

**STATE-NATIONS, THE LEGITIMACY-LEGALITY CONSTITUTIONAL
CONUNDRUM, AND SUB-STATE PARTY SYSTEM REALIGNMENTS:
CATALONIA AND PUERTO RICO (2005-2018)**

ARTICLE

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I. THE LEGITIMACY-LEGALITY CONSTITUTIONAL CONUNDRUM

MOST FORMULATIONS OF THE LEGITIMACY-LEGALITY CONSTITUTIONAL conundrum are based on the observation that at times there can be a collision between constituent power¹ and constitutional form,² or a clash between politics and law, or between democracy and constitutionalism.³ Such a collision can lead to a clash of legitimacies between an established constitutional form and the constituent power represented by the democratic will of a people in a well-defined territory. Moreover, modern constitutions often aim not only to establish a form of governmental authority, but also to “reconstitute the people in a particular way. The notion of a *constitutional* identity⁴ of a people, and particularly its relation to the *constituent* power possessed by the people, is perplexing.”⁵ There is the suggestion, in the first place, that to the degree that there are *natural* units of *peoples*, constitutional texts can reshape and mold these *natural* boundaries between *peoples*.⁶ Political identities can thus be *constitutionalized*, given that there is some space for malleability and fluidity, but, conversely, constitutional form itself is not unchallengeable.⁷

States enact constitutions, but we argue that the resulting constitutional form is not a sacralized text impervious to evolving societal norms or to identities, affiliations, and loyalties that reflect the sociological and national reality of the *demos* (or *demosi*) in the state. Specifically, in complex multinational polities:

[I]f the *influence* of constitutional form lies in its ability to refine the meaning and import of collective political identity, its *authority* must nevertheless in some measure depend upon its continuing capacity faithfully to reflect that collective

¹ Referring to the democratic power of a people to establish their collective constitutional structure and narrative. See Martin Loughlin & Neil Walker, *Introduction, at THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 1* (Martin Loughlin & Neil Walker eds., 2007).

² Referring to the actual constitutional structure established after the people have expressed their will. *Id.*

³

Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the ‘consent of the people’ and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. . . . This indicates what, in its most elementary formulation, might be called the *paradox of constitutionalism*.

Id. (emphasis added).

⁴ Referring to the observation that a constitution is the projection of the identity of the underlying *demos* (or *demosi*) that has exercised its constituent power, or at times can reconstitute such *demos* (or *demosi*). *Id.* at 1-2.

⁵ *Id.* at 1.

⁶ *Id.* at 1-2.

⁷ *Id.* at 2.

political identity. The formal constitution that establishes unconditional authority, therefore, must always remain provisional. The legal norm remains subject to the political exception, which is an expression of the constituent power of a people to make, and therefore also to break, the constituted authority of the state.⁸

Constitutions of modern times are developed as a result of a singular founding act,⁹ usually a Constitutional Convention or Constituent Assembly. The act serves to define the institutional parameters of a new polity and the rules for coexistence.¹⁰ But who is the *people* that authorized this founding moment, acting under what authority? That is:

Does that founding authority extend through time to bind subsequent generations? Does the authorizing agent manifest itself only for the purpose of a foundational act and, its business concluded, extinguish itself? Or does that agent maintain a continuing presence within the polity, such that it may reassert itself to modify, or radically alter, the terms of the original foundation?¹¹

At first glance, one possible interpretation is that the constituent power of the people would seem to be circumscribed by the constituted power of the governmental form. But established constitutional forms may also be challenged and questioned:

It is in coming to terms with these realities of power in modern societies that constituent power insinuates itself into the discourse of constitutionalism, whether in the form of oppositional politics in their various guises and the (counter) constitutional visions they implicitly or explicitly espouse or, more generally, by ensuring that the intrinsic tension between the abstract rationalities of constitutional design and the quotidian rationalities of governing remains exposed.¹²

A. *State-Nations and the Legitimacy-Legality Constitutional Conundrum*

The world today is parceled into 195 states. While these states are presumed to have authority over the population in their territory, we often find that this power is not accompanied by a “we-feeling” as members of a single nation. Most states were not created by a singular nation but were instead born as a result of rulers successfully imposing themselves, often by wars, military conquests, colonial acquisitions, partitions, and other conflicts. Thus, most contemporary “nation-states” were created by existing powers. “For too long, the normatively privileged model for a modern state has been the nation-state.”¹³ However, in some

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 4.

¹³ ALFRED STEPAN *ET AL.*, CRAFTING STATE-NATIONS: INDIA AND OTHER MULTINATIONAL DEMOCRACIES xi-xii (2011).

states more than one sub-state group thinks of itself as a nation and asserts a right to self-determination. Such states are “robustly politically multinational.”¹⁴ The complexity of contemporary multinational polities requires us to imagine alternatives to the nation-state model. The major alternative is the state-nation model theorized by Alfred Stepan, Juan J. Linz, and Yogendra Yadav.¹⁵ We need to develop the constitutional framework for state-nations as an alternative to the statist logic of the traditional nation-state in part because “one of the major theoretical and political problems of our time was to conceptualize and realize political arrangements whereby deeply diverse cultures, even different ‘nations,’ can peacefully and democratically coexist within one state.”¹⁶

Nation-state policies stand for a constitutional-institutional approach that in veritable Gellnerian fashion purports to match the cultural/national unit with a corresponding state. The creation of nation-states often involves the imposition of one cultural/national unit over other potential or actual cultural/national units. Nation-state policies have been pursued historically:

(1) [B]y creating or arousing a special kind of allegiance or common cultural identity among those living in a state; (2) by encouraging the voluntary assimilation of those who do not share that initial allegiance of cultural identity into the nation state’s identity; (3) by using various forms of social pressure and coercion to achieve this and to prevent the emergence of alternative cultural identities or to erode them, should they exist; and (4) by resorting to coercion that might, in the extreme, involve ethnic cleansing.¹⁷

On the other hand, state-nation policies represent a political-institutional approach that promotes and respects multiple but complementary cultural/linguistic/national identities. The policies of a State-nation:

[R]ecognize the legitimate public and even political expression of active sociocultural cleavages, and they include mechanisms to accommodate competing or conflicting claims made on behalf of those divisions without imposing or privileging in a discriminatory way, any one claim. State-nation policies involve crafting a sense of belonging (or “we-feeling”) with respect to the state-wide political community, while simultaneously creating institutional safeguards for respecting and protecting politically salient sociocultural diversities.¹⁸

Successful state-nations have developed with these political contours: (1) despite multiple cultural identities, there will be a degree of positive identification with the state; (2) the citizens will have multiple but complementary political

¹⁴ *Id.* at xii.

¹⁵ *Id.*

¹⁶ *Id.* at xvi.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 4-5.

identities, affiliations, and loyalties; and (3) a high level of institutional trust in the key constitutional and legal structures of the state.

If we consider eleven of the world's most durable federations, Switzerland, Canada, Belgium, Spain, and India are essentially state-nations, while Germany, Austria, the United States, Australia, Argentina, and Brazil are closer to the nation-state model.¹⁹ State-nations such as the former are characterized by a “nested policy grammar” that includes: an asymmetrical federal state, individual rights and collective recognition of group rights, a parliamentary instead of a presidential or semi-presidential system, state-wide “centric-regional” political parties, predominance of autonomist or federalist sub-state nationalists, and widespread multiple but complementary identities.²⁰

Contemporary multinational democracies such as Canada, Spain, Belgium, and India are all state-nations. In the context of the social and political peculiarities of state-nations, we argue that the complexity of these polities adds an additional level of intricacy to the contemporary debates concerning the relationship between constituent power and constitutional form. Contemporary state-nations is the universe of cases covered by the scope conditions of this article.

State-nations are often multinational, and the dominant constitutional and political view of sub-state national societies in them—such as Scotland, Quebec, the Basque Country, Catalonia, Puerto Rico, Northern Ireland, South Tyrol, etc.—challenges contemporary assumptions about the nation-state, namely, the “monistic demos” thesis. That is, the traditional assumptions of contemporary republican theory are disputed in these sub-state national societies: the notion of a “monistic conception of the nation as the embodiment of a unified demos”²¹ is rejected. In contemporary state-nations, there is a distinctive historiographical account of the state's origins: there is a “conceptualization of this founding moment as a union of pre-existing peoples subsequent to which sub-state national societies within the state continued to develop as discrete *demos*.”²² Thus, sub-state nationalists present “particular challenges to constitutional form which do not generally arise in *uninational* states.”²³

These debates about the relationship between constituent power and constitutional form matter, especially in state-nations, because “the challenge posed by

¹⁹ *Id.* at xii.

²⁰ *Id.* at 18-22.

²¹ Jaime Lluch, *Varieties of Territorial Pluralism: Prospects for the Constitutional and Political accommodation of Puerto Rico in the USA*, in CONSTITUTIONALISM AND THE POLITICS OF ACCOMMODATION IN MULTINATIONAL DEMOCRACIES 21 (Jaime Lluch ed., 2014) (footnote omitted) (citing Stephen Tierney, *We the Peoples: Constituent Power and Constitutionalism in Plurinational States*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 232 (Martin Loughlin & Neil Walker eds., 2007)); Neil Walker, *Taking Constitutionalism Beyond the State*, 56 POL. STUD. 519, 521 (2008).

²² Stephen Tierney, *We the Peoples: Constituent Power and Constitutionalism in Plurinational States*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 232 (Martin Loughlin & Neil Walker eds., 2007).

²³ *Id.* at 236 (emphasis added).

sub-state national societies to the central state has been . . . formulated in three varieties of sub-state nationalism: independentist, autonomist, and pro-federation nationalism.²⁴ In other words, sub-state national movements tend to bifurcate or, at times, trifurcate, into two or three basic political orientations: independence,²⁵ autonomy,²⁶ and, oftentimes, pro-federation.²⁷ While independentist nationalism remains a vital force in societies such as Catalonia and Scotland, for example, other orientations within such sub-state national movements seek an autonomous special status or seek greater power as a constituent unit of a fully formed federation.

State-nations in particular may require that the state be willing to display innovative forms of constitutional accommodation and territorial pluralism. The trend towards accommodation within the state has led to the rethinking and reformulation of increasingly complex constitutional models of accommodation within existing states. The search for these sophisticated institutional designs of mutual accommodation may—as a matter of fact—pose a more radical challenge to the state and its constitutional self-understanding than secession itself. Such demands could question many of the Constitution’s most profound precepts, including the concept of unitary citizenship which has been an article of faith for

²⁴ Lluch, *supra* note 21, at 1 (citations omitted).

²⁵ Independence is the realization of full political sovereignty for a nation. For stateless nations, it is the attainment of separate statehood, independent from the majority nation with which they have coexisted within the same state for some time. Also, proposals for Sovereignty-Association and Associated Statehood are variants of the independence option.

²⁶ See SUSAN J. HENDERS, TERRITORIALITY, ASYMMETRY, AND AUTONOMY: CATALONIA, CORSICA, HONG KONG AND TIBET 12-13 (2010) (Autonomy proposals are political arrangements that generally renounce independence—at least for the medium to short-term—but which seek to promote the self-government of a territorial unit populated by a polity with national characteristics). Contemporary instances of actually-existing autonomy relationships include: Åland Islands/Finland, Puerto Rico/USA, etc. Most cases of actually-existing autonomy arrangements can be clearly distinguished from classic *federations*. See Hans-Joachim Heintze, *On the Legal Understanding of Autonomy*, in AUTONOMY: APPLICATIONS AND IMPLICATIONS 25 (Markku Suksi ed., 1998) (Generally speaking, “autonomy is always a fragmented order, whereas a constituent [unit of a federation] is always part of a whole. . . . The ties in a [federation] are always stronger than those in an autonomy.”) (omitted footnotes). Autonomist parties seek a special status and special powers within a defined geographical territory, but one that does not constitute a constituent unit of a classic federation.

