

COMMENT

Puerto Rico's Eleventh Amendment Status Anxiety

Puerto Rico is not among the fifty united states, so the Eleventh Amendment—which gives immunity only to “States”¹—appears not to apply. But ever since then-Judge Breyer first addressed the issue thirty years ago, the First Circuit has been consistent and clear in recognizing Puerto Rico's Eleventh Amendment sovereign immunity. As this Comment will demonstrate, that holding, which the First Circuit has repeated dozens of times, is founded on Judge Breyer's mistaken reading of prior cases on common law immunity, not on constitutional immunity, and has not since been supported by any additional analysis or reasoning. Thus, Puerto Rico's long-enjoyed Eleventh Amendment immunity is liable to evaporate if the U.S. Supreme Court takes a more skeptical approach.

The Supreme Court will soon have an opportunity to weigh in on the Eleventh Amendment question if it grants certiorari in the First Circuit case *Vaquería Tres Monjitas, Inc. v. Irizarry*.² In their briefs in opposition to certiorari, respondents question the legitimacy of Puerto Rico's invocation of Eleventh Amendment protection;³ petitioners reply that “the proposition that Puerto Rico is entitled to sovereign immunity is not open to serious debate.”⁴ The Court has shown interest in the case by referring it to the Acting Solicitor General for his views on granting certiorari.⁵

1. U.S. CONST. amend. XI.

2. 587 F.3d 464 (1st Cir. 2009), *reh'g en banc denied*, 600 F.3d 1 (1st Cir. 2010).

3. Brief in Opposition at 8-11, *Rivera Aquino v. Suiza Dairy, Inc.*, No. 10-74 (Aug. 26, 2010); Brief in Opposition of Respondent *Vaquería Tres Monjitas, Inc.* at 23-24, *Rivera Aquino*, No. 10-74 (Aug. 27, 2010).

4. Reply Brief for the Petitioners at 8, *Rivera Aquino*, No. 10-74 (Sept. 8, 2010).

5. Lyle Denniston, *Court To Rule on Child Interviews*, SCOTUSBLOG (Oct. 12, 2010, 10:37 AM), <http://www.scotusblog.com/2010/10/court-to-rule-on-child-interviews> (noting the Court's request for the views of the Acting Solicitor General). Recent empirical work has shown that

The first four Parts of this Comment show that, should the Court decide to face the Eleventh Amendment question directly, it would be a mistake for it to adopt the faulty reasoning underlying the First Circuit's case law. It does not follow, however, that Puerto Rico must be treated like the other American territories, none of which currently enjoys Eleventh Amendment protection. Part V of this Comment surveys those territories and concludes that, among them, Puerto Rico's claim to Eleventh Amendment protection is the strongest. For historical and structural reasons, recognizing Puerto Rico's claim to Eleventh Amendment immunity will not start down a slippery slope to similar claims on behalf of territories like Guam. Thus, while the First Circuit's repeated holdings on Puerto Rico and the Eleventh Amendment are no more than a house of cards, there are still justifications for a constitutional distinction between Puerto Rico and the other territories that could sustain the Eleventh Amendment status quo among the territories.

I. SOVEREIGN IMMUNITY: ELEVENTH AMENDMENT VERSUS COMMON LAW

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”⁶ The Supreme Court has repeatedly held that the Eleventh Amendment extends beyond its plain terms to give states immunity not only in suits by citizens of other states but also in suits by their own citizens.⁷ In short, the Amendment prevents a private party from suing a state without the state's consent.⁸ That protection for the states was of such central concern to the Founders that the Supreme

a referral to the Solicitor General is a strong and rather infrequent indication of the Court's interest in a petition. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 245 (2009) (calculating that “[t]he Supreme Court calls for the views of the [Solicitor General] in approximately 11 petitions each year” and concluding that “the Court is 37 times more likely to grant a petition following a [referral to the Solicitor General]”).

6. U.S. CONST. amend. XI.

7. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

8. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997); *Ex parte New York*, 256 U.S. 490, 497 (1921); *Hans v. Louisiana*, 134 U.S. 1 (1890).

