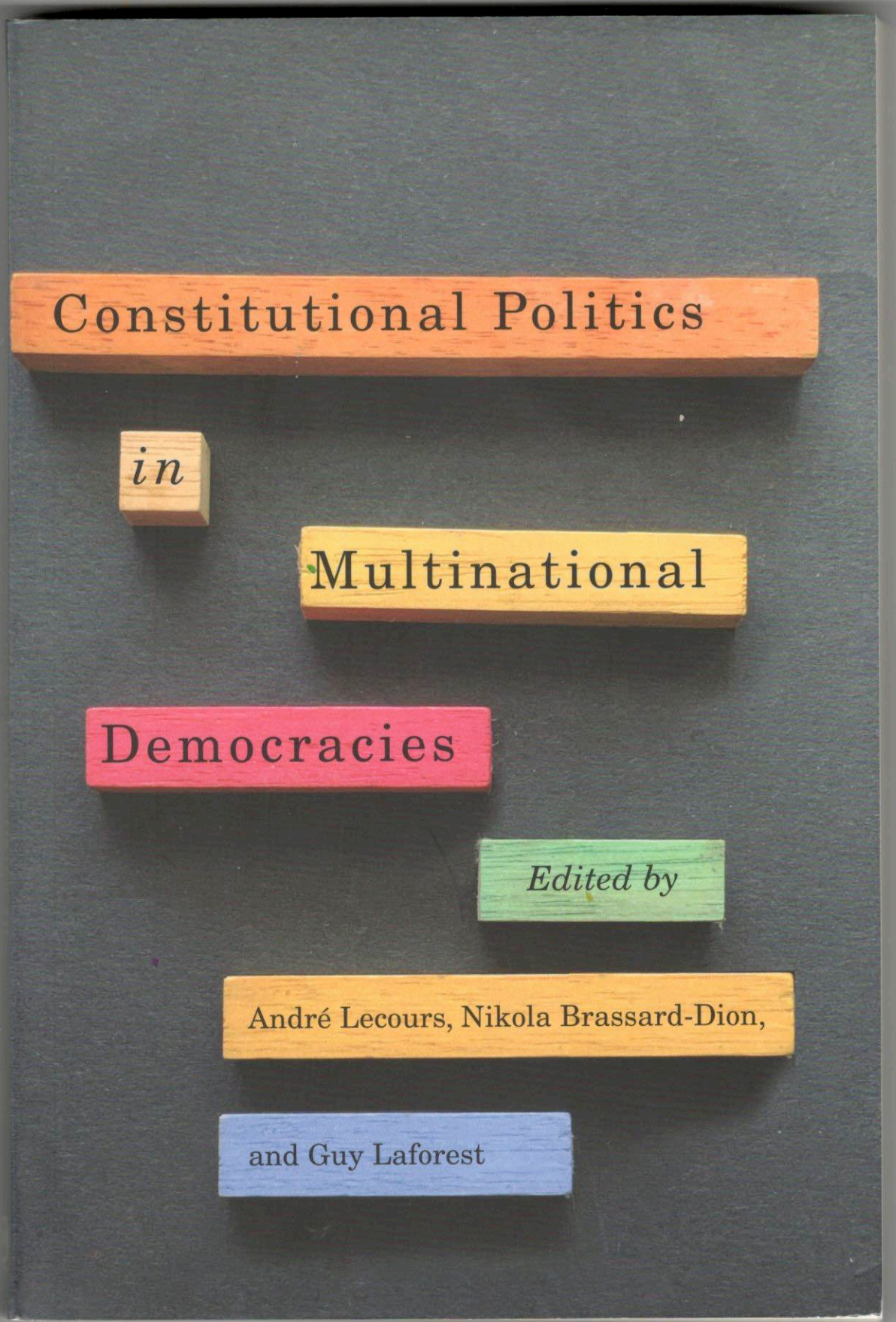
Constitutional Politics
in
Multinational
Democracies
Edited by
André Lecours, Nikola Brassard-Dion,
and Guy Laforest

Political studies

"As embodiments of a shared political community, constitutions specify the rules of the game and the boundaries for legal political action. But what happens when some groups feel they do not fully belong in said community? How can constitutions accommodate minorities – and can they provide mechanisms for an amicable divorce? These issues have been at the forefront of politics in countries like Canada, Spain, and the United Kingdom. *Constitutional Politics in Multinational Democracies* brings together the foremost experts in the field and provides answers to these pressing questions. Highly recommended!"
MATT QVORTRUP, Coventry University

Constitutional politics is exceptionally intense and unpredictable. It involves negotiations over the very nature of the state and the implications of self-determination. Multinational democracies face pressing challenges to the existing order because they are composed of communities with distinct cultures, histories, and aspirations, striving to coexist under mutually agreed-upon terms. Conflict over the recognition of these multiple identities and the distribution of power and resources is inevitable and, indeed, part of what defines democratic life in multinational societies.

Constitutional Politics in Multinational Democracies brings experts together to assess what constitutional politics is, who is involved in it, and how it happens. Case studies include Catalonia and Spain, Puerto Rico and the United States, Scotland and the United Kingdom, Belgium, Bosnia and Herzegovina, and Quebec and the Métis People in Canada. Theoretically significant and empirically rich, *Constitutional Politics in Multinational Democracies* is a necessary read for any student of multinationalism.

