

# I LIKE TO BE IN AMERICA, PUERTO RICO'S QUEST FOR DIFFERENCE IN THE UNITED STATES

ÁNGEL R. OQUENDO\*

I like to be in America!  
O.K. by me in America!  
Ev'rything free in America.  
For a small fee in America!

*America*, WEST SIDE STORY  
Lyrics by Stephen Sondheim  
Music by Leonard Bernstein

## I. THE PUERTO RICAN CULTURAL EXCEPTION

When Gabriel García Márquez visited Puerto Rico recently, someone asked him why he had never written about the island. The Colombian Nobel Prize-winning novelist smiled and paused for a second before responding. “If I told the truth about Puerto Rico,” he explained, “everyone would say I was making it up.”<sup>1</sup>

Indeed, the Puerto Rican experience is in many ways too outlandish, even for magical realism. Despite being a territory of the world’s largest exporter of democratic rhetoric, Puerto Rico does not function as a true democracy. Puerto Ricans have absolutely no electoral say with respect to the institutions that enact, execute, and apply the supreme laws of the land.<sup>2</sup> Moreover, even though it has

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\* Professor of Law, University of Connecticut School of Law. A.B., M.A., Ph.D., Harvard University; J.D., Yale University. I would like to express my appreciation to Philip Blumberg, Christina Burnett, Maria Clara Dias, Mark Janis, Richard Kay, Wilson Mendonça, and Shaina Spreng for their critical comments on earlier drafts.

1. Elea Carey, *Spark's Novel Was Worth the Wait*, COM. APPEAL, Jan. 22, 1995, at G3.

2. U.S. federal law generally applies in Puerto Rico as in any state of the Union. Yet, Puerto Ricans enjoy no real representation in the legislative body that produces this law. They have no Senators or Representatives in the U.S. Congress. They only send a Resident Commissioner—who may speak but not vote (except in Committees)—to the U.S. House of Representatives. 48 U.S.C. § 891 (1982) (establishing the position of resident commissioner as an elected representative of Puerto Rico); *New U.S. Panel to Study Future of Puerto Rico*, CHI.

lost virtually all of its economic and strategic value to the United States, the island continues to receive increasing amounts of U.S. federal transfer payments—up to about thirteen billion dollars a year<sup>3</sup>—out of imperial, bureaucratic inertia. Finally, though Puerto Ricans almost unanimously take an immense pride in their national culture and in their distinctness from the United States, they overwhelmingly support keeping Puerto Rico part of the United States.<sup>4</sup>

The first two antinomies show that U.S. foreign and economic policy at times works in mysterious ways. This phenomenon is in itself fascinating, but I am more interested in exploring the third paradox, which points to what appears to be a profound tension in the soul of the Puerto Rican people. How can Puerto Ricans, on the one hand, celebrate their national cultural difference and, on the other hand, want ever closer ties with the United States?

The explanation is not that Puerto Ricans irrationally pursue two inconsistent goals—i.e., separation from and absorption into the United States. Nor is it that Puerto Ricans see their first and foremost aim as receiving U.S. dollars, even if they have to give up deeply held patriotic convictions. Puerto Ricans are simply trying to

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TRIB., Dec. 24, 2000, at C9 (noting that Puerto Rico has no voting representation in Congress). Puerto Ricans do not vote for the President who has the power to sign or veto the bills that Congress has endorsed, though (oddly enough) they do take part in U.S. presidential primaries. Consequently, they lack ultimate electoral influence over the President that nominates or the Senate that consents to the U.S. judges that apply federal norms in Puerto Rico.

José Trías Monge has made the following statement on this issue:

Democratic theory establishes that governments and laws must respond to the popular will. Our difficulty stems from the fact that at this day and age, the President and the Congress of the United States still enact laws and make decisions that affect profoundly our lives, without our specific consent or that of our representatives. It is true that through a plebiscite in 1950 Puerto Ricans agreed to the future application of those North-American laws that Congress wished to extend to Puerto Rico—as long as Congress followed certain basic norms—and blessed the continued application of those federal laws already in force. This argument has lost any validity it might have once had. As Carl Friedrich notes, the technique of generic consent is a precarious source of legitimacy.