Court's initial failure to recognize states' immunity prompted an immediate constitutional amendment.⁹

States do not rely solely on the Eleventh Amendment for their sovereign immunity, however. The Supreme Court has explained that sovereign immunity is a fundamental preconstitutional doctrine that has protected the states since their inceptions.¹⁰ But there are substantial differences between this common law notion of sovereign immunity and constitutionally enshrined Eleventh Amendment immunity. The Court's "understanding of common-law sovereign immunity does not protect against liability under the laws of a superior governmental authority," meaning that common law immunity can be abrogated not only by a state's legislature but also by Congress.¹¹ In addition, while common law immunity protects a sovereign from being "sued in its own courts without its consent, . . . it affords no support for a claim of immunity in another sovereign's courts."¹² Thus, without the Eleventh Amendment, a sovereign has immunity from claims raised "in its own courts under its own *local* laws," but not from claims raised "in federal court based on federal law."¹³ As this Comment will explain in Part III, there is no dispute that Puerto Rico enjoys common law immunity, but the U.S. Supreme Court has yet to recognize its Eleventh Amendment immunity.

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9. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-70 (1999) (describing the Eleventh Amendment's swift passage in response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).
 10. *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("We have . . . sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity.' The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . .").
 11. *Ngiraingas v. Sanchez*, 495 U.S. 182, 205 (1990) (Brennan, J., dissenting); see also *Owen v. Independence, Miss.*, 445 U.S. 622, 647-48 (1980); cf. *Alden*, 527 U.S. 706 (holding that Congress cannot use its Article I powers to abrogate a state's constitutional sovereign immunity from suits in its own courts); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot use its Article I powers to abrogate a state's constitutional sovereign immunity from suits in federal court).
 12. *Nevada v. Hall*, 440 U.S. 410, 416 (1979).
 13. *Ngiraingas*, 495 U.S. at 205.

II. HISTORY OF PUERTO RICO'S TERRITORIAL STATUS

Since 1899, Congress has granted a steadily increasing measure of autonomy to Puerto Rico, culminating in 1952 with a governing constitution adopted by the people of Puerto Rico. Puerto Rico has emerged as a sovereign territory that has amassed many of the trappings of the United States while remaining outside their number. The particular features of Puerto Rico's territorial status and relationship to the United States influence its claim to constitutional sovereign immunity.

The relationship between the United States and Puerto Rico began in 1898 when the Treaty of Paris, ending the Spanish-American War, gave the United States possession of the formerly Spanish territory. Shortly thereafter, Congress ratified the treaty and set out its governing relationship with Puerto Rico in the Foraker Act,¹⁴ which recognized a political entity known as "The People of Porto Rico," but did not recognize its residents as U.S. citizens or provide for any form of self-government.¹⁵ The Jones Act followed in 1917,¹⁶ granting U.S. citizenship¹⁷ and a bill of rights to the Puerto Rican people.¹⁸ Finally, in 1950, Congress provided a way for Puerto Rico to adopt its own constitution and form its own government. Congress enacted a law repealing the structural provisions of the Jones Act—which structured Puerto Rico's executive, legislature, and courts—and replacing those provisions with a new constitution to be adopted by the people of Puerto Rico.¹⁹ Unlike the Foraker and Jones Acts, Public Law 600 was "in the nature of a compact," requiring the consent of both Congress and Puerto Rico before Puerto Rico's constitution would become effective.²⁰ Puerto Rico approved the compact in 1951 and approved a constitution in 1952; in doing so it became a commonwealth.

Since that time, the U.S. Supreme Court has hinted that it considers Puerto Rico to be state-like. In *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*,²¹ the Court observed that Puerto Rico could conceivably be

14. Act of Apr. 12, 1900, 31 Stat. 77 (codified as amended in scattered sections of 48 U.S.C.).

15. 31 Stat. at 79.

16. 39 Stat. 951 (1917) (codified as amended in scattered sections of 48 U.S.C.).

17. 39 Stat. at 953.

18. 39 Stat. at 951-52.

19. Pub. L. No. 600, 64 Stat. 319, 319-20 (1950).

20. 64 Stat. at 319 (codified at 48 U.S.C. § 731b (2006)).

21. 426 U.S. 572 (1976).

considered a state²² and noted its uniqueness: “We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history”²³ More pointedly still, the Court has approvingly quoted an observation from the First Circuit that “Puerto Rico has . . . not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word.”²⁴ Over the years, too, the Court has found more constitutional provisions that apply to Puerto Rico than provisions that do not.²⁵ But no matter how state-like the Court thinks Puerto Rico is, the Court has yet to determine whether Puerto Rico enjoys the same Eleventh Amendment protection that the states do.²⁶