"*Constitutional Politics in Multinational Democracies* is a valuable book that considers the dynamics of these countries at a critical juncture. The book helps us better understand the friction between legality (formal structure) and legitimacy (political practice) and the extent to which party politics and social pressures push formal structures into adjustment."
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Contents

Figures and Tables

FIGURE

TABLES

5

The Legitimacy-Legality Constitutional Paradox in Multinational Democracies and the Constitutional Origins of Sub-State Party System Realignments

Jaime Lluch

The Legitimacy-Legality Constitutional Paradox and Multinational Democracies

In contemporary multinational democracies such as Spain, Canada, Belgium, Italy, and the United Kingdom, the political aspirations of sub-state national societies for accommodation by the state, for a special status autonomy, for asymmetric federalism, or for a more satisfactory representational scheme in the administrative organs of the central state have been formulated as demands for constitutional reform in the last 30 or 40 years (Tierney 2004, 17). Such demands, in the context of the social and political peculiarities of multinational democracies, add an additional level of intricacy to the contemporary debates concerning the relationship between constituent power and constitutional form. The dominant constitutional and political view in sub-state national societies such as Scotland, Quebec, the Basque Country, Catalonia, Puerto Rico, Corsica, South Tyrol, etc. challenges contemporary assumptions about the nation-state, namely, the monistic demos thesis. Sub-state nationalists present "particular challenges to constitutional form which do not generally arise in uninational states" (Tierney 2007, 236).

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, if taken seriously by the state, can call into question many of the constitution's most profound self-understandings including even the conception of unitary citizenship which has been an article of faith for state-building processes" (Tierney 2004, 96). Autonomist 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 multinational polities.

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.

In this chapter, I seek to go beyond the interesting observation by constitutional theorists that the paradox of constitutionalism is one of the great paradoxes 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 that the clash between constituent power and constitutional form can have an important effect on politics, and thus that constitutionalism can have an effect on the development and evolution of sub-state nationalism, and conversely, 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 chapter uses a Most Different Systems Design (MDSD) approach to compare the effect of constitutional moments that embody the legitimacy-legality paradox on sub-state politics in Catalonia and Puerto Rico in the recent period (2010–2020). In a MDSD, 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" (Hirschl 2014, 253). Puerto Rico and Catalonia are different in almost every conceivable sense: different historical trajectories, demographics, patterns of socioeconomic development, length of liberal democratic experience, size, location, type of central state, etc. 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 both of their party systems have undergone major changes, which are in fact still ongoing. The thesis of this chapter is that they also share the same independent variable that explains this outcome variable: these profound changes were caused by constitutional moments that reflect the legitimacy-legality paradox.

Puerto Rico during 2012–2020 has experienced a dramatic constitutional moment in two phases, still being felt today. First, in 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*. Then, in 2016 a second phase occurred, involving the momentous US Supreme Court decision in *Sánchez Valle* and Congress' decision to establish an all-powerful Fiscal Control Board over Puerto Rico; 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 2012–2020 (Lluch 2018).

Similarly, Spain during 2005–2020 has become a laboratory for observing this interaction between politics and law, and a virtual natural experiment 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 2006–2020 when the tension between constituent power and constitutional form has been clearly expressed: first, in the clash between an organic statute of autonomy and a constitution (the Catalan Statute of Autonomy of 2006 versus the interpretation of the Spanish Constitution expressed in the Spanish Constitutional Court decision of June 2010). This political drama has been playing itself out during 2005–2020. Second, in the case of constitutive referendums,[1]

as the ongoing constitutional standoff between the Catalan government (which has been proposing a self-determination referendum and finally held one) and the Spanish government (which insists that this is not constitutionally permissible). The pro-independence coalition that won the elections of 21 December 2017 and subsequently formed the government in Catalonia, held a referendum on independence on 1 October 2017.[2]

Constitutional Moments and Sub-State and State Nationalisms

A "constitutional moment" is a higher order constitutional event, which impacts the relationship between the central state – largely controlled by the majority nation – and the minority nation embedded within the same state (Ackerman 1991). 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 nations. These critical constitutional transformative events include: the adoption of a new constitution; the adoption or proposal of significant constitutional amendments; 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. (Lluch 2014). The very process of debating and negotiating a constitutional moment is critical because such moments "help to create the political community on whose existence the constitutional order which results from that process depends" (Choudhry 2008, 6).

Note that these critical constitutional transformative events may be either positive or negative in their final outcome. That is, the event could have led to the actual enactment of a constitutional amendment, organic statute, etc., or the event could have been the proposal of such an amendment, etc., even if it was later rejected. What matters is that the event set in motion the public policy discussion and critical reevaluation of the relationship between majority and minority nations, both coexisting in a dialogical relationship within the same state.

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 (Lluch 2014).

Sub-state nationalists inhabit an imagined community that is a "moral polity" where reciprocities are expected and notions of collective dignity, the common weal, and mutual accommodation are essential (Lluch 2014). 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.

Recent developments in Spain, especially during 2006–2020, 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, both at the state level and the sub-state level. I will first examine how the tension between constituent power and constitutional form is expressed in the clash between an organic statute of autonomy and a constitution (the Catalan Statute of Autonomy of 2006 versus the interpretation of the Spanish Constitution expressed in the Spanish Constitutional Court decision of June 2010). Second, I will refer to the current constitutional standoff between the Catalan government and the Spanish government on the issue of holding a self-determination referendum. I will then examine developments arising from constitutional moments between Puerto Rico and the US during 2012–2020.

Constitutional Moments, The Paradox of Constitutionalism, and Constitutional Politics

Consistent with the argument in the Introduction to this book, this chapter is an extended reflection on the nature of constitutional politics. In the context of multinational democracies with significant sub-state national parties, constitutional politics is centred on the legitimacy-legality paradox. How the constitution is viewed by national minorities and national majorities in such complex multinational

democracies is at the centre of constitutional politics. As discussed above, the tension between constituent power and constitutional form, or between democracy and law, or between politics and law, or between legitimacy and legality, embodies the central political dilemma of constitutional politics in plurinational democracies with civic sub-state national movements.