JOSÉ TRIÁS MONGE, *SOCIEDAD, DERECHO Y JUSTICIA* 22 (1986).

3. *New U.S. Panel to Study Future of Puerto Rico*, *supra* note 2, at C9 ("Washington sends about \$13 billion a year to Puerto Rico, nearly a third of its gross domestic product."). Puerto Ricans receive these funds even though they do not pay a cent in federal income taxes. Internal Revenue Code, 26 U.S.C. § 933 (2004).

4. Juan Manuel Carrión poses the following question: "How can one also account for the dichotomy within a cultural nationalism that expresses itself with great force, but that in its political manifestations shows weakness?" JUAN MANUEL CARRIÓN, *VOLUNTAD DE NACIÓN: ENSAYOS SOBRE EL NACIONALISMO EN PUERTO RICO* 105 (1996); *see also id.* at 232.

find a place within the U.S. Constitution while maintaining a separate national identity.<sup>5</sup>

To be sure, most Puerto Ricans favor continuing or strengthening their bonds to the U.S. federation primarily in order to secure monetary support from and free access to the United States.<sup>6</sup> They have no irresistible urge to embrace U.S. traditions, symbols, values, and principles.<sup>7</sup> They genuinely want to be Puerto Rican, to demarcate themselves from the rest of the U.S. citizenry, to preserve their own ways, and to speak their own language.<sup>8</sup>

Most Puerto Ricans are nonetheless convinced that their commitment to their cultural separateness is fully consistent with their desire to remain part of the United States.<sup>9</sup> They strongly believe that the U.S. polity generally encourages diversity and specifically permits the kind of cultural independence that they wish

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5. See Mireya Navarro, *Puerto Rico Rallies to Vote on Shift in Political Status*, N.Y. TIMES, Dec. 12, 1998, at A9 ("Puerto Ricans remain at odds over whether to cement their ties with the United States with statehood or seek more autonomy, but most are united in holding on to three elements of their identity—Spanish language, Latin American culture and American citizenship.").

6. See CARRIÓN, *supra* note 4, at 174 ("Puerto Ricans want to continue being different from Americans while keeping the benefits of the U.S. welfare state; they want to see these benefits increased up to a level of parity with that of the states of the Union.").

7. See Pedro A. Malavet, *The Accidental Crit II: Culture and the Looking Glass of Exile*, 78 DENV. U. L. REV. 753, 771-75 (2001). Malavet explains that "Puerto Rico's cultural tropes . . . are uniquely puertorriquenas/os" and resist Americanization. *Id.* at 773.

8. See Ramón López, *Reveladora encuesta sobre el idioma*, DIÁLOGO, Jan. 1993, at 14 ("The overwhelming majority of Puerto Ricans [according to a poll conducted for the Puerto Rican Athenium] considers itself culturally different from U.S.-Americans."); RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 296-97 (1984) (Puerto Rican "traits and values . . . are distinct from those of North America. . . . Moreover the [Puerto Rican] tribe has preserved its own language."); T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 93-94 (2002) (describing Puerto Rico as "a polity that deeply cherishes its cultural and linguistic differences from the mainland majority").

9. See generally Arnold Liebowitz, *The Commonwealth Of Puerto Rico: Trying To Gain Dignity And Maintain Culture*, 17 REV. JUR. U.P.R. 1, 6-7 (1982) ("Commonwealth partisans view the Puerto Rican identity as based not only on the nation/state, but also as part of a new federal and regional relationship, capable of retaining distinctiveness while engaging the United States and other cultural worlds. Status as a Commonwealth or Associated State, it is argued, would perpetuate the mutually enriching interchange of cultural traits without loss of identity. Proponents of Statehood maintain that American federalism is sufficiently flexible not only to allow but also to welcome the admission of a culturally distinctive Puerto Rico as a State. They cite Hawaii particularly, not only because it is noncontiguous, but also due to its largely non-Anglo-Saxon cultural and ethnic background. Statehood advocates, such as Governor Romero Barcelo, cite federal constitutional protections for the States in such matters as education, marital relations, public morality, health, and welfare to show the potential for States to retain cultural distinctiveness.")