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22. *Id.* at 597 (“Whether Puerto Rico is now considered a Territory or a State, for purposes of the specific question before us, makes little difference . . .”).
 23. *Id.* at 596.
 24. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (quoting *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953)). *Contra Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam) (“Congress, which is empowered under the Territory Clause of the Constitution, U. S. Const., Art. IV, § 3, cl. 2, to ‘make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,’ may treat Puerto Rico differently from States so long as there is a rational basis for its actions.” (alteration in original)).
 25. Those found to apply include the First Amendment Speech Clause, *see Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922), the safeguards of the Fourth Amendment either through the Amendment itself or through the Fourteenth Amendment, *see Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979), the Due Process Clause of either the Fifth or the Fourteenth Amendment, *see Calero-Toledo*, 416 U.S. at 668 n.5, the safeguards of the Equal Protection Clause of the Fourteenth Amendment either through the Amendment itself or through the Fifth Amendment, *see Examining Bd.*, 426 U.S. at 599-601, and even the constitutional right to travel, *see Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (per curiam) (assuming without deciding that the right extends to the people of Puerto Rico).
 26. A recent decision of the district court in Puerto Rico provides an interesting coda to this account. In 2008, the court held that the relationship between Puerto Rico and the United States had evolved such that Puerto Rico is now “incorporated” and entitled to all the rights and obligations of the U.S. Constitution. *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22 (D.P.R. 2008). The court found that “the ties between the United States and Puerto Rico have strengthened in a constitutionally significant manner,” *id.* at 43, because “[a]lthough Congress has never enacted any affirmative language such as ‘Puerto Rico is hereby an incorporated territory,’ its sequence of legislative actions from 1900 to present has in fact incorporated the territory,” *id.* at 41. Therefore, the court ruled, “the entire Constitution [is extended] to the island, and today entitles the territory and United States citizens thereof to full enjoyment of all rights and obligations under the Constitution.” *Id.* at 43. The case was not appealed.

III. THE SUPREME COURT'S VIEW: AT LEAST COMMON LAW IMMUNITY

The Supreme Court is aware that deciding when to treat Puerto Rico like a state—and when not to—is a “delicate subject.”²⁷ Perhaps accordingly, in 1993, the Supreme Court expressly declined to rule on the question of Puerto Rico’s Eleventh Amendment immunity,²⁸ and despite being faced with regular opportunities to do so,²⁹ the Court has not spoken on the issue since that time.

The Supreme Court has long recognized Puerto Rico’s common law sovereign immunity, however, beginning with *Porto Rico v. Rosaly y Castillo* in 1913.³⁰ In *Rosaly y Castillo*, the Court relied in part on the resemblance of Puerto Rico’s government and organic act (the Foraker Act)³¹ to the Territory of Hawaii’s;³² the Court had recognized Hawaii’s common law immunity just six years earlier.³³ The Court also construed the congressional purpose behind Puerto Rico’s organic act as granting Puerto Rico state-like autonomy.³⁴ The Court actually went so far as to say that not recognizing Puerto Rico’s common law immunity would “destroy the government [Congress tried] to create.”³⁵

Thus, while the Supreme Court recognizes some measure of sovereign immunity for Puerto Rico and has hinted that Puerto Rico is distinctly state-

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27. *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 620 (1950); *cf.* *Jusino Mercado v. Puerto Rico*, 214 F.3d 34, 40 (1st Cir. 2000) (“[I]f experience teaches us anything, it is that most legal inquiries that turn upon Puerto Rico’s political status are complex.”).
 28. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993) (“As the case comes to us, the law of the First Circuit—that the Commonwealth of Puerto Rico is treated as a State for purposes of the Eleventh Amendment—is not challenged here, and we express no view on this matter.” (citation omitted)).
 29. *See, e.g.*, *Petition for a Writ of Certiorari, Int’l Shipping Agency, Inc. v. P.R. Ports Auth.*, 129 S. Ct. 1312 (2009) (No. 08-457).
 30. 227 U.S. 270, 273 (1913) (stating that Puerto Rico “is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent”).
 31. Act of Apr. 12, 1900, 31 Stat. 77 (codified as amended in scattered sections of 48 U.S.C.).
 32. *Rosaly y Castillo*, 227 U.S. at 274.
 33. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).
 34. *Rosaly y Castillo*, 227 U.S. at 274 (“The purpose of the act is to give local self-government, conferring an autonomy similar to that of the States.” (quoting *Gromer v. Standard Dredging Co.*, 224 U.S. 362, 370 (1912))); *see also* *Puerto Rico v. Shell Co.*, 302 U.S. 253, 261-62 (1937) (“The aim of the Foraker Act and the [Jones] Act was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories.”).
 35. *Rosaly y Castillo*, 227 U.S. at 277.

like among the country's territories, its reticence to endorse the First Circuit's Eleventh Amendment holding is an important qualification.