Regarding the actors of constitutional politics, there are two levels at which we can answer this question. I will first discuss objective institutions. In this category, the first actor is obviously the highest court of the land that has the power of judicial review, that is, the power to interpret the constitution and to declare statutes unconstitutional. In addition, the second set of actors are the political parties at the state and sub-state levels. But there is another level at which this can be analyzed: constitutional politics in multinational democracies is less about concrete political institutions and more about subtle perceptions between national minorities and national majorities, about legitimacy, identity, recognition, and reciprocity, and about accommodation and pluralism.

The difference between constitutional politics and what lawyers refer to as constitutional law is treated implicitly and explicitly throughout this chapter. Constitutional law is about the text of the constitution, relevant statutes, and the relevant constitutional case law. This chapter considers how constitutional politics works: constitutional politics is about the political effects of constitutional moments, which often crystallize such intersubjective perceptions between minorities and majorities about legitimacy, recognition, and reciprocity.

The Paradox of Constitutionalism and the Constitutional Moment in Spain (2005–2020): The Catalan Statute of Autonomy of 2006 and the Spanish Constitution of 1978

The Spanish territorial model established in the 1978 constitution, the State of Autonomies, and the Catalan Statute of Autonomy of 1979, 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. In Catalonia, the major parties during this time period were: *Esquerra Republicana de Catalunya* (ERC), the federation of *Convergència i*

Unió (CiU) – consisting of *Convergència Democràtica de Catalunya* (CDC) and *Unió Democràtica de Catalunya* (UDC) – the *Partit dels Socialistes de Catalunya* (PSC), and *Iniciativa per Catalunya-Verds* (ICV).[3] "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...National pluralism was not implemented by the State central authorities" (López Bofill 2014). Moreover, autonomy did not ensure the protection of the Catalan language and culture, given the overwhelming presence of Spanish in the public sphere. 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 centre of almost 17 billion euro, or 9.8% 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" (López Bofill 2014).

During a number of years, the major Catalan parties had been putting forward proposals for reform of the 1979 Statute of Autonomy. 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 (CSA), including the representatives of practically all the Catalan parties, except the *Partido Popular* (Popular Party-PP). The new CSA was a complex document containing a preamble, a preliminary title, and the following seven titles, in its final version (2006):

Title I. Rights, obligations and governing principles (Articles 15–54)
Title II. Institutions (Articles 55–94)
Title III. Judicial power in Catalonia (Articles 95–109)
Title IV. Powers (Articles 110–73)
Title V. Institutional relations of the Generalitat (Articles 174–200)
Title VI. Funding of the Generalitat (Articles 201–21)
Title VII. Reform of the Estatut (Articles 222–3)

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.

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*). The new CSA 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% of the articles in the proposal that came out of the Catalan Parliament in September 2005 were amended by the Spanish Congress of Deputies (ERC 2006).

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 Catalan prime minister or *president* from 2010 until 2015, when he was succeeded by Carles Puigdemont – about the definition of the nation, the Catalan language regulation, and the allocation of powers and financing. This agreement, however, represented the step back from the principles that had inspired the new CSA 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 parliamentarian 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 CiU in the Congress and the Senate). But the main opposition party in the Spanish Parliament, the conservative People's Party (*Partido Popular,* PP) strongly contested the new CSA's amendment process. The People's Party fostered a fierce campaign against the Statute's approval in the course of the winter

and the spring 2006, which sometimes included vitriolic language, and a campaign to boycott Catalan products, such as the Cava (López Bofill 2014).

The final form of the new CSA of 2006 was enacted by the Spanish Parliament and ratified by the Catalan people in a referendum that was held on 18 July 2006 in Catalonia, in which 73.9% of the votes were in favour, 20.8% against, and 5.3% blank votes, with 48.85% participation (Argelaguet 2014).

The new CSA 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. The text was approved by 120 out of 135 members of the Catalan Parliament in 2005, was then subsequently approved by the Spanish Parliament in 2006, and by the Catalan people in a referendum on 18 June 2006.

The People's Party 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 PP parliamentarian 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 (SCC) finally issued the decision on the Statue of Catalonia in June 2010.[4] In this momentous decision, the court nullified 14 key provisions of this Statute and interpreted another 27 key provisions in accordance with the 1978 Spanish Constitution. The decision undermined the aims and the basic structure of the CSA of 2006. The SSC decision of June 2010, and its interpretation of the constitutional form embodied in the Spanish Constitution of 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 repeatedly stressed 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 (López Bofill 2014; Spanish Constitutional Court Decision 31/2010 of 28 June 2010; Revista d'Estudis Autonòmics i Federals: 2011).

With regard to "historical rights" referred to in Article 5 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 rebuffed 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 (López Bofill 2014; Spanish Constitutional Court Decision 31/2010 of 28 June 2010).

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 Castillian language as vehicular in education at the same level of Catalan. The Spanish 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 from 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

The Political Effect of the Paradox of Constitutionalism in Spain, 2006–2020

The Spanish Constitutional Court ruling on Catalonia's Statute was contested by a huge demonstration that filled Barcelona's centre on 10 July 2010 with an estimated attendance of more than one million people. Even though the call for independence began to be 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 CSA of 2006. Even Catalonia's prime minister at that time, a member of the PSC opposed to Catalan independence, José Montilla, expressed his "disappointment and indignation" with the Spanish Constitutional Court's ruling and supported the march summoning the Catalan people (López Bofill 2016).

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 was the immediate catalyst for the dramatic growth of independentism in the parliamentary sphere in Catalonia between 2010–2020.

In late November 2010, elections were held in the Parliament of Catalonia, and there 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 government that allowed implementing welfare policies (Argelaguet 2014).

On 11 September 2012, during Catalonia's National Day celebrations, hundreds of thousands of people took to the streets of Barcelona calling for Catalonia's independence from Spain. After this massive demonstration, Artur Mas, Catalonia's prime minister, dissolved the regional Parliament and called for elections. The prime minister's coalition, *Convergència i Unió* (CiU) included for the very

first time in 2012 the demand for statehood in its electoral manifesto (López Bofill 2014).