²⁷ Pro-federation nationalists seek to have their nation remain (or become) a:

[C]onstituent unit of classic *federations*, which constitute a particular species within the *genus* of “federal political systems,” wherein neither the federal nor the constituent units’ governments (cantons, provinces, länder, etc.) are constitutionally subordinate to the other, i.e., each has sovereign powers derived directly from the constitution rather than any other level of government, each is given the power to relate directly with its citizens in the exercise of its legislative, executive and taxing competences, and each is elected directly by its citizens.

state-building mechanisms.²⁸ Autonomism and pro-federation sub-state nationalisms may question central tenets of the constitutional ideology of the central state, and may lead to the development of a *metaconstitutional* discourse—using Neil Walker’s term—that challenges the State’s traditional constitutional discourse. All of this leads to a rethinking of the possibilities for evolution and development of new models of constitutional accommodation in state-nations. To encourage such accommodation, it would be best to minimize the tension between constituent power and constitutional form, especially in constitutional disputes between the central state and the governments of sub-state national societies.

B. *Research Design*

In this article, we seek to go beyond the interesting observation by constitutional theorists²⁹ that the paradox of constitutionalism is one of the great conundrums of contemporary constitution-making and to show how politics and law actually interact in a number of concrete situations in multinational polities. I will show how the clash between constituent power and constitutional form can have an important effect on politics, and, thus, how constitutionalism can have an effect on the development and evolution of sub-state nationalism, and conversely, how sub-state nationalism can mobilize itself with the aim of impacting constitutionalism. There is a mutual interaction between law and politics, and the best method we can use to account for this interaction is to integrate comparative politics and comparative constitutional law.

My research design in this article uses a *most different systems design* (onwards, “M.D.S.D.”) to compare the effect of constitutional moments that embody the legitimacy-legality conundrum on sub-state politics in Catalonia and Puerto Rico in the recent period (2005-2018). In a M.D.S.D., researchers choose cases that are different for all variables that are not central to the study but similar for those that are. “Doing so emphasizes the significance of the independent variables that are similar in both cases to the similar readings on the dependent variable.”³⁰ Puerto Rico and Catalonia are different in almost every conceivable sense: different historical trajectories, demographics, patterns of socio-economic development, length of liberal democratic experience, size, location, type of central state, etc. They are also different in the nature of their respective central states: Spain is a quasi-federal system that is essentially a state-nation while the United States is a federation that is much closer to the nation-state model. We argue that, although it is not widely recognized, given that Puerto Rico is part of the federal

²⁸ See Tierney, *supra* note 22.

²⁹ Sujit Choudhry, *Bridging comparative politics and comparative constitutional law: Constitutional Design in divided societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 3-40 (Sujit Choudhry ed., 2008); See Walker, *supra* note 21; Tierney, *supra* note 22.

³⁰ RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 253-54 (2014).

political system (distinct from the federation) that is the “United States,”³¹ this turns the United States into a multinational federal political system. Yet, they share the following outcome variable: they are both sub-state national societies and they are part of a much larger state with different national characteristics, and recently in both sub-state national societies their party systems have undergone major changes, which are in fact still ongoing. The thesis of this article is that they also share the same independent variable that explains this outcome variable: it was caused by constitutional moments that reflect the legitimacy-legality conundrum.

During 2012-2018 Puerto Rico has experienced a dramatic constitutional moment in two phases. First, on November 2012 the people expressed themselves in a referendum and clearly expressed their dissatisfaction with the present *status quo*, thus delegitimizing the *Estado Libre Asociado* (onwards, “ELA”). Then, in 2016 a second phase occurred, involving the momentous Supreme Court decision in *Sánchez Valle*³² and Congress’ decision to establish an all-powerful Fiscal Control Board over Puerto Rico,³³ both reaffirmed the nature of the present subordinate constitutional form, which had already been rejected by the Puerto Rican electorate in 2012. Hence, the clash between legitimacy (2012) and legality (2016) in the constitutional moment of 2012-2018, which is still being felt in 2018.

Similarly, during 2006-2018 Spain became a natural experiment for observing the interaction between politics and law, helping us to understand how the clash of legitimacies between constituent power and constitutional form can have a substantial impact on nationalist politics, both at the state level and the sub-state level. Spain is also interesting because in the constitutional standoff between Catalonia and the Spanish state in the period 2006 to date, the tension between constituent power and constitutional form is expressed in two varieties. First, in the clash between an organic statute of autonomy and a constitution (the Catalan Statute of Autonomy of 2006³⁴ versus the interpretation of the Spanish Constitution expressed in the Spanish Constitutional Court decision of June 2010).³⁵ Second, implementation of constitutive referendums, specifically in the form of the current constitutional standoff between the Catalan government (which has been proposing a self-determination referendum in the last few years and finally held one last October 1, 2017) and the Spanish government (which insists that this is

31 RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 12 (3rd ed. 2008).

32 See *Pueblo v. Sánchez Valle*, 192 DPR 594 (2015).

33 Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, §§ 101-109, 201, 130 Stat. 549, 553-65 (2016).

34 Organic Act 6/2006 of the 19th July, on the Reform of the Statute of Autonomy of Catalonia (B.O.E. 2006, 6) (Spain).

35 S.T.C., June 28, 2010 (B.J.C., No. 31, p. 275) (Spain).

not constitutionally permissible).³⁶ The first variety arises out of the conflict between constituent power and constitutional form that is crystallized around a *constitutional moment*. The second arises out of the tension between constituent power and constitutional form that arises in a *constituent moment*. Each of these two varieties of the paradox of constitutionalism has an important effect on sub-state and state nationalisms.

II. CONSTITUTIONAL MOMENTS, PLURINATIONALISM, AND SUB-STATE AND STATE NATIONALISMS

Constitutionalism is a critical element of the politics of mutual accommodation in state-nations. Constitutions establish the very demos that governs itself pursuant to the constitutional framework. They establish a *demos* by formalizing a vision of national groupness with the aim of molding the very self-understanding of citizens, often manifestly visible in “*constitutional moments*.” This is especially evident in state-nations in light of their plurinationalism.³⁷ Plurinationalism implies the coexistence within the same polity of more than one national identity, with all the normative and constitutional implications this carries. Plurinationalism is more than multinationalism: under the former “more than one national identity can pertain to a single group or even an individual, opening up the possibility of multiple nationalities. . . .”³⁸ *Plurinational* intends to express the plurality not merely of nations or imagined communities, but of conceptions of nationhood and nationality themselves.

“Constitutional moments” play a critical role in the process of state formation and majority nation-building by creating institutions with state-wide authority and by reifying images of political community.³⁹ Furthermore:

A constitutional transformative event[, a “constitutional moment,”] is a higher order constitutional event, which impacts the relationship between the central state

³⁶ The pro-independence coalition—that won the elections of last September 27, 2015 and which formed the current government in Catalonia—held a referendum on independence on October 1, 2017. The Spanish government meanwhile continues to insist that this was constitutionally impermissible. The referendum was highly conflictual, with Spanish police impeding the voting process that day, with over 800 electoral colleges intervened. In that rarified environment, the outcome was a landslide in favor of independence. In response to the Catalan government’s subsequent declaration of independence, the central state invoked Article 155 of the Constitution and suspended the Catalan government and called elections on December 21, 2017. The result of that election last December 21 was very similar to the previous election of September 27, 2015: the only coalition that can form a government is the pro-independence coalition.

³⁷ Jaime Lluch, *Introduction*, in CONSTITUTIONALISM AND THE POLITICS OF ACCOMMODATION IN MULTINATIONAL DEMOCRACIES 6-7 (Jaime Lluch ed., 2014) (emphasis added) (citations omitted) (citing Choudhry, *supra* note 29, at 5).

³⁸ MICHAEL KEATING, PLURINATIONAL DEMOCRACY: STATELESS NATIONS IN A POST-SOVEREIGNTY ERA 27 (2004) (citation omitted).

³⁹ JAIME LLUCH, VISIONS OF SOVEREIGNTY: NATIONALISM AND ACCOMMODATION IN MULTINATIONAL DEMOCRACIES 87 (2014) (citing Choudhry, *supra* note 29, at 30).

—largely controlled by the majority nation— and the minority nation embedded within the same state. It is of a higher order than ordinary legislative activity. Such “constitutional moments” are relatively rare, and they represent a critical event that crystallizes the nature of the relationship between the central state and the embedded minority nation. . . . These critical constitutional transformative events include the adoption of a new constitution, the adoption or proposal of significant constitutional amendments, or the adoption or proposal of a new organic statute for the government of the embedded minority nation[, the proposal, organization, or holding of a self-determination referendum for a sub-state territorial unit,] etc.⁴⁰

These critical constitutional moments may be either positive or negative in their final outcome. For example, if we are referring to constitutional amendments, the final outcome may have been either the adoption or rejection of the proposed amendment. What really matters is that the proposed amendment set forth a high level and public discussion of the nature of the plurinational polity.⁴¹

Some constitutional moments are often interpreted by the minority nationalists as an instance of majority-nation nationalism, and, thus, these constitutional events impact the intersubjective relations of reciprocity between minority nationalists and majority-nation nationalism. Importantly, such constitutional moments often dramatize and encapsulate the tension between constituent power and constitutional form, or the tension between democracy and law, in multi-*demoi* polities. They may also lead to a clash of legitimacies between an established constitutional form and the constituent power represented by the democratic will of the people in a well-defined territorial sub-state unit.

Intersubjective relations of reciprocity are essential for understanding the constitutional politics between majority nations and minority nations in state-nations. Indeed, previous research has established:

Substate nationalists inhabit an imagined community that is a “moral polity” [where] reciprocities are expected and notions of collective dignity, the commonwealth, and mutual accommodation are essential. The perception by these sub-state nationalists that their expectations of reciprocity have been violated is a factor that contributes [to radical changes in sub-state] nationalists’ political preferences.⁴²

The recent developments in Spain and in Puerto Rico, especially during 2006-2018, have given us another opportunity to further understand how the clash of legitimacies between constituent power and constitutional form can have a substantial impact on nationalist politics. We will now examine the Spanish case, and will then examine developments in Puerto Rico-USA during 2006-2018.

⁴⁰ *Id.* at 7 (citation omitted).

⁴¹ *Id.* at 34.

⁴² *Id.* at 64.

III. THE CLASH BETWEEN LEGALITY AND LEGITIMACY AND THE CONSTITUTIONAL MOMENT IN SPAIN (2006-2018)⁴³

A. *The Catalan Statute of Autonomy of 2006 and the Spanish Constitution of 1978*

The Spanish territorial model established in the 1978 constitution,⁴⁴ the State of Autonomies,⁴⁵ and the Catalan Statute of Autonomy of 1979⁴⁶ had been unsatisfactory for several years in the eyes of the main political parties in Catalonia, culminating in the effort to reform the Catalan Statute of Autonomy in 2004-2006.⁴⁷ In Catalonia, the major parties during this time period were: *Esquerra Republicana de Catalunya* (onwards, “E.R.C.”), the federation of *Convergència i Unió* (onwards, “C.i.U.”) —consisting of *Convergència Democràtica de Catalunya* (onwards, “C.D.C.”) and *Unió Democràtica de Catalunya* (onwards, “U.D.C.”)— the *Partit dels Socialistes de Catalunya* (onwards, “P.S.C.”), and *Iniciativa per Catalunya-Verds* (onwards, “I.C.-V.”).⁴⁸ The autonomy achieved at the foundational moment of the Spanish constitutional state was closer to the administrative decentralization than to a model of national minorities’ accommodation; thus, national pluralism was not implemented by the State central authorities.⁴⁹ Moreover, autonomy did not ensure the protection of the Catalan language and culture, given the overwhelming presence of Spanish in the public sphere.⁵⁰ Furthermore, in the financial and fiscal sphere, the system established has been perceived as inadequate. There has been:

[A] persistent transfer of resources to the Spanish central government as a ‘solidarity’ contribution with the outcome of a fiscal imbalance with the center of almost 17 billion euro, or 9.8 [percent] of the Catalan GDP. As an average, during more than 30 years of autonomy, for every euro that Catalans paid in taxes, only 57 cents were spent in the region.⁵¹

⁴³ In this Part, I use the analysis that will be appearing in my chapter on *Constitutional Moments and the Paradox of Constitutionalism in Multinational Democracies (Spain, 2006-2017)*, which will be published as a chapter in a forthcoming book edited by Rogers M. Smith, *Constitution-Making* (Philadelphia: University of Pennsylvania Press).