IV. THE FIRST CIRCUIT: THE ELEVENTH AMENDMENT APPLIES

The U.S. Court of Appeals for the First Circuit has appellate jurisdiction over the U.S. District Court for the District of Puerto Rico. The First Circuit has consistently held that Puerto Rico, though not a state, is entitled to Eleventh Amendment immunity as if it were. The First Circuit first embraced this holding in 1981³⁶—in an opinion by then-Judge Breyer—and assumed Puerto Rico's immunity even earlier.³⁷ Since 1981, the First Circuit has reiterated the holding at least twenty-eight times—about once a year—and described it as “settled,” a “verity,” “consistently held,” and “beyond dispute.”³⁸

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36. *Ezraty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981) (Breyer, J.) (“The principles of the Eleventh Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico.”).
 37. *See, e.g., Litton Indus., Inc. v. Colon*, 587 F.2d 70, 72 (1st Cir. 1978) (“[I]t is equally clear that the eleventh amendment effectively bars [a breach of contract] claim [against Puerto Rico or its Department of Education].”); *Constr. Aggregates Corp. v. Rivera de Vicenty*, 573 F.2d 86, 97 (1st Cir. 1978) (“[D]ismissal of the Commonwealth as a defendant on eleventh amendment grounds was entirely proper.”); *Cortes v. Puerto Rico*, 422 F.2d 1308 (1st Cir. 1970); *Salkin v. Puerto Rico*, 408 F.2d 682 (1st Cir. 1969).
 38. *See Igartúa v. United States*, 626 F.3d 592, 598 (1st Cir. 2010); *Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 529 n.23 (1st Cir. 2009); *Torres-Álamo v. Puerto Rico*, 502 F.3d 20, 24 (1st Cir. 2007); *Dávila v. Corporación de P.R. para la Difusión Pública*, 498 F.3d 9, 14 n.1 (1st Cir. 2007); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 23 n.24 (1st Cir. 2007); *Toledo v. Sánchez*, 454 F.3d 24, 31 n.1 (1st Cir. 2006); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 33 (1st Cir. 2006); *Redondo Constr. Corp. v. P.R. Highway & Transp. Auth.*, 357 F.3d 124, 125 n.1 (1st Cir. 2004); *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 127 (1st Cir. 2003); *Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490, 494 (1st Cir. 2003); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 53 (1st Cir. 2003); *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir. 2003); *Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 21 n.3 (1st Cir. 2001); *Acevedo López v. Police Dep’t*, 247 F.3d 26, 28 (1st Cir. 2001); *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 495 n.3 (1st Cir. 2000); *Jusino Mercado v. Puerto Rico*, 214 F.3d 34, 39 (1st Cir. 2000); *Ortiz-Feliciano v. Toledo-Davila*, 175 F.3d 37, 39 (1st Cir. 1999); *Torres v. P.R. Tourism Co.*, 175 F.3d 1, 3 (1st Cir. 1999); *Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth.*, 945 F.2d 10, 11 n.1 (1st Cir. 1991) (“It is settled that Puerto Rico is to be treated as a state for Eleventh Amendment purposes.”), *rev’d on other grounds*, 506 U.S. 139 (1993), *remanded*, 991 F.2d 935, 939 n.3 (1st Cir. 1993) (“We have consistently treated Puerto Rico as if it were a state for Eleventh Amendment purposes.”); *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991) (describing Puerto Rico’s sovereign immunity as a “verit[y]”); *Fred v. Roque*, 916 F.2d 37, 38 (1st Cir. 1990) (“[Sovereign immunity] applies equally to the Commonwealth of Puerto Rico.”); *P.R. Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 9

The court recently referred to these precedents as a “phalanx of cases.”³⁹ Notably, then-Judge Breyer was on ten of the panels contributing to that phalanx, authoring or signing onto the holding in each of those ten cases.

Through all of these iterations of the Eleventh Amendment holding, the First Circuit has never revisited its original reasoning. In fact, the court often states the holding perfunctorily in an opening footnote or paragraph before proceeding to other issues—if it bothers to state it at all. The original 1981 opinion relies on two decisions of the district court of Puerto Rico, one of which the First Circuit had affirmed without comment.⁴⁰ The other case, which the former cites, contains the district court’s reasoning:

It is an established principle of law in our system, which rests on grounds of public policy, that the sovereign cannot be sued in its own courts or any other court without its consent and permission. It is inherent in the nature of the sovereignty not to be amenable to a suit by an individual without its consent. This principle applies with full force to the several states of the Union.