to maintain.<sup>10</sup> In their view, they should be entitled, as members of U.S. society, to the benefits of economic solidarity without having to conform their way of life to that of their fellow citizens on the mainland.<sup>11</sup>

The island's two main political parties, which together regularly account for approximately 95% of the vote in local elections, have responded to and promoted this popular perception.<sup>12</sup> They have each presented their preferred political status—commonwealth or statehood—as enabling Puerto Rico to maintain its cultural distinctness, while belonging to the United States.<sup>13</sup> The Popular Democratic Party has been asserting for over fifty years that under the current territorial status (or an improved version of such status) Puerto Ricans can attain the goal of safeguarding their national identity without renouncing many of the benefits of their U.S. citizenship.<sup>14</sup> The New Progressive Party, in turn, has been contending since the late 1960s that an idiosyncratically Puerto Rican or *jíbaro*<sup>15</sup> statehood would enable Puerto Rico to attain full integration into the United States without abdicating its cultural uniqueness.<sup>16</sup> Both parties call for a Puerto Rican government that forcefully fosters the national culture.

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10. *Id.*

11. *See id.*

12. *See* Ediberto Roman & Theron Simmons, *Plenary Power And The Principle Of Liberty: An Alternative View Of The Political Condition Of Puerto Rico*, 39 SAN DIEGO L. REV. 437, 483 (2002) ("The popular Democratic party, arguably the most popular of the territory's three major parties, has repeatedly argued that the 1952 status change created a relationship that empowered Puerto Rico with a true form of sovereignty, including the ability to prevent the United States from imposing its will in all instances."); José Trías Monge, *Plenary Power And The Principle Of Liberty: An Alternative View Of The Political Condition Of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 20 (1999) (explaining that the New Progressive Party called for "a special kind of statehood, so-called *jíbaro* statehood, meaning statehood which in no way disturbs local culture, sense of identity and language use").

13. *Id.*

14. *See* CARR, *supra* note 8, at 297; ALEINIKOFF, *supra* note 8, at 75.

15. The *jíbaro* is the traditional peasant of Puerto Rican folklore. *See supra* text accompanying note 12.

16. *See* CARR, *supra* note 8, at 297; CARRIÓN, *supra* note 4, at 30–31. Carrión unfairly accuses the New Progressive Party of abandoning the idea of a *jíbaro* state and of returning to pre-1967 "*pitiyanki*"—i.e., U.S. adulatory—conceptions following the collapse of the congressional plebiscite process, upon perceiving "that Puerto Rican culture constitutes an obstacle for statehood." *Id.* at 155; *see also id.* at 160, 168; CARR, *supra* note 8, at 277 ("Universalism, by which the intellectuals of the PNP meant Western values as mediated by America, could be used if not to deny the existence of a specific Puerto Rican culture, at least to denigrate it."); Ricardo E. Alegría, *Los puertorriqueños unidos son mayoría*, EL NUEVO DÍA (Puerto Rico), Jan. 2, 1999, at 94 (observing that supporters of annexation within and without the New Progressive Party constitute "a subculture characterized by an inferiority complex,

Even the third party, which favors independence, proposes in fact another variation on the theme of asserting cultural sovereignty while maintaining strong ties to the United States. The Puerto Rican Independence Party advocates the creation of a separate nation that would nonetheless continue significantly within the U.S. political and economic orbit.<sup>17</sup> The Party calls for a transition period of ten years or longer, within which the United States would keep the current level of financial support.<sup>18</sup> Even after this term ends, Puerto Rico would presumably expect U.S. foreign aid at a level comparable to that received by nations with special relations to the United States, such as Israel.