⁴⁴ See CONST. ESP.

⁴⁵ See *id.* art. 147.

⁴⁶ See Statute of Autonomy of Catalonia (B.O.E. 1979, 4) (Spain).

⁴⁷ See Reform of the Statute of Autonomy of Catalonia (B.O.E. 2006, 6).

⁴⁸ These are the Republican Left of Catalonia, Democratic Convergence of Catalonia, Democratic Union of Catalonia, Socialists’ Party of Catalonia, and Initiative for Catalonia-Greens.

⁴⁹ Véase Hèctor López Bofill, *The Limits of Constitutionalism: Politics, Economics, and Secessionism in Catalonia (2006-2013)*, in CONSTITUTIONALISM AND THE POLITICS OF ACCOMMODATION IN MULTINATIONAL DEMOCRACIES (Jaime Lluç ed., 2014).

⁵⁰ *Id.* at 75-76.

⁵¹ *Id.* at 70.

During a number of years, the major Catalan parties had been putting forward proposals to reform the 1979 Statute of Autonomy.⁵² By September 2005, the parties were able to come to an agreement and, in September 2005, a major proposal for the reform of the Catalan Statute of Autonomy was passed by the Catalan Parliament. A total of 120 out of 135 members of Parliament voted for the September 2005 Catalan Statute of Autonomy (onwards, “C.S.A.”), including the representatives of practically all the Catalan parties, except the *Partido Popular* (onwards, “P.P.”).⁵³ The new C.S.A. was a complex document containing a Preamble, a Preliminary Title, and the following seven titles in its final version of 2006:

Title One. Rights, obligations and governing principles (articles fifteen through fifty-four); Title Two. Institutions (articles fifty-five through ninety-four); Title Three. Judicial power in Catalonia (articles ninety-five through 109); Title Four. Powers (articles 110 through 173); Title Five. Institutional relations of the *Generalitat* (articles 174 through 200); Title Six. Funding of the *Generalitat* (articles 201 through 221), and Title Seven. Reform of the *Estatut* (articles 222 through 223).⁵⁴

The new CSA proposal sought: (1) the recognition of Catalonia as a *nation* and to increase the symbolic, linguistic and identity elements of Catalonia within the Spanish State; (2) the protection of the Catalan self-government powers *vis-à-vis* the central government’s constitutional powers; and (3) the improvement of the finance system in order to limit the *solidarity* contribution.⁵⁵

In the quasi-federal system, that is the State of Autonomies, the amendment of an Autonomous Community’s statute of autonomy must be enacted by the Spanish Parliament (*Cortes Generales*) as a Spanish State law (*Ley Orgánica*).⁵⁶ The new C.S.A. of 2005 was amended extensively by both Houses of Parliament (the Congress of Deputies, whose members must approve the Autonomy Statute’s amendment by overall majority, and the Senate). According to one study, 64.7 percent of the articles in the proposal that came out of the Catalan Parliament in September 2005 were amended by the Spanish Congress of Deputies.⁵⁷

The approval by the Spanish Parliament was possible since the Spanish Prime Minister, the socialist José Luis Rodríguez Zapatero, arrived at an agreement with the Catalan leader of the opposition, Artur Mas—who would become the Catalan Prime Minister or *President* from 2010 until 2015 (and afterwards be succeeded by Carles Puigdemont)—about the definition of the nation, the Catalan language reg-

⁵² Statute of Autonomy of Catalonia (B.O.E. 1979, 4) (Spain).

⁵³ ELPais.ES, *El Parlamento de Cataluña aprueba el nuevo estatuto*, EL PAÍS (September 30, 2005), https://elpais.com/elpais/2005/09/30/actualidad/1128068217_850215.html.

⁵⁴ Reform of the Statute of Autonomy of Catalonia (B.O.E. 2006, 6) (Spain).

⁵⁵ LLUCH, *supra* note 39, at 277.

⁵⁶ CONST. ESP. art. 144.

⁵⁷ ESQUERRA REPUBLICANA DE CATALUNYA, VALORACIÓ DE LA PROPOSTA DE LA REFORMA DE L’ESTATUT APPROVAT PER LES CORTS GENERALS 2 (2006).

ulation, the allocation of powers and financing. This agreement, however, represented a step back from the principles that had inspired the new C.S.A. of September 2005 (the national recognition, the protection against the central state's infringement against Catalan self-government's exclusive competences, the measures adopted in order to strengthen the Catalan language's social use, and the effort to limit *solidarity* revenue transfers from Catalonia to the central state). The so-called Mas-Zapatero agreement on the amendment of the Catalan Statute of Autonomy engaged the socialist parliamentary groups in Congress and Senate, which at that time were the majority of both Houses. Other minority political groups represented in the Spanish Parliament gave support to the Catalan Statute's amendment as well (the left-wing political groups and those that represented national minorities such as the Basque and the Galician, besides the support of the Catalan nationalist group of C.i.U. in the Congress and the Senate). But the main opposition party in the Spanish Parliament, the conservative P.P. strongly contested the new C.S.A.'s amendment process. The P.P. fostered a fierce campaign against the Statute's approval in the course of the Winter and the Spring of 2006, which sometimes included vitriolic language, and a campaign to boycott Catalan products, such as the Cava.⁵⁸

As explained by Jordi Argelaguet, the final form of the new C.S.A. of 2006 was enacted by the Spanish Parliament and ratified by the Catalan people in a referendum that was held on July 18, 2006 in Catalonia, in which 73.9 percent of the votes were in favor, 20.8 percent against, and 5.3 percent blank votes, with 48.85 percent participation.⁵⁹ The new C.S.A. of 2006 was therefore the quintessential example of the invocation of constituent power to express the democratic will of a people in a territory with a sub-state national society.

Notwithstanding, the P.P. voted against the Statute's amendment project in the Spanish Parliament and, after its enactment by the Spanish Parliament and the ratification by the Catalan people, the P.P. parliamentary groups in Congress and Senate challenged the constitutionality of the new Catalan Statute before the Spanish Constitutional Court in Madrid.

After four years of deliberation, the Spanish Constitutional Court (onwards, "S.C.C.") finally issued the decision on the Statute of Catalonia in June 2010.⁶⁰ In this momentous decision, "[t]he Court nullified [fourteen] key provisions of this Statute and interpreted another [twenty-seven] key provisions in accordance with the [1978 Spanish] Constitution. The decision undermined the aims and the basic structure of 2006 Statute of Autonomy."⁶¹ The S.C.C. decision of June 2010, and its interpretation of the *constitutional form* embodied in the Spanish Constitution of

⁵⁸ López Bofill, *supra* note 49, at 76.

⁵⁹ Jordi Argelaguet, *From Autonomism to Independentism: The Growth of Secessionism in Catalonia (2010-2013)*, in *CONSTITUTIONALISM AND THE POLITICS OF ACCOMMODATION IN MULTINATIONAL DEMOCRACIES* 115 (Jaime Lluich ed., 2014).

⁶⁰ S.T.C., June 28, 2010 (S.T.C., No. 31, p. 784) (Spain).

⁶¹ López Bofill, *supra* note 49, at 71. See S.T.C., June 28, 2010 (S.T.C., No. 31, p. 784) (Spain).

1978, dramatized the clash between constituent power and constitutional form in contemporary Spanish constitutionalism.

According to the interpretation given by professor Hèctor López Bofill, a constitutionalist at Universitat Pompeu Fabra:

The recognition of Catalonia as a “nation” was curtailed[,] since the judgment held that the term “nation” used in the Statute’s preamble had no legal standing. The Court insisted that[,] according to the Spanish constitutional framework[,] there is only one nation, Spain, which is the unique holder of sovereign power through the will of the Spanish people represented in the Spanish Parliament. The term “nation” mentioned in the Catalan Statute’s preamble was therefore rejected by the Spanish Constitutional Court [to the extent] it contained any attribute of sovereign power. Nevertheless, it was considered compatible with constitutional provisions insofar as it referred to what the Spanish Constitution defines as a “nationality”: a community that can exercise a right to autonomy [following the procedures] set by the Spanish Constitution. The interpretation [held] by the Court [of] the term “nation” as a “nationality” was extended to any aspect of the Statute in which the national character of Catalonia was mentioned such as the reference to the “national situation” or the regulation of the “national symbols.” The [effort towards a] political recognition of Catalonia within a plurinational conception of Spain [was] therefore [rejected by the Spanish] Constitutional Court ruling.

With regard to “historical rights” referred to in [a]rticle [five] of the [Catalan] Statute, the Court’s decision deliberately excluded this provision from the recognition that the Spanish Constitution makes of historical rights in Navarra and the three Basque provinces, on which the independent financing system of these territories is based. Avoiding any possible correspondence between the Catalan “historical rights” and the constitutionally enshrined historical rights of the above-mentioned territories, the Court rejected the [Catalan] Statute’s aims[,] not just in [the field concerning] the recognition of [identity elements] within the Spanish State[,] but also in the improvement of [the Catalan’s] financing system.

Concerning linguistic rights, the ruling abolished the preferential status for Catalan in the Catalan public administration and media. Even though the decision maintained the [regulation] of Catalan language in the area of education and its vehicular character, the Court subjected the Statute’s provisions to the recognition of the [Castilian] language as vehicular in education at the same level [of] Catalan. The [Constitutional Court’s] decision [on the Statute] regarding language policy was the beginning of a sequence of judgments issued by Spanish ordinary courts that have threatened the policy established since 1983 by the Catalan government of making Catalan the main language of communication and learning in Catalonia’s public schools. This policy was considered [a key tool] in order to [preserve] the Catalan language after 40 years of [prohibition] during General Franco’s dictatorship. However, according to the Constitutional Court’s ruling, Spanish should increase its presence as a language of learning, [menacing the social use of Catalan among students]. Regarding the allocation of powers, the Constitutional Court’s ruling [on the Catalan Statute] closed the door to the Statute’s [intention]

of modulating the competences framework between the [S]tate and the Autonomous Community [of Catalonia].⁶²

The ruling deactivated practically all the new aspects that the Statute had sought to introduce, by explicitly specifying an inferior position of the Statutes of Autonomy within the block of constitutionality and promoting the role of the Constitutional Court in the interpretation of the system of the allocation of powers. Therefore, “it [rejected all of] the Statute’s attempt[s] to broaden the material content of the exclusive powers of the autonomous community and to ensure that, as far as possible, the central government would not use its own powers to intervene in these areas.”⁶³ Furthermore, stated that the Constitutional Court enhanced its interpretative monopoly on the general categories regarding the functional definition of competences, watering down the range of exclusivity applied to the competences recognized under the new C.S.A. of 2006.⁶⁴

Regarding institutions, the ruling questioned the articles related to the Judicial Power altogether and declared them unconstitutional.

Finally, the financing system was also [heavily modified] by the [Spanish] Constitutional Court’s decision since it reduced the legal effect of the Statute’s provisions in this area.⁶⁵

The Statute’s norms are not enforceable against the Spanish Parliament, which is sovereign to regulate the contribution of every Autonomous Community to the *solidarity* fund, and the financial transfers. In practice, the Constitutional Court’s decision on the financing system was contrary to one of the central purposes of the new C.S.A. of 2006: to do a structural reform of Catalonia’s financing system and to avoid the burden of fiscal transfers and the enormous fiscal imbalance with the center that has a deleterious effect on the sub-state territory’s economy.⁶⁶

B. The Political Effect of the Legality-Legitimacy Conundrum in Spain, 2006-2018

The first notable effect of the Spanish Constitutional Court rulings on Catalonia’s Statute was an enormous demonstration that took place in the center of Barcelona on July 10, 2010 with an estimated attendance of more than one million

⁶² López Bofill, *supra* note 49, at 71-72. See also the special issue of *Revista d’Estudis Autònomic i Federals* (2011) dedicated specifically to the S.C.C.’s decision and titled *Especial sobre la Sentència de l’Estatut d’autonomia de Catalunya S.T.C.*, June 28, 2010 (B.J.C., No. 31, p, 275) (Spain).

⁶³ López Bofill, *supra* note 49, at 72.