That the principle is, likewise, applicable to the Commonwealth of Puerto Rico is clear, for the Commonwealth possesses many of the attributes of sovereignty, and has full power of local self-determination similar to the one the states of the Union have. Immunity from suit without its consent is one of those attributes. Such was the state of the law even prior to the creation of the Commonwealth of Puerto Rico.⁴¹

This reasoning describes Puerto Rico’s common law immunity rather than Eleventh Amendment immunity, a fact that is confirmed by the passage’s concluding citation to the Supreme Court’s *Rosal y Castillo* decision from 1913.⁴² Curiously, this passage also cites a diversity case from the Southern

(1st Cir. 1990) (“That these principles apply to the Commonwealth of Puerto Rico is beyond dispute.”); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F.2d 940, 942 (1st Cir. 1989); *Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1044 (1st Cir. 1988); *Paul N. Howard Co. v. P.R. Aqueduct Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984); *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983); *Fernandez v. Chardon*, 681 F.2d 42, 59 n.13 (1st Cir. 1982), *aff’d on other grounds*, *Chardon v. Fumero Soto*, 462 U.S. 650 (1983).

39. *Jusino Mercado*, 214 F.3d at 39.

40. *Carreras Roena v. Camara de Comerciantes Mayoristas, Inc.*, 440 F. Supp. 217, 219 (D.P.R. 1976) (“[T]he principle embodied by the Eleventh Amendment—that a sovereign cannot be sued in its own courts or in any other without its previous consent or permission—is fully applicable to Puerto Rico.” (citing *Ursulich v. P.R. Nat’l Guard*, 384 F. Supp. 736 (D.P.R. 1974))), *aff’d mem.*, 559 F.2d 1201 (1st Cir. 1977).

41. *Ursulich*, 384 F. Supp. at 737 (citations omitted).

42. See *supra* notes 30-35 and accompanying text.

District of New York (S.D.N.Y.)—actually misidentifying its district as “D.C.P.R.” and its circuit as the First—that includes the statement, “Whatever the true political nature of the Commonwealth, it possesses the sovereign immunity of a state”⁴³ In this latter case too, the S.D.N.Y. cites *Rosaly y Castillo*, making clear that its own decision also refers to Puerto Rico’s common law immunity.

Thus, the First Circuit’s now-settled holding on Puerto Rico’s Eleventh Amendment immunity is ultimately based on a judicial game of “telephone.”⁴⁴ Tracing all citing references for the holding back to their origins leads to (1) a Puerto Rico district court opinion describing common law, rather than constitutional, immunity and (2) a miscited New York district court footnote that gives an unfortunately imprecise description of that common law immunity: “[Puerto Rico] possesses the sovereign immunity of a state.”⁴⁵ Despite the decades of reliance on Puerto Rico’s Eleventh Amendment immunity, there is no rigorous discussion or defense of it in any of the First Circuit’s case law.⁴⁶

43. *Krisel v. Duran*, 258 F. Supp. 845, 847 n.3 (S.D.N.Y. 1966), *aff’d on other grounds*, 386 F.2d 179 (2d Cir. 1967).

44. A professor recently dubbed this judicial “telephone” game the “persistence of legal error.” Bruce Boyden, *The Persistence of Legal Error*, PRAWFSBLAWG (Feb. 15, 2011, 11:59 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/02/the-persistence-of-legal-error.html>. Professor Boyden traced a similar chain of iterated inaccuracies in cases concerning the tort concept of “enterprise liability.” *Id.*

45. *Krisel*, 258 F. Supp. at 847 n.3.

46. Despite its exclusive jurisdiction over Puerto Rico, the First Circuit is not the only circuit to have passed judgment on Puerto Rico’s sovereign immunity.

In 2006, the D.C. Circuit held that Puerto Rico is immune from private damage suits brought in federal court under the Fair Labor Standards Act (FLSA), just as the fifty states are. *Rodriguez v. P.R. Fed. Affairs Admin.*, 435 F.3d 378 (D.C. Cir. 2006). The D.C. Circuit relied on a century-old provision, now codified in the Puerto Rican Federal Relations Act of 1950, stating that “[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States.” *Id.* at 379-80 (alterations in original) (quoting 48 U.S.C. § 734 (2006)). Since the fifty states are immune from private suits under the FLSA, the D.C. Circuit relied on the “same force and effect” language to find Puerto Rico likewise immune. Two years later, the D.C. Circuit cited that holding with approval as it reiterated: “[T]he Puerto Rican Federal Relations Act grants Puerto Rico the same sovereign immunity that the States possess from suits arising under federal law.” *P.R. Ports Auth. v. Fed. Mar. Comm’n*, 531 F.3d 868, 872 (D.C. Cir. 2008).