A key part of this separatist economic agenda would be the attraction of high levels of U.S. private investment through tax and other incentives.<sup>19</sup> Moreover, continued free movement between the island and the mainland after independence would be crucial in order

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which leads them to deny their nationality and to be willing to exchange their cultural identity for supposed economic benefits"); Ramón Grosfoguel, *Lecciones del año plebiscitario*, EL NUEVO DÍA (Puerto Rico), Jan. 2, 1999, at 71. Leadership continues to hold on to reactionary social projects and obsolete cultural definitions in order to convince the racist North American new right that statehood would be neither too costly nor culturally too threatening to that right wing's interests. To deny that Puerto Rico constitutes a nation culturally and to propound neo-liberal cuts as a social project is not only a colonialist position but also a dangerous process for Puerto Rico's future no matter which status is involved. The New Progressive Party still expresses a solid commitment to the Puerto Rican national culture. In its rules and regulations, the Party makes the following statement: "The New Progressive Party promotes Puerto Rican culture together with the Spanish language as the vernacular and the English language as the second official language of Puerto Ricans." NEW PROGRESSIVE PARTY, RULES AND REGULATIONS, STATEMENT OF PURPOSE, available at <http://www.pnppr.org> (last visited April 2, 2004) (copy on file with the Duke Journal of Comparative and International Law). In its platform, the Party declares: "We shall support the activities of the Institute of Puerto Rican Culture in its effort to help hundreds of public and private entities promote cultural engagement." NEW PROGRESSIVE PARTY, 1996 PLATFORM, CULTURAL MATTERS § 101 (on file with author); see also *id.* § 114.

17. See Stephen Handleman, *Puerto Rico Wants What Quebec Has*, TORONTO STAR, Oct. 28, 1997, at A23 (observing that "[w]hat Puerto Rico wants is to be allowed to be itself while remaining economically and juridically under the protection of the U.S." and quoting Manuel Orellana, an official of the Puerto Rican Independence Party, stating that "[w]e believe that we can be excellent partners with the U.S. in Latin America without being American.").

18. PROGRAMA DEL PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO 90 (1996) [hereinafter PROGRAMA INDEPENDENTISTA 1996]. The payments would arrive not as individual entitlements but rather as block disbursements to the sovereign government of Puerto Rico. *Id.*; see also PROGRAMA DEL PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO § VIII(B) (2000) [hereinafter PROGRAMA PUERTORRIQUEÑO].

19. PROGRAMA INDEPENDENTISTA 1996, *supra* note 18; see also PROGRAMA PUERTORRIQUEÑO, *supra* note 18.

to avoid splitting the Puerto Rican community in two.<sup>20</sup> Under the Independence Party's plan, Puerto Ricans would have the opportunity to acquire double citizenship.<sup>21</sup> Finally, through a series of additional bilateral agreements, the Republic of Puerto Rico would, to a significant extent, bind its fate with that of the United States.<sup>22</sup> The two sovereign countries would thus have a common market and currency.<sup>23</sup>

This article will not probe into this secessionist vision, but rather into the ambitions of the advocates of a permanent relationship with the United States—whether in the form of commonwealth or statehood. The piece will examine specifically the extent to which Puerto Rican cultural sovereignty is compatible with the U.S. constitutional framework. It will, in other words, reflect upon whether solid state support of the national culture runs counter to the political principles that underlie the U.S. Constitution.

To this end, I will work through three conceptions of the U.S. polity, with increasing degrees of plausibility and openness to cultural difference. First, the nationalist interpretation demands strict assimilation to a common ethos by all citizens. Second, the liberal reading tolerates diversity in the private sphere, but precludes any official fomentation of divergent cultures. Finally, the pluralist option contemplates the encouragement and subvention of all cultural minorities on equal terms. I will argue that a concerted effort on the part of the Puerto Rican government to prop up the locally predominant culture runs counter to all three constructions. Even the third alternative would preclude such an intense and partial cultural engagement as a violation of the requirement of neutrality vis-à-vis the various ethnic subgroups.