⁶⁴ See S.T.C., June 28, 2010 (B.J.C., No. 31, p, 275) (Spain). See also the special issue of *Revista Catalana de Dret Públic* (2010) focusing on the S.C.C.’s decision and titled *Especial sentència 31/2010 del Tribunal Constitucional, sobre el Estatuto de Autonomia de Catalunya de 2006*.

⁶⁵ López Bofill, *supra* note 49, at 72.

⁶⁶ See S.T.C., June 28, 2010 (B.J.C., No. 31, p, 275) (Spain).

people.⁶⁷ Even though the call for independence was present in the demonstration, the march's slogan, "We decide. We are a nation" still sought to defend the will of the Catalan people expressed in the new C.S.A. of 2006. Even Catalonia's Prime Minister at that time, José Montilla (a member of the P.S.C. —opposed to Catalan independence), expressed his "disappointment and indignation" with the Spanish Constitutional Court's ruling and supported the march summoning the Catalan people to demonstrate in order to defend the full implementation of the Statute.⁶⁸

The constitutional moment of 2006-2010 was interpreted by many in Catalonia as an instance of majority-nation nationalism, and, thus, it impacted the intersubjective relations of reciprocity between minority nationalists and majority-nation nationalism. Importantly, it embodied the tension between constituent power and constitutional form. Many scholars and political analysts would concur that the constitutional moment of 2006-2010 has served as the *trigger* event; that is, the immediate catalyst for the dramatic growth of independentism in the parliamentary sphere in Catalonia between 2010-2017.

As per the elections held during November 2010:

[T]here emerged a new political plurality. CiU, the moderate Catalan nationalist coalition, won 62 seats out of 135. However, it had to govern in minority, hoping to receive some support from other parties. The political commitment of the new president, Artur Mas, was to get a new fiscal pact and try to cope successfully with the economic crisis [that was having] two important effects: it was eroding the living conditions of many families and it was jeopardizing the finances of the [G]overnment [that allowed implementing] welfare policies.⁶⁹

"On September 11, 2012, during the Catalonia's National Day celebrations, hundreds of thousands of people took to the streets of Barcelona calling for Catalonia's independence from Spain."⁷⁰ After this massive demonstration, Artur Mas, the Catalan's Prime Minister, dissolved the regional Parliament and called for elections. The Prime Minister's coalition, *Convergència i Unió* (C.i.U.), included for the very first time in 2012 the demand for statehood in its electoral *manifesto*.⁷¹

According to the results reported by *Departament de Governació* (Government of Catalonia):

On [November 25,] 2012, in the elections to the Parliament of Catalonia, CiU received 30.7 [percent] of the votes and [fifty] seats (out of 135); ERC, 13.7 [percent] and [twenty-one] seats; PSC, 14.4 [percent] and [twenty] seats; PP, [thirteen per cent] and [nineteen] seats; ICV-EUiA, 9.9 [percent] and [thirteen] seats; C's, 7.6 [percent] and [nine] seats; and, finally, CUP, 3.5 [percent] and [three] seats. These

67 López Bofill, *supra* note 49, at 72.

68 *See id.*

69 Argelaguet, *supra* note 59, at 116-17.

70 López Bofill, *supra* note 49, at 70.

71 *Id.* at 72-73

results showed that in Catalonia [there was] a clear majority of the parties [that were] defending the so-called “right to decide” (CiU, ERC, ICV and CUP), that is, they believe that the people of Catalonia have the right to [choose] its political future [including independence] and, moreover, they are committed to holding a referendum [in which the Catalans will be able to express their preferences].⁷²

Respecting one of the first courses of action taken by the New Parliament:

[O]n [January 22,] 2013, the Resolution 5/X, whose title was ‘the Declaration of sovereignty and right to decide of the people of Catalonia.’ Its centerpiece states that ‘[t]he people of Catalonia has, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject.’ This resolution —adopted by [eighty-five] votes in favor (CiU, ERC, ICV-EUiA, and a member of CUP), [forty-one] against (PSC, PPC, and C’s) and two abstentions (CUP)— came into collision with the Spanish Constitution, which establishes that the Spanish people are sovereign.⁷³

As such, the new Parliament of Catalonia of 2012 was reflecting the growth of the secessionist option that occurred in the Catalan society in recent years, especially since the Constitutional Court ruling of June 2010. Data from the *Centre d’Estudis d’Opinió* (onwards, “C.E.O.”) of the Catalan government show the dramatic growth of catalanist sentiment and independentism. The C.E.O. is a well-respected instrumentality in charge of measuring public opinion. While non-partisan, it is a branch of the Catalan government, it should be noted. It is the counterpart of the *Centro de Investigaciones Sociológicas* (onwards, “C.I.S.”) in Madrid.

⁷² Argelaguet, *supra* note 59, at 109 (footnotes omitted). Regarding the acronyms of each of these political parties:

CiU, *Convergència i Unió* (Convergence and Union) is a moderate center to right Catalan nationalist coalition. ERC, *Esquerra Republicana de Catalunya* (Republican Left of Catalonia) is a pro-independence and leftist party. PSC, *Partit dels Socialistes de Catalunya* (Party of the Socialists of Catalonia) is a Catalan socialist party with narrow links with PSOE (PSOE). PPC, *Partit Popular Català* (Catalan Popular Party) is the regional branch of the Popular Party (PP). ICV-EUiA, *Iniciativa per Catalunya Verds – Esquerra Unida i Alternativa* (Initiative for Catalonia Greens – Alternative and United Left) is a coalition between a post[-]communist and green party with a coalition of leftist groups led by the Party of the Communists of Catalonia (PCC). C’s, *Ciudadanos – Partido de la Ciudadanía* (Citizens – Citizenship’s Party) is a Spanish nationalist and populist party. CUP, *Candidatura d’Unitat Popular* (Popular Unity Candidature) is an extreme left and pro-independence party. SI, *Solidaritat per la Independència* (Solidarity for Independence) is a pro-independence party.

Id. at 128 n.2.

⁷³ *Id.* at 109 (footnotes omitted). Five members of the Parliament belonging to P.S.C. did not participate in the vote because they did not want to vote against the “right to decide” like it was suggested by their party. Two deputies belonging to C.U.P. abstained because they rejected the references to EU and some other aspects of the Declaration. The complete declaration is available at <http://www.parlament.cat/web/documentacio/altres-versions/resolucions-versions> (last visited May 17, 2017).

TABLE 1. CONSTITUTIONAL PREFERENCES OF THE RELATIONSHIPS BETWEEN CATALONIA AND SPAIN ACCORDING TO *CENTRE D'ESTUDIS D'OPINIÓ* SURVEYS (2006-2013)⁷⁴

	Region	Autonomous Community	A State within a Federal Spain	An Independent State	DK/NA	N	Source
2006 (1)	8.1	38.2	33.4	13.9	6.3	2.000	REO, 346
2006	6.8	40.0	32.8	15.9	4.5	2.000	REO, 367
2007	5.1	37.8	33.8	17.3	6.0	2.000	REO, 404
2008	7.1	38.3	31.8	17.4	5.4	2.000	REO, 466
2009	5.9	37.0	29.9	21.6	5.6	2.000	REO, 544
2010	5.9	34.7	30.9	25.2	3.4	2.500	REO, 612
2011	5.7	30.3	30.4	28.2	5.4	2.500	REO, 651
2012	4.0	19.1	25.5	44.3	7.1	2.500	REO, 705
2013	4.4	20.7	22.4	46.4	6.1	2.000	REO, 712

Note: This is the first survey of the CEO's Barometer Series, in March 2006. The other surveys are the last wave of the Barometer in each year. In 2013, it is the first wave of the Barometer.

Table 1 shows the dramatic upswing in the citizenry's political orientation. Pro-independence alternative has grown from 13.9 percent to 46.4 percent in 2013. Correspondingly, the pro-autonomism orientation (which represents the *status quo*—the State of Autonomies) has suffered a drop from 38.2 percent in 2006 to 20.7 percent in 2013. The pro-federalism orientation has also suffered a dramatic descent from 33.4 percent to 22.4 percent.

This data indicates that the pro-independence orientation is at its best moment in history, and its upward turning point can be located in 2011, which is right after the constitutional moment of 2006-2010. This provides support for my thesis that the latter was the *trigger* event and the immediate catalyst for the dramatic growth of independentism in Catalonia between 2010-2017.

TABLE 2. SUBJECTIVE NATIONAL IDENTITY IN CATALONIA (1979-2013)⁷⁵

	Only Catalan	Cat > Spa	Cat= Spa	Spa > Cat	Only Spanish	DK/NA	(N)	Source and study number
1979	14.9	11.7	35.4	6.7	31.3		1.079	DATA
1982	9.3	11.7	41.2	8.7	23.1		1.176	DATA
1984	7.1	22.4	46.2	8.8	12.5	3.0	4.872	CIS, 1413
1988	11.1	28.2	40.4	8.4	9.1	2.7	2.896	CIS, 1750
1992	15.6	23.4	35.7	8.3	14.9	2.0	2.489	CIS, 1998
1995	13.4	23.1	41.0	7.0	13.8	1.7	1.593	CIS, 2199
1999	14.0	21.8	43.1	6.1	11.5	3.3	1.368	CIS, 2374
2001	15.4	25.8	35.9	6.2	14.7	2.0	2.778	CIS, 2410
2003	13.9	24.7	43.2	6.7	9.8	1.8	3.571	CIS, 2543
2006	13.8	24.7	41.6	7.6	8.8	4.5	1.965	CIS, 2660

⁷⁴ Argelaguet, *supra* note 59, at 111.

⁷⁵ *Id.* at 113.

2006	14.2	27.7	42.5	5.2	6.6	3.9	2.000	REO, 346
2006	14.5	27.2	44.3	4.7	6.1	3.2	2.000	REO, 367
2007	17.1	29.4	41.2	5.1	3.9	3.4	2.000	REO, 404
2008	16.4	25.7	45.3	5.4	4.7	2.5	2.000	REO, 466
2009	19.1	25.6	42.7	4.5	5.7	2.4	2.000	REO, 544
2010	20.3	25.5	42.5	3.9	5.5	2.3	2.500	REO, 612
2011	20.5	29.5	39.3	3.3	5.0	2.4	2.500	REO, 651
2012	29.6	28.7	35.0	2.5	2.0	2.3	2.500	REO, 705
2013	29.1	27.9	35.1	2.7	2.9	3.2	2.000	REO, 712

Note: DATA and C.I.S. surveys are based on personal interview; C.E.O., CATI.

Sources: DATA. Quoted by Shabad and Gunther (1982); C.I.S., *Centro de Investigaciones Sociológicas*, available at www.cis.es; C.E.O., *Centre d'Estudis d'Opinió*, available at www.ceo.gencat.cat.

Table 2 shows subjective national identity in Catalonia, based on the “Linz-Moreno” question, which allows us to examine an indicator on the identification of individuals with two political communities that claim to be nations, as in this case, Spain and Catalonia. There have been some changes between 2006 and 2013, mainly, the Catalan identity has grown while the Spanish one has declined significantly.

TABLE 3. EVOLUTION OF THE OPTIONS ABOUT THE INDEPENDENCE OF CATALONIA⁷⁶

	2001	2011 (June)	2011 (Oct.)	2012 (Jan.)	2012 (June)	2012 (Nov.)	2013 (Feb.)
Yes, in favor	35.9	42.9	45.4	44.6	51.1	57.0	54.7
No, against	48.1	28.2	24.7	24.7	21.1	20.5	20.7
Non-voting	---	23.3	23.8	24.2	21.1	14.3	17.0
Other answers	---	0.5	0.6	1.0	1.0	0.6	1.4
DK	13.3	4.4	4.6	4.6	4.7	6.2	5.2
NA	2.8	0.8	1.0	0.9	1.1	1.5	1.0
(N)	2.777	2.500	2.500	2.500	2.500	2.500	2.000
Source	CIS	CEO	CEO	CEO	CEO	CEO	CEO
Study number	2410	652	661	677	694	705	712

Notes: *Centro de Investigaciones Sociológicas* (C.I.S.) survey is an interview face to face. *Centre d'Estudis d'Opinió* (C.E.O.) survey is a CATI one.