In neither case, however, did the court reach the Eleventh Amendment question, because it decided them both on statutory grounds. That makes a difference: Eleventh Amendment immunity and the sovereign immunity recognized by the D.C. Circuit are materially distinct. The Federal Relations Act can grant immunity only in cases in which federal statutes are at issue. Furthermore, a grant of immunity from a congressional act, as

V. OTHER JURISDICTIONS' SOVEREIGN IMMUNITY

The Supreme Court has not addressed territorial sovereign immunity in a century and has never ruled that the Eleventh Amendment applies to a territory. Thus, this Part surveys lower court rulings to see how other territorial jurisdictions are handled with respect to the Eleventh Amendment. This investigation reveals that Puerto Rico is unique in having a federal court recognize its Eleventh Amendment rights, and perhaps justifiably so.

A. *The District of Columbia*

The D.C. Circuit has discussed the Eleventh Amendment's applicability to the District of Columbia exclusively in footnotes, but the court has consistently denied that the District of Columbia is a state for the purposes of the Eleventh Amendment. It first held so as an in banc court,⁴⁷ and the meager extent of its reasoning is as follows: "The District of Columbia is not a state. It is the seat of our national government, subject . . . to the plenary authority of Congress under Article I, Section 8, Clause 17 of the Constitution."⁴⁸ The court relied on and affirmed that holding most recently in 2005.⁴⁹ Of course, Congress's plenary power over the District, which is enshrined in the U.S. Constitution,⁵⁰ is a potentially material distinction between the District and Puerto Rico.

When the Supreme Court recognized the Territory of Hawaii's common law immunity in 1907, Justice Holmes explained that "[t]he District of Columbia is different, because there the body of private rights is created and

the D.C. Circuit found, can be abrogated by another federal statute. Eleventh Amendment immunity obviously cannot be.

More recently, the Third Circuit—in an opinion by retired Justice Sandra Day O'Connor, sitting by designation—observed (though did not hold) that "[l]ike the States, [Puerto Rico] has a republican form of government, organized pursuant to a constitution adopted by its people, and a bill of rights. This government enjoys the same immunity from suit possessed by the States." *United States v. Laboy-Torres*, 553 F.3d 715, 721 (3d Cir. 2009) (O'Connor, J.) (citation omitted) (citing *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983)). A recent Ninth Circuit case also adopts the First Circuit's holding. *Del Campo v. Kennedy*, 517 F.3d 1070, 1079 n.14 (9th Cir. 2008). But perhaps most importantly, across all of the circuits, no court has questioned or cast doubt on Puerto Rico's claim to Eleventh Amendment immunity.

47. *LaShawn A. v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) (in banc).

48. *Id.*

49. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 674 n.7 (D.C. Cir. 2005).

50. U.S. CONST. art. I, § 8, cl. 17.

controlled by Congress and not by a legislature of the District.”⁵¹ More recently, the Court observed that “the sources of congressional authority with respect to [the District of Columbia and Puerto Rico] are entirely different,” and so there is no reason to treat them alike.⁵² As such, there is support within the Supreme Court’s case law to distinguish Puerto Rico and the District of Columbia on the Eleventh Amendment question.

B. The Commonwealth of Northern Mariana Islands

The Ninth Circuit has held that the Northern Mariana Islands (NMI) are not entitled to Eleventh Amendment immunity, a result compelled by the covenant with Congress establishing them as a Commonwealth (CNMI).

Following World War II, the United States administered the NMI as the U.N. trustee for the Trust Territory of the Pacific Islands.⁵³ In 1976, the NMI and the United States entered into the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant).⁵⁴ The Covenant granted the people of the NMI the autonomy to draft and approve a constitution—with a bill of rights—that provided for a republican form of government, including legislative, executive, and judicial branches.⁵⁵ The Covenant expressly adopted several provisions of the Federal Constitution to apply to the NMI as if the NMI were a state—including the first nine amendments, the Reconstruction Amendments, and the Nineteenth and Twenty-Sixth Amendments—but the Eleventh Amendment was not among them.⁵⁶

For that reason, the Ninth Circuit held in 1988 that the Eleventh Amendment did not apply to CNMI. The Court reasoned:

From the specificity with which the applicable provisions of the United States Constitution are identified, it is clear that the drafters considered fully each constitutional amendment and article for inclusion in the Covenant. That they deliberately declined to include

51. *Kawananakoa v. Polyblank*, 205 U.S. 349, 354 (1907).

52. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 596 n.27 (1976).

53. *See Fleming v. Dep’t of Pub. Safety*, 837 F.2d 401, 403 (9th Cir. 1988).

54. Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified at 48 U.S.C. § 1801 (2006)).

