵ The purpose of enacting this law was to regulate the use and sale of certain firearms in Puerto Rico, by Puerto Rican individuals as a matter of safety.⁹⁶ Because the goal of this legislation is to protect Puerto Rican citizens from unregistered guns, it is evident that the interests of Puerto Rican citizens are superior and thus different

⁹⁴ *People of Puerto Rico v. Sanchez Valle*, 2015 TSPR 25, 192 D.P.R. 594, 588–89 (2015).

⁹⁵ *See* Puerto Rico Weapons Act, P.R. LAWS ANN. tit. 25, § 458c (2008). *See also Sanchez Valle*, 2015 TSPR 25, 598 (2015).

⁹⁶ *See* S.B. 1756, 16th Leg. Assemb., 2d Spec. Sess. (P.R. 2012).

to any interest by the United States, whose primary objective in this case stems from interstate commerce. Despite this difference, adequate repayment for a violation of law is no longer guaranteed to Puerto Ricans as a result of this ruling. Because of the importance of both concerns to fundamental legal principles, the Supreme Court should reconsider the decision rendered in this case in future case law as subtly implied by Justice Ginsburg in her *Sanchez Valle* concurrence.⁹⁷

C. *Impact on Overall Sovereignty of the Nation*

Third, in addition to the impact this ruling has on the day-to-day operations of criminal defendants in the Puerto Rican court system, this decision also has a profound influence on the overall notion of sovereignty in Puerto Rico. Not only does this decision affect the Double Jeopardy Clause, but this decision may also affect areas of law and other issues plaguing the country, such as the looming debt crisis.⁹⁸ While in *Sanchez Valle*, the Supreme Court steered clear of Congress's ability to deny the island debt-relief and other larger constitutional issues revolving around the island's sovereignty, the Courts willingness to grant certiorari to analyze one parameter of Congressional power over Puerto Rico may evidence the Court's willingness to review the entire power structure and potentially undo the existing framework.⁹⁹ In addition, the relatively inconsistent results recently decided case law has produced may force the Supreme Court to reconsider these issues in deciding the future of Puerto Rican sovereignty once and for all.

For example, in *Puerto Rico v. Franklin California Tax-Free Trust*,¹⁰⁰ decided in June 2016 the U.S. Supreme Court struck down a bankruptcy law that would allow Puerto Rico to restructure

⁹⁷ See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016) (Ginsberg, J., dissenting) (noting that the "current separate sovereign doctrine" undermines a fundamental principle of Double Jeopardy and should be reconsidered).

⁹⁸ See Mary Williams Walsh & Liz Moyer, *How Puerto Rico Debt [sic] is Grappling with a Debt Crisis*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html> (last updated July 1, 2016).

⁹⁹ Mark Joseph Stern, *The Supreme Court Deals a Blow to Puerto Rican Sovereignty*, SLATE (June 9, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/06/the_supreme_court_s_blow_to_puerto_rican_sovereignty.html.

¹⁰⁰ *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016).

some of the debt coming from its public utility companies.¹⁰¹ While Chapter 9 specifically excludes Puerto Rico, disallowing the restructuring of debt of public utility companies under U.S. bankruptcy law, Puerto Rico passed a similar law that would function in the same manner as Chapter 9 and would allow Puerto Rico to restructure the debt how they anticipated under Chapter 9.¹⁰² This was the provision that was struck down by the Court in *Franklin California Tax Free Trust* as it conflicted with U.S. federal law, and circumvented Congress's exclusive power to enact bankruptcy laws.¹⁰³ Surprisingly, Justice Thomas wrote the majority opinion in this case, finding the language of the federal law straightforward under a formalist theory, although he and Justice Ginsberg concurred in *Sanchez Valle*, where they subtly hinted that the entire dual sovereignty framework could be scrapped using functionalist reasoning.¹⁰⁴ Despite the Justice's contradictory leanings, the *Sanchez Valle* case could breathe new life into the movement for Puerto Rican autonomy. Decided just four days apart, *Sanchez Valle* and *Franklin California Tax Free Trust* come to different, even slightly inconsistent conclusions about the future sovereignty and autonomy of Puerto Rico.¹⁰⁵ Eventually, the Supreme Court will be forced to remedy the two opinions. With any luck, this will lead to an overhaul of Puerto Rico's sovereignty framework, something which should have been done in *Sanchez Valle*.

IV. CONCLUSION

As demonstrated above, the dual sovereignty doctrine must be discarded in favor of a more uniform and just policy. Using functionalist theory when analyzing cases will aid in amending these principles, as this will allow the Court to focus on the outcome of the cases rather than the words of the laws themselves. This change in focus will alleviate some of the injustice rendered

¹⁰¹ See *id.* at 1942 (discussing Puerto Rico's characterization as a state for the purposes of federal pre-emption. Surprisingly, it is a state in this context).

¹⁰² *Id.* at 1942–43.

¹⁰³ See *id.* at 1946–47.

¹⁰⁴ See *id.* at 1946 (noting “the plain text of the Bankruptcy Code begins and ends our analysis,” evidencing Justice Thomas's use of formalist reasoning). See also *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsberg, J., dissenting) (noting that the underlying separate sovereign framework is faulty).

¹⁰⁵ See *Sanchez Valle*, 136 S. Ct. at 1863 (decided on June 9, 2016). See also *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1938 (decided June 13, 2016).

as a result of this decision, as well as, rectify some of the inconsistencies in dual sovereignty case law if another jurisdiction were to challenge the separate sovereign status of their jurisdiction. In addition, future case law relying on this decision will likely bring to light the unpredictability of the dual sovereignty doctrine, as the Supreme Court in *Sanchez Valle* found a way to tweak Puerto Rican, American and tribal history in order to fit the existing doctrine instead of fixing the framework itself. Although no one was physically or financially injured as a result of this case, in future cases, this is not a guarantee. The same concerns that stem from *Sanchez Valle*, namely an increased ability to forum shop and deprivation of adequate justice for Puerto Rican citizens, may be amplified when greater harm is at stake. *Sanchez Valle* was incorrectly decided and must be amended for the future of Puerto Rico.