Table 3 shows the growth in the pro-independence orientation in Catalan politics. As I have noted previously, in 1989 for the first time in contemporary Catalan history, a fully pro-independence political party (*Esquerra Republicana de Catalunya*) made its appearance in the parliamentary sphere.⁷⁷ This political orientation gained support in the electorate: in the 1990s it was about one-third, and in 2013, it was measured at 54.7 percent. The above discussion takes us through 2013. In the two figures below, I update them and provide us with the data through 2016.

⁷⁶ *Id.* at 120.

⁷⁷ LLUCH, *supra* note 39, at 58.

FIGURE 1. CONSTITUTIONAL PREFERENCES IN CATALONIA (2006-2016)⁷⁸

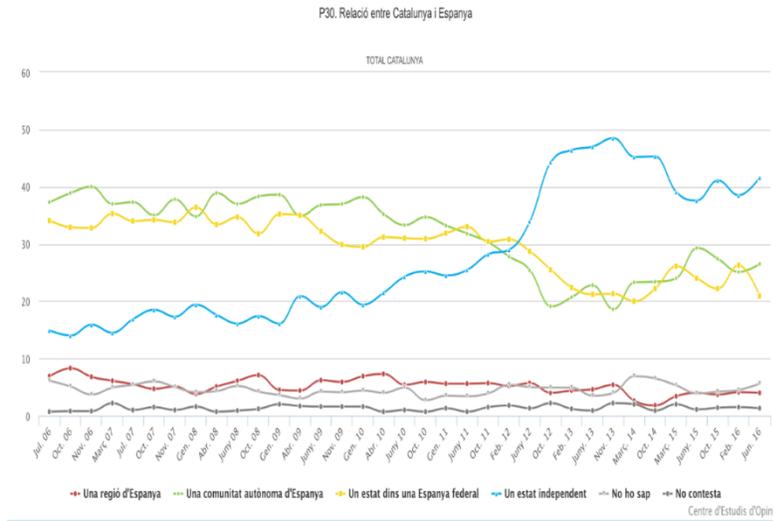
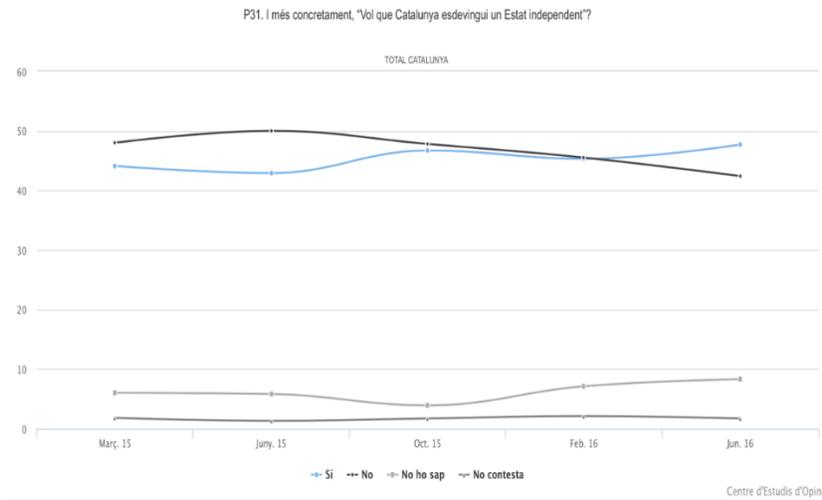


FIGURE 2. RESPONSES TO “DO YOU WANT CATALONIA TO BE AN INDEPENDENT STATE? (2016)”⁷⁹



⁷⁸ CENTRE D'ESTUDIS D'OPINIÓ, BARÒMETRE D'OPINIÓ POLÍTICA 2A ONADA 54 (2016), <http://upceo.ceo.gencat.cat/wsceop/5868/Dossier%20de%20oprensa%20-826.pdf> (last visited May 17, 2018).

⁷⁹ *Id.* at 56.

Since 2013, political events have been moving at a fast pace in Catalonia. By 2015, the constitutional moment of 2006-2010 had provoked a major realignment in the political party system in Catalonia. The first momentous effect is the fundamental and historic transformation of the Catalan national movement that we have examined above: historically since the late 19th century the Catalan national movement had maintained a majoritarian orientation that was either federalist or autonomist. This was also the case right after the transition to democracy and, since 1980, the parties that dominated the Catalan national movement until about 2010 were either federalist or autonomist. This situation changed dramatically in the period right after 2010. C.D.C., the party of Jordi Pujol, which had been autonomist since 1980, passed through a quick transformation in the years after 2010 and became an independentist organization. Correspondingly, after 2010, E.R.C. experienced a growth in electoral support.

The second momentous effect on this sub-state party system is that the coalition of C.i.U. (composed of C.D.C. and U.D.C.) that ruled the Catalan government from 1980 to 2003, and again from 2010 to 2015, dissolved itself on June 17, 2015. U.D.C. was a historic party founded in 1931. There was the perception that C.D.C. had become an independentist party during the years after 2010, but U.D.C. and its president Josep Antoni Duran i Lleida, had remained ambiguous and vaguely pro-autonomism in their political orientation. In the 2015 elections, U.D.C. failed to gain parliamentary representation, Duran i Lleida retired from politics, and the party recently dissolved itself on March 24, 2017. Part of U.D.C., led by Antoni Castellà, Núria de Gispert and others, separated itself from U.D.C. and became *Demòcrates de Catalunya*, a pro-independence formation. On the other hand, during the summer of 2016, the leaders and militants of C.D.C. decided to dissolve that entity and transformed it into a new party known as the *Partit Demòcrata Europeu Català* (PDeCAT), effective on July 8, 2016; and Artur Mas was elected as its president.

A non-binding self-determination “citizen participation process” was held on November 9, 2014. In light of the impossibility of holding a normal self-determination referendum such as the one held in Scotland in 2014, the government of Artur Mas decided to call normal autonomic elections, but turned it into a “plebiscitary election,” on September 27, 2015.⁸⁰ The parties in this plebiscitary election did not present themselves as in a regular election. Instead, there was a *bloc* of parties that favored the alternative of independence for Catalonia, and another *bloc* that opposed it. In between, there were two entities that were ambiguous in their positioning and were not clearly in either camp. “Junts pel Sí” represented the yes option, and it was composed of C.D.C. (now PDeCAT) and E.R.C. Also, on the yes camp was the radical left formation C.U.P. Representing the no option were Ciutadans (Cs), P.S.C., and P.P. In between, there was U.D.C. (formerly in

80 For the full results, see figure 3.

coalition with C.D.C. since 1980) and the coalition of *Catalunya Si Que Es pot* (onwards, “C.S.Q.P.”). These last two formations were not clearly in either the yes or the no camps. The result was that the pro-independence coalition of forces (C.D.C.-E.R.C.-C.U.P.) won a majority of seats in the Catalan parliament (seventy-two out of 135), thus forming a strongly independentist government. However, the coalition received only about 48 percent of the popular vote on that occasion. The no camp received 39.17 percent of the vote. The U.D.C. and C.S.Q.P. received 11.45 percent of the votes.⁸¹

Since 2015, the government of the Generalitat has continued with its secessionist ambitions, and the clash with the central state has continued unabated. The latest developments are moving at a riveting pace. Last October 1, 2017 the Generalitat organized a referendum on independence. The ballot question was a direct one: *Do you want Catalonia to become an independent state in the form of a republic?*

The Spanish government responded with a tough and unrelenting repressive strategy. Weeks before the event, the authorities in Madrid were using the police to harass the organizations that were organizing the referendum, attempting to confiscate all ballot materials, closing down the websites being used to organize the referendum, and using the criminal law to threaten serious penalties against its organizers. Meanwhile, some of the parties opposed to holding the referendum boycotted the event. The day of the referendum, on October 1, 2017 Madrid sent over 10,000 policemen to stop people from voting. That day, hundreds of electoral colleges were attacked by the police, and ballot boxes, ballots, registration lists, etc. were forcibly removed by the police. The international media covered the event and there were scenes of bloodied faces, police brutality, and women and elderly people being mistreated by huge men dressed for battle. There were about 800 people hurt that day. The result was that the participation rate stood only at 43 percent and the independence option unsurprisingly won by a huge landslide (92 percent). On October 10, 2017, president Carles Puigdemont declared in a speech he was ready to implement that mandate for secession but suspended it to allow for dialogue with the Spanish state. No dialogue ensued and on October 21, 2017 the Spanish government initiated the implementation of Article 155 of the Spanish Constitution,⁸² suspending the Catalan government and dissolving the Catalan Parliament.

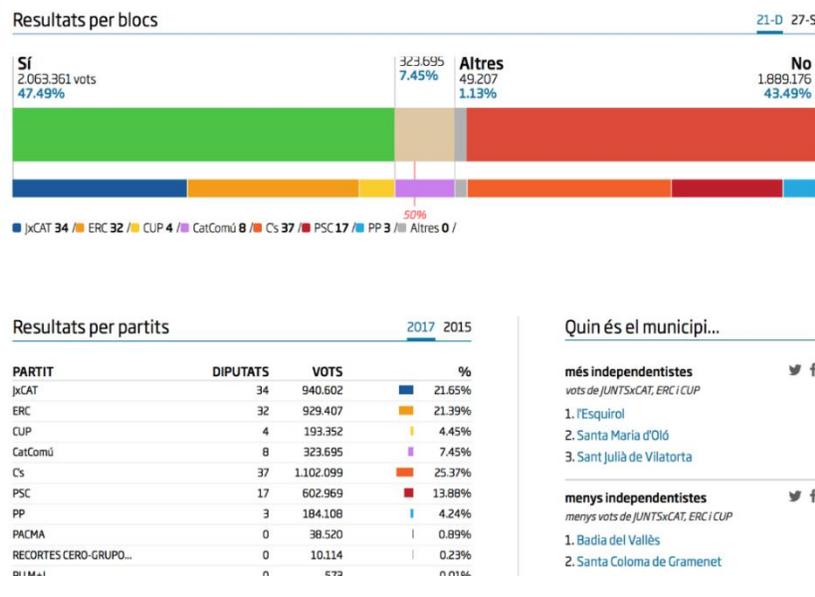
After a protracted, unspirited, and almost reluctant declaration of independence by the Catalan Parliament on October 27, 2017, the response by the Spanish authorities was to jail half the Catalan government, including vice-president, Oriol Junqueras, and two prominent Catalan leaders from civil society. The rest of the government, including president Puigdemont, fled to Brussels as a strategy for internationalizing the conflict and, also, because they alleged that in Belgium they

⁸¹ For full results, see ARA, *Plebiscit sobre la independència*, <http://www.ara.cat/elections27s/dades/resultats-catalunya-2015>, (last visited Dec. 25, 2017).

⁸² CONST. ESP. art. 155.

would be judged by a more impartial judicial system. Spanish prime minister Rajoy has dissolved the Catalan Parliament and has called for autonomic elections on December 21, 2017.⁸³ All parties agreed to participate in this election, and it developed in a similar way as the last election of 2015: there was a clear block of pro-independence parties and a clear block of parties for remaining in Spain, and in the middle, there was *Catalunya en Comú-Podem*, which was a bit ambiguous and elusive on this momentous question.⁸⁴ Basically, the results were comparable to the results of the last autonomic elections. This time the coalition of pro-independence forces won 47.49 percent of the vote and they are the only coalition of parties that could form a government. ERC, JxCAT, and CUP together have seventy members of Parliament, which is an absolute majority. Since December 21, 2017, as of this writing, the winning coalition have put forward several candidates for the President of Catalonia, but the response of the Spanish government, and its judicial branch especially, has made it impossible to elect a President. Carles Puigdemont was in Brussels and now in Germany and was not allowed to return in order to be elected as Catalan President. Jordi Sánchez is in prison and has not been allowed to leave the prison in order to exercise his political rights as member of Parliament. For over three months there has been a stalemate, complicated by the intransigence of the Spanish government.