I will maintain that an associated or fully incorporated state of Puerto Rico would be able to promote and embrace the national culture only if exempt from the U.S. political culture—i.e., the norms

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20. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 83 (1995) ("Cultures do not have fixed centres or precise boundaries."); See also YAEL TAMIR, *LIBERAL NATIONALISM* 65 (1993).

21. PROGRAMA INDEPENDENTISTA 1996, *supra* note 18; see also PROGRAMA PUERTORRIQUENO, *supra* note 18.

22. PROGRAMA INDEPENDENTISTA 1996, *supra* note 18; see also PROGRAMA PUERTORRIQUENO, *supra* note 18. Notwithstanding the Party's general goal of demilitarization, a deal to allow U.S. military bases to stay on and a significantly coordinated defense policy would be practically unavoidable.

23. PROGRAMA INDEPENDENTISTA 1996, *supra* note 18; see also PROGRAMA PUERTORRIQUENO, *supra* note 18.

that define constitutional democracy in the United States. To this end, island and mainland would have to evolve towards a bilateral association or an asymmetrical federation that would enable Puerto Rico to exist as a distinct polity, subject to political principles different from those in force in the fifty states. The bond between Puerto Rico and the United States would then rest on a general set of shared social and economic values.

Of course, this kind of arrangement would be extremely difficult to set up as a practical matter. It would run into considerable opposition in the United States. It would not only afford Puerto Rico preferential treatment and establish a dangerous precedent, but it would also specifically infringe upon the notion of a Union of equals, particularly in the form of asymmetric federalism. Moreover, it would be hardly justifiable on its own terms, inasmuch as it would ultimately amount to a sheer pretense of political integration. Appearances notwithstanding, Puerto Rico and the United States would remain separate polities. They could construct a similar kind of relationship more realistically and coherently as sovereign nations through international agreements.

Nonetheless, the ultimate decision of whether to configure United States-Puerto Rico relations domestically or internationally bears more upon form than content. The peoples of Puerto Rico and the United States should first focus on how they want their respective political communities to come together in areas such as economics, welfare, immigration, defense, and citizenship. They ought to make sure that their coordinated interaction in these domains does not preclude them from adhering to different political principles, particularly on matters of national culture. Once they have solved these substantive matters, they should find it considerably easier to decide whether to structure their ties through a shared constitution or an international treaty. In particular, they should be in a position to determine whether maintaining two distinct polities within the same constitutional space is a feasible and worthwhile endeavor.

## II. TERMINOLOGICAL POINTERS

### A. National Culture

I do not intend to provide an exhaustive definition of the term “national culture.” My sole purpose in this subsection is to sketch the concept so as to make my argument intelligible. Of course, the discussion itself will further sharpen the contours of this key notion.

A national culture is a set of activities and beliefs that a significant group of people shares.<sup>24</sup> It includes literature, music, cuisine, language, tradition, and perhaps even religion.<sup>25</sup> It typically develops over time and across generations.<sup>26</sup> There is no fixed list of areas that all national cultures must encompass.<sup>27</sup> Some cultural ventures, such as sports, may be part of the legacy of one national culture, but not of another.<sup>28</sup>

The individuals who converge on this multiplicity of endeavors or commitments constitute a nation.<sup>29</sup> They are engaged in a common life project.<sup>30</sup> More specifically, they share a conception of the good, which organizes the various components of their national culture.<sup>31</sup> Therefore, they are an ethical association, and not just an ethnic group.<sup>32</sup> They are bound to each other not by lineage, but rather by a

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24. See, e.g., GUILLERMO BONFIL BATALLA, *Identidad nacional y patrimonio cultural*, IV OBRAS ESCOGIDAS 397, 397 (Mexico City: Instituto Nacional Indigenista, 1995) ("[d]efinitions of ethnic groups, peoples, or nations . . . include in one way or another a reference to a common culture as a necessary condition for the existence of those longstanding collectivities . . ."). See also DAVID MILLER, ON NATIONALITY 85 (1995); Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 279 (2002) (explaining that a national culture is "a set of values and understandings generally shared by the population that constitutes the nation"). Clifford Geertz identifies culture with "webs of significance." CLIFFORD GEERTZ, INTERPRETATION OF CULTURES 5 (1973). He explains that "culture is not a power, something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which they can be intelligibly—that is thickly—described." *Id.* at 14.