55. *See Norita v. Northern Mariana Islands*, 331 F.3d 690, 693 (9th Cir. 2003).

56. *See id.*

the eleventh amendment unequivocally demonstrates their desire that the Commonwealth not be afforded eleventh amendment immunity.⁵⁷

The Ninth Circuit concluded that “in entering into the Covenant the Commonwealth impliedly waived whatever immunity it might otherwise have enjoyed against suits in federal court arising under federal law.”⁵⁸ The court, moreover, found that CNMI had waived any common law sovereign immunity against federal suits because “there is simply no meaningful distinction between eleventh amendment immunity and common law sovereign immunity insofar as federal suits are concerned.”⁵⁹

The statutory provisions pertaining to Puerto Rico do not contain a list of incorporated constitutional provisions akin to the one found in the Covenant. Accordingly, there can be no suggestion that Puerto Rico waived its sovereign immunity in any similarly general way.

C. *The Territory of Guam*

Similar reasoning supports an inference that the Eleventh Amendment does not apply to Guam, either. Much like the CNMI’s Covenant, Guam’s “bill of rights” (codified in the *United States Code*⁶⁰) includes a list of specific constitutional provisions and amendments that apply to Guam with “the same force and effect there as in the United States or in any State of the United States.”⁶¹ The Eleventh Amendment is not included among them.⁶²

The U.S. District Court for the District of Guam did not reach that analysis in 1983, however, when it briskly assumed, without any discussion, that “since the Eleventh Amendment to the Constitution of the United States does not encompass unincorporated territories, the Territory of Guam lacks the

57. *Fleming*, 837 F.2d at 405, *overruled on other grounds by* *Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990), *and* *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 68-70 (1989); *see also* *DeNueva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992) (recognizing the Supreme Court’s disapproval of *Fleming* on an issue not germane to this Comment).

58. *Fleming*, 837 F.2d at 407.

59. *Id.* The Ninth Circuit has reaffirmed its sovereign immunity holding in *Fleming* twice more. *See Norita*, 331 F.3d at 692-97; *Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1440 (9th Cir. 1997).

60. 48 U.S.C. § 1421b (2006).

61. *Id.* § 1421b(u).

62. *Id.*

sovereignty of a state.”⁶³ The basis for the district court’s assumption remains unclear, but a similar result might be gleaned from the fact that the Eleventh Amendment was not incorporated into Guam’s bill of rights.

Though the U.S. Supreme Court has never reached the question of whether Guam is entitled to Eleventh Amendment immunity, Justice Brennan once observed (in dissent, but not in disagreement) that “a Territory, particularly an unincorporated Territory such as Guam that is not destined for statehood, . . . can have no immunity against a claim like the one here—a suit in federal court based on federal law.”⁶⁴ Brennan made a potentially material distinction that could support Puerto Rico’s claim to Eleventh Amendment immunity: Puerto Rico, with its own constitution and sovereign government, is closer to full statehood than Guam, which remains under Congress’s plenary legal authority.

Even if Justice Brennan’s criterion were insufficient to distinguish Guam’s and Puerto Rico’s claims to Eleventh Amendment immunity, it remains true that Guam’s (statutory) bill of rights excludes the Eleventh Amendment from its list of incorporated constitutional provisions, a deficiency in its immunity claim that Puerto Rico’s does not share.

D. The U.S. Virgin Islands

As with CNMI’s Covenant and Guam’s bill of rights, the Virgin Islands’ organic act enumerates a list of incorporated constitutional provisions that does not include the Eleventh Amendment, weakening the Virgin Islands’ claim to constitutional immunity. Congress first defined the government of the Virgin Islands through the Organic Act, originally passed in 1936 and substantially revised in 1954, when it became known as the Revised Organic Act⁶⁵ (ROA). The ROA lists the specific provisions of the Federal Constitution that apply to the Virgin Islands, and the list does not include the Eleventh Amendment. Thus, an argument against Eleventh Amendment immunity similar to the one that prevailed with respect to CNMI can be made regarding the Virgin Islands.

Indeed, the district court in the U.S. Virgin Islands has recently professed that neither it nor the Third Circuit, which has federal appellate jurisdiction

63. *Sakamoto v. Duty Free Shoppers, Ltd.*, 613 F. Supp. 381, 386 (D. Guam 1983), *aff’d on other grounds*, 764 F.2d 1285 (9th Cir. 1985).

64. *Ngiraingas v. Sanchez*, 495 U.S. 182, 205 (1990) (Brennan, J., dissenting) (citation omitted). The Ninth Circuit has maintained, however, that Guam retains some inherent common law immunity. *See Marx v. Guam*, 866 F.2d 294, 297-98 (9th Cir. 1989).