FIGURE 3. RESULTS OF THE AUTONOMIC ELECTIONS OF SEPTEMBER 27, 2015⁸⁵

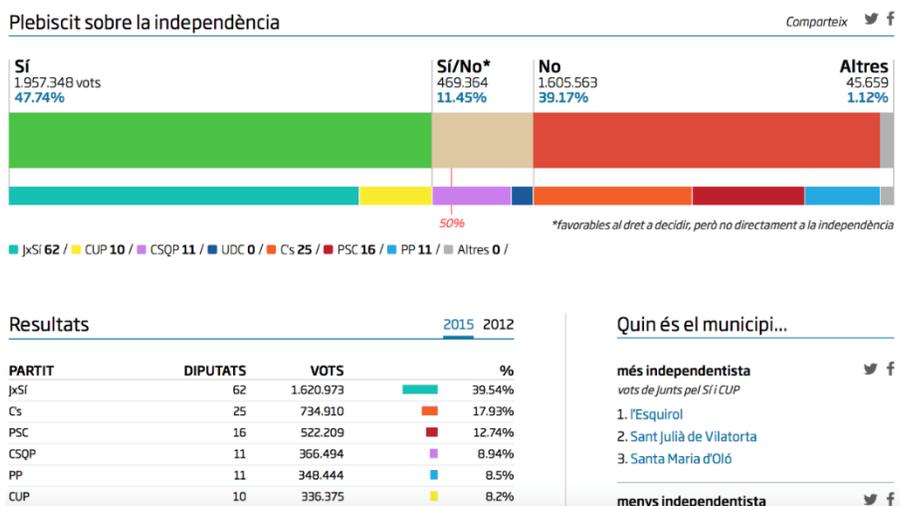


⁸³ Jon Henley, *Catalonia Secessionists Parties Declare Victory in Regional elections –as it happened*, THE GUARDIAN (December 21, 2017), <https://www.theguardian.com/world/live/2017/dec/21/catalonia-voters-results-regional-election-spain-live>.

⁸⁴ For the full results, see Figure 4.

⁸⁵ ARA, *supra* note 81.

FIGURE 4. RESULTS OF THE AUTONOMIC ELECTIONS OF DECEMBER 21, 2017⁸⁶



IV. PUERTO RICO SINCE 1898: COLONIALISM, AUTONOMISM, AND FEDERALISM

Let us now turn our attention to a very different society when compared to Catalonia. What sort of autonomy is Puerto Rico? From the standpoint of comparative federalism/autonomism, Puerto Rico is a “nonfederalist autonomy.”⁸⁷ There are four ways that an autonomy, such as Puerto Rico’s, is non-federalist. First, in autonomies such as Puerto Rico the formal distribution of legislative and executive authority between the two levels of government is not constitutionally entrenched. A review of the origins of the current political status of Puerto Rico as an “unincorporated territory” of the U.S. demonstrates that it is a judicial and statutory creation, not a constitutionally entrenched level of government.⁸⁸ Second, autonomies such as Puerto Rico are non-federalist because they are constitutionally subordinate to the center State. “The ‘shared rule’ component between the central [S]tate and the autonomous unit is weak or practically inexistent. The

⁸⁶ For full results, see ARA, *Resultats Eleccions 21-D*, <https://eleccions.ara.cat/parlament-21d> (last visited April 4, 2018).

⁸⁷ See Jaime Lluç, *Autonomism and Federalism*, 42 PUBLIUS: THE JOURNAL OF FEDERALISM 132, 136 (2011).

⁸⁸ See MARCOS RAMÍREZ LAVANDERO, DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 178-616 (3rd ed. 1988).

power to terminate or modify the Puerto Rico-U.S.A. relationship rests squarely on the U.S. Congress, contrary to what Elazar asserts.”⁸⁹

Third:

Autonomies such as Puerto Rico are nonfederalist if their influence [of] the policy-making institutions [over] the center [State] is weak or negligible. Under the [concept of the Commonwealth], Puerto Rico has a degree of self-government, with local government institutions that are similar to the ones in the U.S. states. Puerto Rico enjoys fiscal autonomy . . . and [fiscal] income[,] received from sources in Puerto Rico [that] not subject to federal personal income taxation. [However,] most . . . federal laws apply, [but] Puerto Rico has no effective representation in Congress, except for a token representative [that] has no right to vote [there]. Nor do the residents of Puerto Rico vote for the U.S. federal executive.⁹⁰

Fourth, “[a]utonomies are also nonfederalist if the two orders of government [that have been set up] are so unequal that the element of ‘self-rule’ in the relationship gives the autonomy a special status arrangement that is not [part of] the core institutional apparatus of the central state.”⁹¹

Moreover, from the perspective of the literature on comparative federalism, Ronald L. Watts’s typology of federal systems is highly regarded, and it can further help us to describe in political terms the nature of Puerto Rico’s constitutional status.⁹² *Federal political systems* is a broad *genus* encompassing a whole spectrum of specific non-unitary forms, i.e., species ranging from *quasi-federations*, *federations*, to *confederations*, and beyond. Following Watts, if we see the United States as a federal political system composed of fifty constituent units of the core federation, one federal district, two federacies, three associated states, three unincorporated territories, Native American domestic dependent nations, etc.,⁹³ then it is clear that Puerto Rico is part of this broad federal political system that we call the United States, although it is not a constitutive unit of the federation, nor is it seen by Congress as part of the majority *nation*. Nor does it have many elements of federalism in its constitutional contours, in view of its current constitutional status, as we have seen above.

⁸⁹ LLUCH, *supra* note 39, at 166 (citations omitted). See also DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 57 (1987); DANIEL J. ELAZAR, *FEDERAL SYSTEMS OF THE WORLD: A HANDBOOK OF FEDERAL, CONFEDERAL, AND AUTONOMY ARRANGEMENT* (1991).

⁹⁰ LLUCH, *supra* note 39, at 166-67.

⁹¹ *Id.* at 167.

⁹² RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 8 (2008).

⁹³ *Id.* at 12.

A. *The Clash Between Legitimacy and Legality and the Constitutional Moment in Puerto Rico (2012-2018): The Rigidity of the United States Constitution*

Puerto Rico is an unincorporated territory of the U.S.⁹⁴ and it is subject to the plenary powers of the US Congress under the Territory Clause of the US Constitution.⁹⁵ Article IV, Section 3 of the latter gives Congress the “[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁹⁶ It gives Congress “general and plenary” power with respect to federal territory, which relates specifically to “full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.”⁹⁷ The contemporary legal consensus is that “case law from more than a century ago gives Congress freedom to legislate for at least some territories in a fashion that would violate the Constitution in other contexts.”⁹⁸ A series of decisions by the Supreme Court, dating from the period 1901-1922 and known as the *Insular Cases*, created the category of “unincorporated territories” and held that in such territories only rights deemed by the Court as “fundamental” would be applied.⁹⁹ The *Insular Cases* are still good law, although no contemporary scholar, of any methodological or political inclination, defends them.¹⁰⁰

The U.S. Constitution of 1789 is a rather inflexible constitutional form, and Puerto Rico’s challenge is how to seek a non-colonial form of accommodation within the U.S. federal system, in spite of its rigidity, and its characteristics as a symmetrical national federation. “[L]et us consider whether U.S. constitutionalism could accommodate Puerto Rico”¹⁰¹ under a form of autonomism that is non-subordinate and non-colonial. The challenge posed by the rigid U.S. constitutional form is implicitly analyzed in two Reports by the President’s Task Force on Puerto Rico’s Status (of 2005 and 2011).¹⁰²

It would seem that the U.S. Constitution allows unambiguously for three options: independence, becoming a unit of the federation, or the current “unincorporated territory” status. However, for decades autonomists in Puerto Rico have put forward proposals for greater autonomy that have been labeled as “culminated

94 See RAMÍREZ LAVANDERO, *supra* note 88.

95 T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 76 (2002).

96 See Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1144 (2009).

97 *Id.* at 1144-45 (citing *Nat’l Bank v. County of Yankton*, 101 U.S. 129, 133 (1880)).

98 Lawson & Sloane, *supra* note 96, at 1145.

99 See *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).

100 Lluch, *supra* note 21, at 24 (citations omitted). See also Lawson & Sloane, *supra* note 96, at 1146.

101 Lluch, *supra* note 21, at 30.

102 *Id.* at 28 (I find that the analysis in the 2005 Report is more “authoritative and scholarly”, and more explicit in laying bare the rigidity of the U.S. constitutional form).

or enhanced ELA,” or “New ELA or Commonwealth.” Are “New ELA or Commonwealth” proposals feasible under the U.S. Constitution?¹⁰³ “The White House Task Force of 2005 has signaled that some of these proposals for more autonomy would not be constitutionally feasible, largely relying on a Memorandum of Law by the Office of Legislative Affairs of the US Department of Justice [(onwards, “D.O.J.”)], dated January 18, 2001.”¹⁰⁴

The colonial limits of the autonomy of Puerto Rico were underscored by the federal authorities: “The D.O.J. recognizes that the creation of the ELA during 1948-52 did not take Puerto Rico outside the ambit of the Territory Clause.”¹⁰⁵ Thus, “Congress [pursuant to the Territory Clause] may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”¹⁰⁶ There seems to be an absolute consensus in the Executive branch of the federal government: “The Department of Justice has long taken the same view, and the weight of appellate case law provides further support for it.”¹⁰⁷

Under “New Commonwealth,” the island would “become an autonomous, non-territorial[, non-colonial], non-State entity in permanent union with the United States under a covenant that could not be altered without the ‘mutual consent’ of Puerto Rico and the federal Government.”¹⁰⁸ The U.S. Constitution:

[D]oes not allow for such an arrangement. For entities under the sovereignty of the United States, the only constitutional options are to be a State or territory. As the U.S. Supreme Court stated in 1879, “[a]ll territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.”¹⁰⁹

Furthermore:

[I]t is a general rule that one legislature cannot bind a subsequent one. . . . Thus, one Congress cannot irrevocably legislate with regard to a territory . . . and, therefore, cannot restrict a future Congress from revising a delegation to a territory of powers of self-government.

103 RAMÓN LUIS NIEVES, *EL ELA QUE QUEREMOS: PREGUNTAS Y RESPUESTAS SOBRE EL DESARROLLO DEL ESTADO LIBRE ASOCIADO* (2009).

104 Lluch, *supra* note 21, at 28; Letter from Robert Raben, Assistant Att’y Gen., U.S. Dept. of Justice, to Frank H. Murkowski, Chairman of Committee on Energy and Natural Resources, United States Senate (January 18, 2001) (appearing as Appendix E of President’s Task Force on Puerto Rico’s Status December 2007 Report), <https://www.justice.gov/archive/opa/docs/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf>.

105 Lluch, *supra* note 21, at 28 (citing Letter from Robert Raben, *supra* note 104, at 5).

106 *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980). See also *Califano v. Torres*, 435 U.S. 1, 3 n.4 (1978) (*per curiam*) (“Congress has the power to treat Puerto Rico differently”).

107 Letter from Robert Raben, *supra* note 104, at 6.

108 PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS, REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS 6 (2005).

109 *Id.* (citing *Nat’l Bank v. County of Yankton*, 101 U.S. 129, 133 (1879)).

. . . It therefore is not possible, absent a constitutional amendment, to bind future Congresses to any particular arrangement for Puerto Rico as a Commonwealth.¹¹⁰

As the D.O.J. argues, “as a matter of domestic constitutional law, the United States cannot irrevocably surrender an essential attribute of its sovereignty.”¹¹¹ Thus, to the extent a covenant to which the United States is party stands on no stronger footing than an Act of Congress, it is, for purposes of federal constitutional law, subject to unilateral alteration or revocation by subsequent Acts of Congress.¹¹² Thus, any New Commonwealth proposal with a mutual consent provision would be constitutionally unenforceable.¹¹³

Under the present constitutional form, it seems unlikely that the U.S. Congress could accommodate Puerto Rico under a form of autonomism that is non-subordinate and non-colonial.