On 25 November 2012, in the elections to the Parliament of Catalonia (Government of Catalonia 2012), CiU received 30.7% of the votes and 50 seats (out of 135); ERC, 13.7% and 21 seats; PSC, 14.4% and 20 seats; PP, 13.0% and 19 seats; ICV-EUiA, 9.9% and 13 seats; C's, 7.6% and 9 seats; and, finally, CUP, 3.5% and 3 seats.[5] These 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 (Argelaguet 2014).

One of the first decisions of the new Parliament was to approve, on 22 January 2013, the Resolution 5/X, whose title was "the Declaration of sovereignty and right to decide of the people of Catalonia."[6] Its centrepiece states that "The people of Catalonia has, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject." This resolution – adopted by 85 votes in favour (CiU, ERC, ICV-EUiA and a member of CUP), 41 against (PSC PPC and C's) and 2 abstentions (CUP)[7] – came into collision with the Spanish Constitution, which establishes that the Spanish people are sovereign (Argelaguet 2014).

The new Parliament of Catalonia of 2012 was reflecting the growth of the secessionist option 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* (CEO) of the Catalan government show the dramatic growth of Catalanist sentiment and independentism. The CEO 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* (CIS) in Madrid.

Table 5.1 shows the dramatic upswing in the citizenry's political orientation. Pro-independence alternative has grown from 13.9% to 46.4% in 2013. Correspondingly, the pro-autonomism orientation (which represents the status quo – the State of Autonomies) has suffered a drop from 38.2% in 2006 to 20.7% in 2013. The pro-federalism orientation has also suffered a dramatic descent from 33.4% to 22.4%.

Table 5.1 | Constitutional preferences on the relationships between Catalonia and Spain according to *Centre d'Estudis d'Opinió* surveys (2006–2013)

	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.
Source: Argelaguet, 2014

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.

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the relationships between Catalonia
d'Opinió surveys (2006–2013)

An Independent State	*DK/ NA*	*(N)*	Source
13.9	6.3	2.000	
15.9	4.5	2.000	
17.3	6.0	2.000	
17.4	5.4	2.000	
21.6	5.6	2.000	
25.2	3.4	2.500	
28.2	5.4	2.500	
44.3	7.1	2.500	
46.4	6.1	2.000	

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Table 5.2 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: after 2006, the Catalan identity has grown while the Spanish one has declined significantly.

Table 5.3 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 (Lluch 2014). This political orientation has been gaining support in the electorate: in the 1990s it was about one-third, and in 2013, it has been measured at 54.7%.

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 it has maintained a majoritarian orientation that was 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 were either federalist or autonomist. This situation changed dramatically in the period right after 2010. CDC, the party of Jordi Pujol that had been autonomist since 1980, passed through a quick transformation in the years after 2010 and became an independentist formation. Correspondingly, ERC after 2010 experienced a growth in electoral support.

The second momentous effect on this sub-state party system is that the coalition of CiU (composed of CDC and UDC) that ruled the Catalan government from 1980 to 2003, and again from 2010 to 2015, dissolved itself on 17 June 2015. UDC was a historic party founded in 1931. There was the perception that CDC had become an independentist party during the years after 2010, but UDC and its president Josep Antoni Duran i Lleida, had remained ambiguous and vaguely pro-autonomism in their political orientation. At the 2015 elections, UDC failed to gain parliamentary representation, Duran i Lleida retired from politics, and the party dissolved itself on 24 March 2017. Part of UDC, led by Antoni Castellà, Núria de Gispert and others, separated itself from UDC and became *Demòcrates de Catalunya*, a pro-independence formation. On the

Table 5.2 | Subjective National Identity in Catalonia (1979–2013)

	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
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

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

Note: DATA and CIS surveys are based on personal interview; CEO, CATL.

Source: Argelaguet, 2014

Table 5.3 | Evolution o

	2001
Yes, in favour	35.9
No, against	48.1
Non-voting	–
Other answers	–
DK	13.3
NA	2.8
(N)	2.77
Source	CIS
Study number	241

Note: Centro de Invest
face. *Centre d'Estudis*
Source: Argelaguet, 20

Catalonia (1979–2013)

Only Catalan	DK/ NA	(N)	Source and study number
31.3		1.079	DATA
23.1		1.176	DATA
12.5	3.0	4.872	CIS, 1413
9.1	2.7	2.896	CIS, 1750
14.9	2.0	2.489	CIS, 1998
13.8	1.7	1.593	CIS, 2199
11.5	3.3	1.368	CIS, 2374
14.7	2.0	2.778	CIS, 2410
9.8	1.8	3.571	CIS, 2543
8.8	4.5	1.965	CIS, 2660
6.6	3.9	2.000	REO, 346
6.1	3.2	2.000	REO, 367
3.9	3.4	2.000	REO, 404
4.7	2.5	2.000	REO, 466
5.7	2.4	2.000	REO, 544
5.5	2.3	2.500	REO, 612
5.0	2.4	2.500	REO, 651
2.0	2.3	2.500	REO, 705
2.9	3.2	2.000	REO, 722

ther (1982); CIS, Centro de
w.cis.es; CEO, *Centre d'Estudis*

ersonal interview; CEO, CATL.

Table 5.3 | Evolution of the options about the independence of Catalonia

	2001	2011 (June)	2011 (Oct.)	2012 (Jan.)	2012 (June)	2012 (Nov.)	2013 (Feb.)
Yes, in favour	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

Note: *Centro de Investigaciones Sociológicas* (CIS) survey is an interview face to face. *Centre d'Estudis d'Opinió* (CEO) survey is a CATI one.
Source: Argelaguet, 2014

other hand, during the summer of 2016, the leaders and militants of CDC decided to dissolve that entity and transformed it into a new party known as the *Partit Demòcrata Europeu Català* (PDeCAT), effective on 8 July 2016.