65. Pub. L. No. 83-517, 68 Stat. 497 (1954) (codified as amended in scattered sections of 48 U.S.C.).

over the U.S. Virgin Islands, has ever recognized the Eleventh Amendment's applicability to the Virgin Islands.⁶⁶ The Third Circuit has described the argument that the Virgin Islands is not a state for Eleventh Amendment purposes as one having "considerable force."⁶⁷ The district court ruled squarely on the question in 1986. In *Tonder v. M/V The "Burkholder,"*⁶⁸ the district court held that the Eleventh Amendment

concerns a principle of federalism which is inapplicable to a territory. Specifically, the Eleventh Amendment was passed as a jurisdictional bar to suits brought against state governments in the federal courts. The inherent prejudice against a state, thought to arise from it being sued in federal court, can not exist here because the Virgin Islands as a legal entity is a creature of the federal government. Unlike States, which are constitutionally protected independent sovereignties, we are beholden to Congress which has ultimate control over us. The underlying rationale for the Eleventh Amendment, therefore, does not fit the situation where an individual is suing the Virgin Islands in the District Court of the Virgin Islands.⁶⁹

Tonder's reasoning is favorable to Puerto Rico's claim to Eleventh Amendment immunity, even if the bottom-line result is not. Puerto Rico more resembles a "constitutionally protected independent sovereignty" like the states than "a creature of the federal government" like the Virgin Islands. Thus, the district court's reasoning pushes toward including Puerto Rico among those entities that "fit the situation" that the Eleventh Amendment is designed to address.

66. See *Esso V.I., Inc. v. U.S. Virgin Islands ex rel. V.I. Dep't of Licensing & Consumer Affairs*, No. CIV.2004-175, 2008 WL 2714242, at *7 n.7 (D.V.I. June 30, 2008) ("[N]either the Third Circuit nor this Court has yet recognized that the Virgin Islands is protected by the Eleventh Amendment."), *vacated*, 2008 WL 4202794 (D.V.I. Sept. 9, 2008).

67. *United States v. Virgin Islands*, 363 F.3d 276, 280 (3d Cir. 2004) (not deciding the Eleventh Amendment question).

68. 630 F. Supp. 691 (D.V.I. 1986).

69. *Id.* at 693-94 (citations omitted). The district court has reiterated this Eleventh Amendment holding twice since *Tonder*. See *V.I. Port Auth. v. Balfour Beatty, Inc.*, Civ. A. No. 1994/0004, 1994 WL 380624, at *1 n.1 (D.V.I. July 15, 1994); *Sunken Treasure, Inc. v. Unidentified, Wrecked, & Abandoned Vessel*, 857 F. Supp. 1129, 1134 n.10 (D.V.I. 1994) ("While not shielded by the eleventh amendment per se, the Virgin Islands is similarly shielded . . . by virtue of the inherent or common law sovereign immunity recognized by the courts as attaching to territorial governments.").

CONCLUSION

The U.S. Supreme Court has recognized Puerto Rico's common law sovereign immunity since 1913 but has never decided its entitlement, if any, to Eleventh Amendment immunity. It has, however, made scattered, nonbinding references to Puerto Rico in its opinions that seem to position Puerto Rico closer to the states than to the territories. In contrast, the First Circuit has unequivocally and repeatedly recognized Puerto Rico's Eleventh Amendment immunity, but those holdings lack a sound foundation. Indeed, they form a chain back to then-Judge Breyer's reliance on district court decisions regarding common law immunity.

The First Circuit's failure to justify adequately its Eleventh Amendment holding does not, however, imply that Puerto Rico is undeserving of immunity under the Amendment. Nor would granting Puerto Rico that immunity necessarily start a slippery slope toward granting all American territories constitutional immunity. There are significant and salient distinctions between the governing powers of Puerto Rico and those of the District of Columbia, the Territory of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands. The first three of those four remain under the plenary legal authority of Congress and lack their own constitutions. The fourth, CNMI, became a constitutional commonwealth pursuant to a covenant with Congress, but the Covenant excluded the Eleventh Amendment from its list of constitutional provisions. The governing statutes of Guam and of the Virgin Islands similarly exclude Eleventh Amendment protection, whereas Puerto Rico's includes no such enumerated list. Thus, Puerto Rico is more autonomous and sovereign than any of these four jurisdictions, making Puerto Rico's claim to Eleventh Amendment immunity the strongest—even without relying on the First Circuit's unconvincing phalanx of case law.

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