B. Constituent Power: the Criollo Referendums on Self-Determination in Puerto Rico

Since 1898, when Spain ceded Puerto Rico to the U.S.A. in the aftermath of the Spanish-Cuba-USA War, the constitutional status of Puerto Rico has undergone only three modifications. In 1917, Congress passed the *Jones Act*, which provided for U.S.A. citizenship for all the residents of the island.¹¹⁴ In 1947, the *Elective Governor Act* provided for the election of the Governor of the island by Puerto Rico’s citizens.¹¹⁵ In 1950, Public Law 600 led to the enactment of a Constitution and the establishment of the newly minted *Estado Libre Asociado*. The *Puerto Rico Federal Relations Act* kept certain provisions found in the Foraker and Jones Act.¹¹⁶

The government of Puerto Rico has on five different occasions organized *criollo* self-determination referendums, none of which were legally binding on the federal government nor counted with its support. There have been 13 different efforts to have a federally-sponsored referendum in Puerto Rico, but none of these have prospered. Nevertheless, one might consider these *criollo* self-determination referendums as instances of the expression of constituent power. I will not discuss

¹¹⁰ PRESIDENT’S TASK FORCE, *supra* note 108, at 6.

¹¹¹ Letter from Robert Raben, *supra* note 104, at 7. See *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (the United States “may not contract away ‘an essential attribute of its sovereignty’”) (*citing* *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977)).

¹¹² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

¹¹³ PRESIDENT’S TASK FORCE, *supra* note 108, at 7.

¹¹⁴ 48 U.S.C. § 731 (2012).

¹¹⁵ *Id.* § 771 (repealed 1950).

¹¹⁶ *Id.* § 731(b). See also Informe requerido por la Resolución Núm. 2013-01, Comisión de Derechos Civiles, February 17, 2016, at 46, <http://online.fliphtml5.com/lyok/imus/#p=1> (discussing the referendum’s design as a byproduct of the *Puerto Rico Federal Relations Act* and the creation of the *Estado Libre Asociado*).

the previous referenda of 1967, 1993, and 1998, but will focus on the most recent ones of 2012 and 2017.

My thesis is that the referendum of 2012 initiated a constitutional moment that has lasted until the present, which dramatizes the tension between legitimacy and legality, between constituent power and constitutional form. Let us see how the expression of constituent power was exercised by the people of the island in 2012. On November 2, 2012, the people were asked whether they “agreed if Puerto Rico should continue to have its present territorial status.”¹¹⁷ Irrespective of their response to this question, the people were also asked to choose their preferred status among three non-territorial (i.e., not subordinated to the US Congress) options. The result was a clear vote (54 percent) against the *status quo*, the current *Estado Libre Asociado*. 61 percent voted in favor of becoming a state of the US federation; 33 percent voted for a sovereign (not subject to the Territorial Clause) *Estado Libre Asociado*; 5.5 percent voted for independence. But, there were also 480,918 blank votes. These have been interpreted as votes for the current *status quo* (the ELA as it is now), so the 61 percent vote in favor of becoming a state would have to be revised downwards (to 45 percent) if one were to consider the blank votes in addition to others.¹¹⁸

Nevertheless, what is most notable and most historic about this constituent moment is that a clear majority (54 percent) of Puerto Rican voters repudiated the current *status quo*. The current ELA is no longer a legitimate political status, as a clear majority think it is inadequate. Yet, there has been no constructive response from the federal government, aside from the often-repeated pleasantries about how Puerto Ricans should decide their own future.

C. *The Constitutional Moment of 2012-2018: Reaffirmation of the Constitutional Form*

i. The Supreme Court decision re: Commonwealth of Puerto Rico v. Sánchez Valle (2016)

There are other important components to the constitutional moment of 2012-2017, two of which occurred in 2016. The first is the recent U.S. Supreme Court case of *Puerto Rico v. Sanchez Valle*.¹¹⁹ This is the most important Supreme Court decision on Puerto Rico’s political status since *Boumediene v. Bush*.¹²⁰ Prior to *Boumediene*, a number of cases seemed to distance themselves (even if timidly) from the traditional doctrine of the Insular Cases. For example, in his dissent in

¹¹⁷ Fortuño informa a Obama los resultados del plebiscito, EL NUEVO DÍA (14 de noviembre de 2012), <https://www.elnuevodia.com/noticias/politica/nota/fortunoinformaaobamalosresultadosdelplebiscito-1385532/>; Cynthia López Cabán, *La travesía histórica del plebiscito*, EL NUEVO DÍA (11 de junio de 2018), <https://www.elnuevodia.com/noticias/politica/nota/latravesiahistoricadelplebiscito-2330014/>.

¹¹⁸ *Id.*

¹¹⁹ *Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863 (2016).

¹²⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

Harris v. Rosario,¹²¹ Justice Marshall expressed that the holding of the Insular Cases was questionable, and Justice Brennan in his concurrence in *Torres v. Puerto Rico* also questioned the validity of these *old cases* such as *Downes v. Bidwell* and *Balzac v. Porto Rico*.¹²² However, in the 2008 case of *Boumediene* the majority opinion stated that the “Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This . . . doctrine [of more than a century] informs our analysis in the [current case].”¹²³

That brings us to *Puerto Rico v. Sánchez Valle*, ostensibly a case about criminal procedure. It is the most definitive and authoritative statement on the nature of the ELA in recent times. The Court held that the Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws. Ordinarily, a person cannot be prosecuted twice for the same offense.¹²⁴ But, under the dual-sovereignty doctrine, the Double Jeopardy Clause does not bar successive prosecutions if they are brought by separate sovereigns.¹²⁵ Yet the *sovereignty* in this context does not have its common meaning. Rather, the test hinges on a single criterion: the *ultimate source* of the power undergirding the respective prosecutions.¹²⁶ If the two entities derive their power to punish from independent sources, then they may bring successive prosecutions. Conversely, if those entities derive their power from the same ultimate source, then they may not.

Under that approach, the States are separate sovereigns from the Federal Government and from one another. Because States rely on “authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment,” state prosecutions have their roots in an “inherent sovereignty” unconnected to the U.S. Congress.¹²⁷ For similar reasons, Indian tribes also count as separate sovereigns. A tribe’s power to punish pre-existed the Union, and so a tribal prosecution, like a State’s, is “attributable in no way to any delegation . . . of federal authority.”¹²⁸ Conversely, a municipality cannot count as a sovereign distinct from a State, because it receives its power, in the first instance, from the State.¹²⁹

¹²¹ *Harris v. Rosario*, 446 U.S. 651, 653 (1980) (Marshall, J., dissenting).

¹²² *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

¹²³ *Boumediene*, 553 U.S. at 759.

¹²⁴ U.S. CONST. amend. V.

¹²⁵ *United States v. Lanza*, 260 U.S. 377, 382 (1922).

¹²⁶ *United States v. Wheeler*, 435 U.S. 313, 320 (1978).

¹²⁷ *Heath v. Alabama*, 474 U.S. 82, 89 (1985).

¹²⁸ *Wheeler*, 435 U.S. at 328.

¹²⁹ *Waller v. Florida*, 397 U.S. 387, 395 (1970) (Brennan, J., concurring).

With respect to the U.S. territories, the Court concluded in the early 20th century that they are not sovereigns distinct from the United States.¹³⁰ The Court reasoned that “the territorial and federal laws [were] creations emanating from the same sovereignty,”¹³¹ and so federal and territorial prosecutors do not derive their powers from independent sources of authority. The Court recognized that when the ELA was born in 1950-1952 by virtue of Public Law 600,¹³² “Congress relinquished its control over the [Commonwealth’s] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States.”¹³³ Also, “Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the [Federal] Constitution.”¹³⁴ The Court emphasized the purely local nature of the self-rule powers accorded to Puerto Rico in 1950-1952. The Puerto Ricans drew up their own Constitution in 1950-1952, but behind “the Puerto Rican people and their Constitution, the ‘ultimate’ source of prosecutorial power remains the U.S. government, just as [behind] a city’s charter lies a state government.”¹³⁵ That makes Congress the original source of power for Puerto Rico’s prosecutors, as it is for the federal government.

In sum, the Puerto Rico government and the United States’ federal government are not separate sovereigns. Puerto Rico is a subordinated autonomy that enjoys a sphere of self-government only for purely local matters, and is not a separate sovereign, as are the constituent units of the U.S.A. federation. U.S. states have an *inherent sovereignty* unconnected to, and indeed pre-existing, the U.S. Congress. They are separate sovereigns from the federal government and from each other. However, Puerto Rico’s authority to govern itself is ultimately derived from the federal government. This holding, therefore, is a veritable reassertion of the subordinate nature of the ELA, absolutely subject to the Territorial Clause of the U.S. Constitution.

Importantly, the Obama Administration, through its Solicitor General, Donald Verrilli, filed an *amicus* brief in this case in December 2015 that supported the position taken in the majority opinion in *Puerto Rico v. Sanchez Valle*. In that brief, the Solicitor General argued that “Congress may treat Puerto Rico differently from States by virtue of Congress’s power under the Territory Clause.”¹³⁶ Puerto Rico has some control over its purely local affairs as a U.S. territory, but is not a sovereign under the U.S. Constitution. In fact, it does not have an independent and separate existence from the U.S. federal government.¹³⁷

¹³⁰ *Grafton v. United States*, 206 U.S. 333, 354-55 (1907).

¹³¹ *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937).

¹³² See RAMÍREZ LAVANDERO, *supra* note 88, at 180-81.

¹³³ *Examining Bd. of Engineers, Architects, Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976).

¹³⁴ *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quotations omitted).

¹³⁵ *Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863, 1875 (2016).

¹³⁶ Brief for the United States as *Amicus Curiae* Supporting Respondents, at 28, *Puerto Rico v. Sánchez Valle*, 136 S.Ct. 1863 (2016) (No. 15-108), 2015 WL 9412680, at *28 (quotations omitted).

¹³⁷ See RAMÍREZ LAVANDERO, *supra* note 88, at 191.

*D. The Puerto Rico Oversight, Management, and Economic Stability Act
(P.R.O.M.E.S.A.-H.R. 5278, S.2328)*

Puerto Rico's current economic and fiscal crisis has deep historical-structural causes. The federal government has responded with a statute known as P.R.O.M.E.S.A.—after its acronym, the Puerto Rico Oversight, Management, and Economic Stability—, which became law on June 30, 2016.¹³⁸ The second major component to the constitutional moment of 2012-2017 was the enactment of this federal statute.

This statute established a Fiscal Control Board with broad powers of budgetary and financial control over Puerto Rico. It created procedures for adjusting debts accumulated by the Puerto Rico government and its instrumentalities. It would expedite approvals of key energy projects and other “critical projects” in Puerto Rico.¹³⁹ Section 101 of the statute specifies that the Fiscal Control Board has been established pursuant to the Territorial Clause granting Congress plenary authority over its territories. Section 104 specifies that the Board can hold hearings, issue subpoenas, obtain information, enter into contracts, enforce Puerto Rico labor laws, initiate civil actions to carry out its responsibilities, etc. Title II specifies the enormous powers of the Board to set fiscal plans and budgets. Essentially, under P.R.O.M.E.S.A., the Puerto Rico government no longer has any authority over economic and fiscal plans, or the government's budget. Those could all be set by the Fiscal Control Board.

The Board's seven members have been designated (none of which represent the interests of the Puerto Rican people nor were elected by them), and the Board has been fully operational since early 2017. Many have said that the Puerto Rican people are no longer in charge of their own affairs through their institutions of government. Instead, the major decisions affecting the people's welfare in the next few years will be taken by an unelected and unaccountable Fiscal Control Board. Public opinion data indicates there has been a serious erosion in the public's confidence in the Board. In October 2016, polls showed that 69 percent of the Puerto Rican people approved of the Board,¹⁴⁰ but that positive perception has eroded substantially. A more recent poll indicates that only 43 percent favor the Board, whereas 40 percent are against it.¹⁴¹

¹³⁸ Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, §§ 101-09, 201, 130 Stat. 549, 553-65 (2016).

¹³⁹ *Id.* § 503.

¹⁴⁰ See Aníbal Acevedo Vilá, *La mortalidad de la Junta*, EL NUEVO DÍA (June 2, 2017), <https://www.elnuevodia.com/opinion/columnas/lamortalidaddelajunta-columna-2327268/>.

¹⁴¹ *Aumenta entre los boricuas el rechazo a la Junta*, EL NUEVO DÍA (June 2, 2017), <https://www.elnuevodia.com/noticias/politica/nota/aumentaelrechazoalajuntadesupervisionfiscal-2327129/>.