A non-binding self-determination "citizen participation process" was held on 9 November 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 27 September 2015. The parties in this plebiscitary election did not present themselves as in a regular election. Instead, there was a bloc of parties that favoured 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 CDC (now PDeCAT) and ERC. Also on the Yes camp was the radical left formation CUP. Representing the No option were Ciutadans (Cs), PSC, and PP. In between, there was UDC (formerly in coalition with CDC since 1980) and the coalition of *Catalunya Si Que Es pot* (CSQP). 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 (CDC-ERC-CUP) won a majority of seats in the Catalan parliament (72 out of 135), thus forming a strongly independentist government. However, the coalition received only about 48% of the popular vote on that occasion. The No camp received 39.17% of the vote. UDC and CSQP received 11.45% of the vote.

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. On 1 October 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. On the day of the referendum, 1 October, 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% and the Independence option unsurprisingly won by a huge landslide (92%). On 10 October 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 21 October, the Spanish government initiated the implementation of Article 155 of the Spanish Constitution, suspending the Catalan government and dissolving the Catalan Parliament. After a protracted, unspirited, and almost reluctant declaration of independence by the Catalan Parliament on 27 October, the response by the Spanish authorities was to jail half the Catalan government, including Vice President Oriol Junqueras, and two prominent Catalanist leaders from civil society. The rest of the government, including President Puigdemont, fled to Brussels as a strategy for internationalizing the conflict. Spanish Prime Minister Rajoy dissolved the Catalan Parliament and called for autonomic elections on 21 December 2017.

Similar to the previous 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. Basically, the results were comparable to the results of the last autonomic elections. This time the coalition of pro-independence forces won 47.49% of the vote and they were the only coalition of parties that could form a government. ERC, JxCAT, and CUP together have 70 members of Parliament, which is an absolute majority. Since 21 December 2017, the winning coalition put forward several candidates for the president of Catalonia, but the response of the Spanish government, and its judicial branch especially, made it difficult to choose a president. Finally, Quim Torra was elected as the current president of the *Generalitat* and the Spanish government reinstituted the Catalan government. The Catalan government is still insisting that

its preferred solution to the quagmire is a legal and mutually accorded self-determination referendum. Meanwhile, politics in Spain has been evolving rapidly, with the PSOE and its premier, Pedro Sánchez, now in power, supported by Podemos, ERC, PNV, et al.

Puerto Rico Since 1898: Colonialism, Autonomism, and Federalism

In this section, I turn my attention to a society which is very different when compared to Catalonia. What sort of autonomy is Puerto Rico? From the standpoint of comparative federalism and autonomism, Puerto Rico is a "non-federalist autonomy" (Lluch 2011). There are four ways in which 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 US demonstrates that it is a judicial and statutory creation, not a constitutionally entrenched level of government (Ramírez Lavandero 1988). Second, autonomies such as Puerto Rico are non-federalist because they are constitutionally subordinate to the centre. The "shared rule" component between the central state and the autonomous unit is weak or practically inexistent. The power to terminate or modify the Puerto Rico-US relationship rests squarely on the US Congress, contrary to what Elazar asserts (Elazar 1987, 1991).

Third, autonomies such as Puerto Rico are non-federalist if their influence over the policy-making institutions of the centre is weak or negligible. Under the ELA, Puerto Rico has a degree of self-government, with local government institutions that are similar to the ones in the US states. Puerto Rico enjoys fiscal autonomy, and income received from sources in Puerto Rico is 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 US federal executive (Lluch 2011). Fourth, autonomies are also non-federalist 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.

Watts' typology of federal systems is highly regarded (Watts 2008: 8). "Federal political systems" is a broad genus encompassing a whole spectrum of specific non-unitary forms, i.e., species ranging from "quasi-federations" and "federations" to "confederations" and beyond. Following Watts, if we see the United States as a federal political system composed of 50 constituent units of the core federation, one federal district, two federacies, three associated states, three unincorporated territories, Native American domestic dependent nations, etc. (Watts 2008: 12), 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 significant elements of federalism in its constitutional contours, in view of its current constitutional status, as we have seen above.

The Clash Between Legitimacy and Legality and the Constitutional Moment in Puerto Rico (2012–2020): The Rigidity of the United States Constitution

Puerto Rico is an unincorporated territory of the US (Rivera Ramos 2001; Lluch 2014), and it is subject to the plenary powers of the US Congress under the Territory Clause of the US Constitution (Aleinikoff 2002: 76). Article IV, Section 3 of the latter gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." It gives Congress "general and plenary" power with respect to federal territory (Lawson and Sloane 2009), which relates specifically to "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." In addition, "[c]ase 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" (Lawson and Sloane 2009: 1146). A series of decisions by the US Supreme Court, dating from the period 1901–1922 and known as the *Insular Cases*, created the category of "unincorporated territories" and it held that the inhabitants of these areas only enjoyed the protection of those provisions of the Constitution deemed as "fundamental" by the court, in the absence of congressional action making other provisions applicable.[8] The *Insular Cases* are still good law,

although no contemporary scholar, of any methodological or political inclination, defends them (Lawson and Sloane 2009: 1146).[9]

The US 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 US federal system, in spite of its characteristics as a symmetrical national federation.[10]

Could US constitutionalism accommodate Puerto Rico under a form of autonomism that is non-subordinate and non-colonial? The challenge posed by the rigid US constitutional form is implicitly analyzed in two reports by the President's Task Force on Puerto Rico's Status (of 2005 and 2011). I find that the analysis in the 2005 Report is more authoritative and scholarly, and more explicit in laying bare the rigidity of the US constitutional form (Lluch 2014).

The US Constitution allows unambiguously for three options: independence, becoming a unit of the federation, or the current "unincorporated territory" status. However, autonomists in Puerto Rico have for decades put forward proposals for greater autonomy (R.L. Nieves 2009) that have been labeled as "culminated or enhanced ELA," or "New ELA or Commonwealth." Are "New ELA or Commonwealth" proposals feasible under the US Constitution? 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 ("DOJ"), dated 18 January 2001 (Lluch 2014).

The DOJ recognizes that the creation of the ELA during 1948–52 did not take Puerto Rico outside the ambit of the Territory Clause (President's Task Force 2005: Appendix E). 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." *Harris v. Rosario*, 446 U.S. 651 (1980). See also *Califano v. Torres*, 435 US 1, 3 n. 4 (1978), a per curiam decision: "Congress has the power to treat Puerto Rico differently...." Furthermore, "The Department of Justice has long taken the same view, and the weight of appellate case law provides further support for it" (President's Task Force 2005: Appendix E, at 6).

Under "New Commonwealth," the island would "become an autonomous, non-territorial [and 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" (President's Task Force 2005: 6). The US Constitution "does 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 US Supreme Court stated in 1879, "All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. *First Nat. Bank v. Yankton County*, 101 US 129, 133 (1879)" (President's Task Force 2005, 6).

Furthermore, "it 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...It therefore is not possible, absent a constitutional amendment, to bind future Congresses to any particular arrangement for Puerto Rico as a Commonwealth" (President's Task Force 2005, 6). As the DOJ argues, "as a matter of domestic constitutional law, the United States cannot irrevocably surrender an essential attribute of its sovereignty." (See *United States v. Winstar Corp.*, 518 US 839, 888 (1996), the United States "may not contract away 'an essential attribute of its sovereignty...'.") Thus, the extent to which the United States is party to a covenant stands on no stronger footing than an Act of Congress, which is, for purposes of federal constitutional law, subject to unilateral alteration or revocation by subsequent Acts of Congress. *Marbury v. Madison*, 5 US (1 Cranch) 137, 177 (1803); *Fletcher v. Peck*, 10 US (6 Cranch) 87, 135 (1810). Thus, any New Commonwealth proposal with a mutual consent provision would be constitutionally unenforceable (President's Task Force 2005: Appendix E, at 8).

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

Constituent Power: The *Criollo* Referendums on Self-Determination in Puerto Rico

Since 1898, when Spain ceded Puerto Rico to the US in the aftermath of the Spanish-Cuba-US War, the constitutional status of Puerto Rico has undergone only three modifications. In 1917, Congress passed the Jones Act, which provided for US citizenship for all the residents of

the island (Organic Act 1917, 8 USCA Sec. 731). In 1947, the Elective Governor Act (48 USCA Sec 737) provided for the election of the Governor of the island by Puerto Rico's citizens. In 1950, the Puerto Rico Federal Relations Act (48 USCA Sec. 745) led to the enactment of a Constitution and the establishment of the newly minted *Estado Libre Asociado* (*Comisión de Derechos Civiles*: 2015).

The government of Puerto Rico has on four 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 (*Comisión de Derechos Civiles* 2015). Nevertheless, one might consider these *criollo* self-determination referendums as instances of the expression of constituent power. I will not discuss the previous referenda of 1967, 1993, and 1998, but will focus on the most recent one, in 2012.

My thesis is that the referendum of 2012 initiated a constitutional moment that has lasted until 2020, which dramatizes the tension between legitimacy and legality, between constituent power and constitutional form (Lluch 2018). I will now explore the expression of constituent power exercised by the people of the island in 2012. On 2 November 2012 the people were asked whether they "agreed if Puerto Rico should continue to have its present territorial status." 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%) against the status quo, the current *Estado Libre Asociado*; 61% voted in favour of becoming a state of the US federation; 33% voted for a sovereign (not subject to the Territorial Clause) *Estado Libre Asociado*; 5.5% 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% vote in favour of becoming a state would have to be revised downwards (to 45%). Nevertheless, what is most notable and most historic about this constituent moment is that a clear majority (54%) of Puerto Ricans 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 usual pleasantries about how "Puerto Ricans should decide their own future."

The Constitutiona of the Constitutiona Commonwealth

There are other import of 2012–2020, two of US Supreme Court cas Valle (No. 15-108-dec 1863 (2016). This is th Puerto Rico's political 723 (2008). Prior to *B* tance themselves (even *Insular Cases*. For exa 651 (1980), Justice Ma *Cases* was questionab *Torres v. Puerto Rico*, validity of these "old in the 2008 case of *Bo* "Court designed in the use power frugally an than a century informs

That brings us to *S* criminal procedure, it ment on the nature o Court. The court held Rico and the United St son for the same cond a person cannot be pr the dual-sovereignty d bar successive prosec eigns. *United States* eignty" in this contex the test hinges on a power undergirding *Wheeler*, 435 US 313 punish from indepen prosecutions. Conver the same ultimate sou

Under that approa Federal Government

The Constitutional Moment of 2012–2019: Reaffirmation of the Constitutional Form; The Supreme Court Decision Re: Commonwealth of Puerto Rico v. Sánchez Valle (2016)

There are other important components to the constitutional moment of 2012–2020, two of which occurred in 2016. The first is the recent US Supreme Court case of *Commonwealth of Puerto Rico v.* Sánchez Valle (No. 15-108-decided 9 June 2016); 579 U.S. (2016); 136 S.Ct. 1863 (2016). This is the most important Supreme Court decision on Puerto Rico's political status since *Boumediene et al. v. Bush*, 553 U.S. 723 (2008). 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 *Harris v. Rosario* 446 US 651 (1980), Justice Marshall expressed that the holding of the *Insular Cases* was questionable, and Justice Brennan in his concurrence in *Torres v. Puerto Rico*, 442 US 465, 475–6 (1979) also questioned the validity of these "old cases" such as *Downes* and *Balzac*. However, in the 2008 case of *Boumediene* the majority opinion stated that the "Court designed in the *Insular Cases* a doctrine that permitted us to use power frugally and where most needed. This doctrine of more than a century informs our analysis in the current case."