E. The Clash Between Legitimacy and Legality and the Evolution of Sub-State Politics in Puerto Rico (2012-2016)

Since 2012 to the present, a momentous constitutional moment has figured itself in the relation between Puerto Rico and the United States in two phases. As in the case of Catalonia, it encapsulates the clash between legitimacy and legality. With respect to legitimacy, during its first phase in 2012, a clear majority of Puerto Ricans expressed their disapproval of the *status quo* since 1952. Puerto Ricans invoked their constituent power and rejected their present constitutional status. In 2016, during its second phase, all three branches of the federal government have reasserted and reaffirmed the quasi-colonial nature of the constitutional form over Puerto Rico: The Supreme Court through *Sánchez Valle*,¹⁴² the Obama Administration through its *Amicus Curiae* brief prepared by its Solicitor General in that case, and the U.S. Congress by enacting P.R.O.M.E.S.A. on June 30, 2016.¹⁴³ Hence, creating a clash between legitimacy and legality during 2012 to the present.

This has provoked profound changes in the political party system of Puerto Rico. In Puerto Rico, public opinion polling is deficient. There are no neutral, serious polling institutions such as the Centro de Investigaciones Sociológicas in Madrid, the Centre d'Estudis d'Opinió in Barcelona, or the Euro barometer.

The first major change in the party system¹⁴⁴ is the growth of a pro-sovereignty tendency within the autonomist party, the PPD. In fact, already in the referendum held in November 6, 2012, 33% of total votes were for the *Estado Libre Asociado Soberano*; whereas 46% were for the ELA as it is now.¹⁴⁵ Thus, the internal balance of forces within the PPD has been changing. Reminiscent to some extent of the transformation of C.D.C. (and the breakup of C.i.U. and the recent disappearance of U.D.C.) in Catalonia, the PPD has been the historic party of autonomism, but it now has an important internal faction that defines itself as pro-sovereignty. They have a new generation of leaders that are militantly pro-sovereignty, such as the mayor of San Juan, Carmen Yulín Cruz, a potential candidate for Governor in the next election to be held in 2020. Whether this will result in a definitive and dramatic transformation of the PPD, as happened in the case of C.D.C. in Catalonia, remains to be seen.

The second effect of the constitutional moment of 2012-2016 is that there has been a growth in those favoring the option of becoming the fifty-first unit of the U.S. federation. In a poll held last February 27, 2017, in a "Federalism Yes or No"

¹⁴² Puerto Rico v. Sánchez Valle, 136 S.Ct. 1863 (2016).

¹⁴³ Pub. L. No. 114-187, 130 Stat. 549.

¹⁴⁴ For several decades, the Puerto Rico party system has been very stable, and it has three major parties: the autonomist *Partido Popular Democrático* (PPD), the federalist *Partido Nuevo Progresista* (PNP), and the independentist *Partido Independentista Puertorriqueño* (PIP).

¹⁴⁵ *Elecciones en Puerto Rico: Escrutinio de la Consulta Sobre el Estatus Político del 6 de noviembre de 2012*, COMISION ESTATAL DE ELECCIONES, <http://eleccionespuertorico.org/2012/voto.consulta.php> (última visita 18 de junio de 2018).

referendum, 65 percent of respondents said they would vote to become a state of the US federation.¹⁴⁶ The current government of Puerto Rico, formed after the last election of November 2016 by the PNP, is strongly in favor of becoming the next state of the U.S. federation. As a result, a very controversial referendum on the political status of Puerto Rico was held on June 11, 2017.¹⁴⁷ Originally, the plan was to hold a referendum with a question posing two options: one was going to be “federalism,” and the other “sovereignty” (including the pro-sovereignty faction in the PPD and the independentists), given that in 2012 the people already determined that the *status quo* is unacceptable. Last April 13, 2017, however, Dana Boente, Acting Deputy Attorney General at the U.S. Department of Justice, sent a letter to the PNP government stating that a third option (the *status quo*) had to be included in the question.¹⁴⁸ The PNP government acceded and, in light of that imposition, the independentist parties announced their decision to boycott the referendum, and the autonomist PPD did so as well. The boycott was successful in the sense that it helped to delegitimize the referendum: only 23 percent participated, and of course the pro-statehood forces won 97 percent of the vote.¹⁴⁹

The third effect of the constitutional moment of 2012-16 is a realignment in the political party system. Based on the last elections held last November 2016, there is an indication that the system is starting to move away from its traditional bipartisan nature. It has traditionally been dominated by two major parties, the PNP and the PPD, with a third party, the PIP, receiving residual numbers in the last decades. In this last election, at the gubernatorial level, we saw the irruption of independent candidates, unrelated to any of the three traditional parties. Close to 17 percent of the vote for the gubernatorial candidates went to independent candidates. The winning candidate, Ricardo Rosselló of the PNP, thus received only 41.80 percent of the vote, and the runner-up was David Bernier of the PPD, who received 38.87 percent of the vote.¹⁵⁰

CONCLUSION

The shift during 2010-2018 in the constitutional preferences among the citizens of Catalonia is remarkable, and I argue that the constitutional moment of 2006-2010 was the *trigger* event and the immediate catalyst for this significant

¹⁴⁶ *Favorecen la Estadidad*, EL NUEVO DÍA (February 27, 2017), http://prdecide.elnuevodia.com/detalle/reportaje/183_favorecen-la-estadidad/preview/.

¹⁴⁷ *Plebiscito para la descolonización inmediata de Puerto Rico*, COMISIÓN ESTATAL DE ELECCIONES (July 25, 2017) http://resultados2017.ceepur.org/Escrutinio_General_79/index.html#es/default/CONSULTA_DE_ESTATUS_Resumen.xml.

¹⁴⁸ Letter from Dana Boente, Acting Deputy Att’y General, U.S. Dept. of Justice, to Ricardo A. Rosselló Nevares, Governor of Puerto Rico, at 2 (April 13, 2017).

¹⁴⁹ COMISIÓN ESTATAL DE ELECCIONES, *Plebiscito*, *supra* note 147.

¹⁵⁰ *Elecciones generales: 2016 escrutinio*, COMISIÓN ESTATAL DE ELECCIONES (Dec. 7, 2016) http://elecciones2016.ceepur.org/Escrutinio_General_77/index.html#es/default/GOBERNADOR_Resumen.xml.

growth in the pro-secessionism orientation within the Catalan national movement. The clash between legitimacy and legality in Spain during 2006-2017 has had a concrete political effect: it shows how politics and law actually interact, and how it can serve as a catalyst for the growth of the pro-secessionism orientation in sub-state nationalism in multinational polities.

These events also confirm one of the theoretical points made in my previous work: sub-state nationalists inhabit an imagined community that is considered a *moral polity*, where “reciprocities are expected and notions of collective dignity, the commonweal, and mutual accommodation are essential.”¹⁵¹ The perception by these sub-state nationalists—that their expectations of reciprocity have been violated—is a factor that contributes to the increasing radicalization of sub-state nationalists’ political preferences. However, it needs to be recognized that after the trigger event of the constitutional moment of 2006-2010, other factors may have intervened, which could have further impacted the growth of substate secessionism in Spain.¹⁵² Some of these factors concern:

[S]trictly political issues such as election results and formation of new governments or they are related to public policy (bills, public investment in the area); . . . or economic factors (the economic crisis and its impact on the finances of the Government of Catalonia, with all its consequences); or, even, they affect some symbolic elements (expressions of opposition to the action of the [H]ead of the [S]tate, for example). Also, this process is completed with the structuring of a [wide] social movement in favor of independence, which showed a high capacity for action in the public sphere and for exerting pressure on political parties.¹⁵³

From 2012 to the 2017, there was a constitutional standoff between the Catalan government (which had been proposing and finally did hold a constitutive referendum on independence last October 1, 2017) and the Spanish government (which insisted throughout that this was not constitutionally permissible).¹⁵⁴ Chapter 3, Section 14[9] ([32]) of the Spanish Constitution states that “authorization of popular consultations through the holding of referendums”¹⁵⁵ is one of the prerogatives of the central state. A new constitutional moment configured itself since 2012, and this new instance of the legality-legitimacy conundrum has had an important effect on sub-state nationalist politics.

¹⁵¹ LLUCH, *supra* note 39, at 35.

¹⁵² *Id.* at 87.

¹⁵³ Argelaguet, *supra* note 59, at 114.

¹⁵⁴ On the possible constitutional avenues for holding a referendum, see -for example- INSTITUT D’ESTUDIS AUTONÒMICS, INFORME SOBRE ELS PROCEDIMENTS LEGALS A TRAVÉS DELS QUALS ELS CIUTADANS I LES CIUTADANES DE CATALUNYA PODEN SER CONSULTATS SOBRE LLUR FUTUR POLÍTIC COL·LECTIU (2013); Gerard Martín i Alonso, *La Consulta sobre el Futur Politic de Catalunya*, 26 *Activitat parlamentària* 25, 26 (2013) (for reports by the Consultative Council for the National Transition of the Catalan government).

¹⁵⁵ CONST. ESP. art. 149 (32).

Unlike the Scottish case, where an agreement between the Scottish Prime Minister, Alex Salmond, and the British Prime Minister, David Cameron, was signed on October 15, 2012,¹⁵⁶ in order to provide the legal framework for the holding of Scotland's independence referendum last September 18, 2014, the Spanish government led by Mariano Rajoy, has taken a stand against the Catalan proposal to hold a referendum on independence. The Spanish government's strong opposition is supported by the interpretation of the Spanish Constitutional Court defending the most restrictive point of view on the issue of the right to self-determination of stateless nations currently existing within the Spanish state.¹⁵⁷

Similarly, during the period 2012-16 a momentous constitutional moment has configured itself in the relation between Puerto Rico and the United States in two phases. As in the case of Catalonia, it encapsulates the clash between legitimacy and legality, and highlights the paradoxical constitutional politics of state-nations. With respect to legitimacy, during its first phase in 2012, a clear majority of Puerto Ricans expressed their disapproval of the *status quo* since 1952. In 2012, Puerto Ricans invoked their constituent power and rejected their present constitutional status. In 2016, during its second phase, all three branches of the federal government have reasserted and reaffirmed the quasi-colonial nature of the constitutional form over Puerto Rico: The Supreme Court through *Sánchez Valle*,¹⁵⁸ the Obama Administration through its *Amicus Curiae* brief prepared by its Solicitor General in that case, and the U.S. Congress by enacting P.R.O.M.E.S.A. on June 30, 2016.¹⁵⁹ Hence, creating the clash between legitimacy and legality during 2012 to 2016. This has had a dramatic effect on sub-state politics: including both the division in the autonomist party between proponents of *ELA Soberano* and the advocates of the ELA as it is, a noticeable growth in the pro-federalism sentiment and the support for the option of becoming a unit of the U.S.A. federation, and a weakening of Puerto Rico's two-party system.

The fact that Puerto Rico is an autonomous territorial entity belonging to the United States, turns the U.S.A. into a state-nation, despite the obvious size, power, and demographic asymmetries between the two. Our analysis foregrounds the critical role of the legitimacy-legality conundrum in the Puerto Rico-United States political relationship.

Despite the fact that they are different in many dimensions, in both Catalonia and Puerto Rico, a clash of legitimacies occurred between an established constitutional form and the constituent power represented by the democratic will of the people. The analysis presented here helps to validate further my argument that "[s]ubstate nationalists inhabit an imagined community that is a 'moral polity'

¹⁵⁶ *Scottish independence referendum deal signed by Cameron and Salmond*, THE GUARDIAN (Oct. 15, 2012), <https://www.theguardian.com/politics/2012/oct/15/scottish-independence-referendum-cameron-salmond>.

¹⁵⁷ LLUCH, *supra* note 39, at 279-80. See also López Bofill, *supra* note 49.

¹⁵⁸ Puerto Rico v. Sánchez Valle, 136 S.Ct. 1863 (2016).

¹⁵⁹ Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016).

[where] reciprocities are expected and notions of collective dignity, the commonweal, and mutual constitutional accommodation are essential."¹⁶⁰

¹⁶⁰ LLUCH, *supra* note 39, at 64.