That brings us to *Sánchez Valle* (2016). Ostensibly a case about criminal procedure, it is the most definitive and authoritative statement on the nature of the ELA as interpreted by the US Supreme Court. 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 offence. But, under the dual-sovereignty doctrine, the Double Jeopardy Clause does not bar successive prosecutions if they are brought by separate sovereigns. *United States v. Lanza*, 260 U.S. 377, 382. 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. *United States v. Wheeler*, 435 US 313, 320. 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 US Congress: *Heath v. Alabama*, 474 U.S. 82, 89. 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": *Wheeler*, 435 US, at 328. Conversely, a municipality cannot count as a sovereign distinct from a State, because it receives its power, in the first instance, from the State: *Waller v. Florida*, 397 US 387, 395.

With respect to the US territories, the court concluded in the early 20th century that they are not sovereigns distinct from the United States: *Grafton v. United States*, 206 US 333. The court reasoned that the "territorial and federal laws were creations emanating from the same sovereignty," *Puerto Rico v. Shell Co.*, 302 US 253, 264, 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, Congress "relinquished its control over the Commonwealth's local affairs, granting Puerto Rico a measure of autonomy comparable to that possessed by the States": *Examining Bd. Of Engineers, Architects, Surveyors v. Flores de Otero*, 426 US 572, 597 (1976). Also, "Puerto Rico, like a state is an autonomous political entity, sovereign over matters not ruled by the Federal Constitution": *Rodriguez v. Popular Democratic Party*, 457 US 1, 8 (1982). The court emphasized the purely local nature of the self-rule powers accorded to Puerto Rico in 1950–52. The Puerto Ricans drew up their own Constitution in 1950–52, but the "back of the Puerto Rican people and their Constitution, the 'ultimate' source of prosecutorial power remains the US government, just as [at the] back of a city's charter lies a state government": *Wheeler*, 435 US at 320. 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 US federation. US states have an "inherent sovereignty" unconnected to, and indeed pre-existing, the US 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, under the Territorial Clause of the US Constitution.

Importantly, the Obama Administration, through its Solicitor General Donald Verrilli, filed an amicus brief in this case in December 2015 that supported the positions taken in the majority opinion in *Sanchez Valle*. In that brief, the Solicitor General argued that "Congress may treat Puerto Rico differently from States by virtue of Congress' power under the Territory Clause" (Brief for Respondents, at 28). Puerto Rico has some control over its purely local affairs as a US territory, but is not a sovereign under the US Constitution. In fact, it does not have an independent and separate existence from the US federal government (ibid., 26).

The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA-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 PROMESA (after its acronym), the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C.A. sections 2121–2241, which became law on 30 June 2016. The second component to the constitutional moment of 2012–2020 was the enactment of this federal statute.

This statute establishes a Fiscal Control Board with broad powers of budgetary and financial control over Puerto Rico. It creates 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. 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, make contracts, enforce Puerto Rico labour 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 PROMESA the Puerto Rico government no longer has any authority

over economic and fiscal plans, or the government's budget. That will all be set by the Fiscal Control Board.

The Board's seven members were 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. I think there is a consensus in Puerto Rico that its 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 November 2016, polls showed that 69% of the Puerto Rican people approved of the Board,[11] but that positive perception has eroded substantially. A subsequent poll indicated that only 43% favoured the Board, whereas 40% were against it.[12] More recent polls show that in November 2018, 52% were against the Board, in May 2019, 58% were against it, and in the most recent poll of 9 November 2019, 63% of respondents were against the Board.[13]

The Clash Between Legitimacy and Legality and the Evolution of Sub-State Politics in Puerto Rico (2012–2020)

During the period 2012–2020 a momentous constitutional moment has configured itself in the relation between Puerto Rico and the United States in two phases, and its effects are still being felt today. 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. 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*, the Obama Administration through its Amicus Curiae brief prepared by its Solicitor General in that case, and the US Congress by enacting PROMESA on 30 June 2016. Hence, the clash between legitimacy and legality during and from 2012 to the present (2020).

This has provoked profound changes in the political party system of Puerto Rico. In Puerto Rico, public opinion polling is deficient. There are no scientific, serious polling institutions such as the CIS in Madrid, the CEO in Barcelona, or the Eurobarometer.

The first major change in the party system[14] is the growth of a pro-sovereignty tendency within the autonomist party, the PPD. In fact, already in the referendum held last 6 November 2012, 48% of PPD votes were for the *Estado Libre Asociado Soberano* whereas 52% was for the ELA as it is now (*Comisión Estatal de Elecciones*: 2012). The internal balance of forces within the PPD has been changing. Reminiscent to some extent of the transformation of CDC (and the breakup of CiU and the recent disappearance of UDC) 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.[15] They have a new generation of leaders that are militantly pro-sovereignty, such as the mayor of San Juan, Carmen Yulín Cruz, a candidate for governor in the next election to be held in November 2020. Whether this will result in a definitive and dramatic transformation of the PPD, as happened in the case of CDC in Catalonia, remains to be seen.

The second effect of the constitutional moment of 2010–2020 is that there has been a significant growth in those favouring the option of becoming the 51st unit of the US federation. In a poll held last 18 August 2016, in a "Federalism Yes or No" referendum, 65% of respondents said they would vote to become a state of the US federation.[16] The current government of Puerto Rico, formed after the last election of November 2016 by the PNP, is strongly in favour of becoming the next state of the US federation. A very controversial referendum on the political status of Puerto Rico was held on 11 June 2017. 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 pro-sovereigntists in the PPD and independentists), given that in 2012 the people already determined that the status quo is unacceptable. Last 13 April 2017, Dana Boente, and Acting Deputy Attorney General at the US Department of Justice, however, sent a letter to the PNP government stating that a third option (the status quo) had to be included in the question. The PNP government agreed, and in light of that imposition, the pro-sovereignty parties announced their decision to boycott the referendum, and the autonomist PPD did so as well. The boycott

worked well: only 23% participated, and of course the pro-statehood forces won 97% of the vote.

The third effect of the constitutional moment of 2012–2020 is a realignment in the political party system: in the last elections held on 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 elections. Indeed, at the gubernatorial level, this last election saw the irruption of independent candidates, unrelated to any of the three traditional parties. Close to 17% of the vote for the gubernatorial candidates went to independent candidates (*Comisión Estatal de Elecciones* 2016). The winning candidate, Ricardo Rosselló of the PNP, thus received only 41.80% of the vote, and the runner-up was David Bernier of the PPD, receiving 38.8% of the vote (*Comisión Estatal de Elecciones* 2016).

Conclusion

The shift during 2010–2020 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 growth in the pro-secessionism orientation within the Catalan national movement. The clash between legitimacy and legality in Spain during 2006–2020 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 a "moral polity" where reciprocities are expected and notions of collective dignity, the common weal, 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 the increasing radicalization of sub-state nationalists' political preferences (Lluch 2014).

However, it needs to be recognized after the trigger event of the constitutional moment of 2006–2010, other factors came into play, which had an additional effect on the growth of sub-state

secessionism in Spain. Some of these factors "concern strictly 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 Head of the State, for example). Also, this process is completed with the structuring of a wide social movement in favour of independence, which showed a high capacity for action in the public sphere and to exert pressure on political parties" (Argelaguet 2014).

From 2010 to the present, there has been a constitutional standoff between the Catalan government (which has been proposing and finally did hold a constitutive referendum on independence) and the Spanish government (which insists that this is not constitutionally permissible. Unlike the Scottish case, where an agreement between the Scottish prime minister, Alex Salmond, and the British prime minister, David Cameron, was signed on 15 October 2012 in order to provide the legal framework for the holding of Scotland's independence referendum, the Spanish government (both of the right and the left) has taken a firm stand against the Catalan proposal to hold a self-determination referendum. 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 other nations currently existing within the Spanish state (Lopez Bofill 2014).

Similarly, during the period 2012–2020 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. 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*, the Obama Administration through its Amicus Curiae brief prepared by its Solicitor General in that case, and the US Congress by enacting PROMESA on 30 June 2016.

Hence, the clash between legitimacy and legality during and from 2012 to 2020. To date, 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 US federation, and a weakening of Puerto Rico's two-party system.

Despite their obvious differences in many dimensions, in both Catalonia and Puerto Rico there occurred a clash of legitimacies between an established constitutional form and the constituent power represented by the democratic will of the people. The analysis presented here helps to further validate my argument that sub-state nationalists inhabit an imagined community that is a "moral polity" where reciprocities are expected and notions of collective dignity, the common weal, and mutual constitutional accommodation are essential (Lluch 2014; 2018).

NOTES

1 Self-determination referendums such as the Scottish one of 2014, or the one that the Catalan government has been trying to hold since 2010, or the ones that have been held by the government of Puerto Rico are a special type of "constitutional referendum," according to Stephen Tierney. I prefer the term "constitutive referendums" because they "can manifest a people´s direct democratic capacity to act as the supreme source of constitutional law in foundational constitutional acts" (Tierney 2012, 14). "Constitutive referendums" is more analytically useful and is more appropriate for this chapter than the term "ethnonational referendum" suggested by Matt Qvortrup (Qvortrup 2014,10).

2 Certainly, Title VIII of the 1978 Constitution created the State of Autonomies in order to better accommodate the historic nationalities, especially Euskadi and Catalunya. In addition, perhaps more than two decades ago, the greatest challenge to the Spanish State was presented by Euskadi, not Catalunya. But, in the last ten years, clearly it is the Catalan case that has come to the foreground, and the constitutional and political tensions between that sub-state nation and the majority nation, paired with the central state, has been the central issue in Spanish politics in the last decade.

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

4 Spanish Constitutional Court Decision 31/2010 of 28 June 2010.

5 CiU, *Convergència i Unió* [Convergence and Union], was a moderate centre 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 postcommunist 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.

6 This complete declaration is available at http://www.parlament.cat/web/documentacio/altres-versions/resolucions-versions.

7 Five members of the Parliament belonging to PSC 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 CUP abstained because they rejected the references to EU and some other aspects of this Declaration.

8 The US is a "national federation" (as opposed to a multinational one). Such federations "may be nationally homogeneous (or predominantly so), or they are organized, often consciously, so as not to recognize more than one official nationality...The official goal...is nation building, the elimination of internal...national differences." (O'Leary and McGarry 2007, 182).

9 *Nat'l Bank v. County of Yankton*, 101 U.S. 129, 133 (1880).

10 *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922).

11 See *Boumediene v. Bush*, 128 S. Ct. at 2255 (2008) which states "century old doctrine [of the *Insular Cases*] informs our analysis in the present matter."

12 "La Mortalidad de la Junta," *El Nuevo Día*, 2 June 2017.

13 "Aumenta entre los boricuas el rechazo a la Junta," *El Nuevo Día*, 2 June 2017.

14 "Sigue en picada el apoyo a la JSF," *El Nuevo Día*, 9 November 2019.

15 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).

16 "Sale Favorecida la Estadidad," *El Nuevo Día*, 18 August 2016, 5.

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