25. See GUILLERMO BONFIL BATALLA, *supra* note 24, at 398.

26. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 471 (2002) (explaining that "the idea of a traditional national culture is an imagined narrative, passed on like an inheritance from one generation to the next").

27. See TAMIR, *supra* note 20 at 65.

28. See generally MILLER, *supra* note 24, at 85; TAMIR, *supra* note 20, at 58.

29. See BATALLA, *supra* note 24, at 397 ("[D]efinitions of ethnic groups, peoples, or nations . . . include in one way or another a reference to a common culture as a necessary condition for the existence of those longstanding collectivities . . ."); see also MILLER, *supra* note 24, at 85.

30. Hernan Lopez-Garay, *Dialogue Among Civilizations: What For?*, INT'L J. ON WORLD PEACE, Mar. 1, 2001, at 15 (arguing that a society of individuals with a common history or meta-narrative have a common life project).

31. These individuals constitute a community in John Rawls' sense. In other words, they share a comprehensive conception of the good. See JOHN RAWLS, POLITICAL LIBERALISM 40 n.43, 42, 146 n.13, 201 (1993).

32. See, e.g., Leti Volpp, *Talking "Culture": Gender, Race, Nation, And The Politics Of Multiculturalism*, 96 COLUM. L. REV. 1573, 1600 (1996) (explaining that in Doriane Lambelet Coleman's theory of national culture "[e]thnic identification . . . disappear[ed] over time through assimilation into a unitary national culture.")



collective conception of how to live.<sup>33</sup> They subsist as a community of will, not of destiny.

Thus far, I have been mostly referring to social culture, which evolves rather informally and often in times of leisure. Yet, many national communities also possess a legal culture, which includes a way of creating, applying, and categorizing the law. In addition, a nation may have an economic culture—i.e., a particular approach to the production and distribution of goods and services.

A political culture, which evokes an overall manner of making decisions in politics, may be part of a national group's heritage as well. It may call for a presidential or parliamentary democracy, for specific protections for minority rights, as well as for judicial review. It may also establish how far the authorities may go in promoting the national culture.<sup>34</sup>

Empowering governments to take such an activist route implies far more than simply allowing them to fund a few artistic and folkloric projects. It also means enabling them, in principle, to promote and identify with the nation's peculiar approach to law, business, politics, as well as other collective undertakings. The state's engagement on this front may indeed end up being intense and pervasive.

## B. The United States as a Political Community

I assume that the United States constitutes a political community. In other words, my premise is that there is a relatively coherent set of political principles or norms that guide collective life in the United States. Consequently, public institutions at both the federal and the state level must comply with these principles. The norms at issue map out a political culture, in the sense alluded to in the previous subsection. They establish, more specifically, the general

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33. See, e.g., Upendra Baxi, *Universal Rights And Cultural Pluralism: Constitutionalism As A Site Of State Formative Practices*, 21 *CARDOZO L. REV.* 1183, 1193 (2000) (observing that Kenneth Karst's vision of a "'national culture' comprises a web of a 'great many understandings and folkways—that is, meanings and day-to-day behaviors.' These are also institutionally embedded in language . . . ; family ('not to be confused with a common definition of family, or a common understanding of familial duty'); religious belief (in 'some form' and with 'varying degrees of intensity'); and a 'future-orientation' . . .").

34. In due course, I will note that liberalism postulates unifying a profoundly diverse society through a joint political culture. A key liberal assumption is that a multiplicity of different national communities can accept, or perhaps even affirm, the same liberal political principles.

functions and the obligations of the state, as well as the basic rights that individuals have against each other and against the government.<sup>35</sup>

I am thus excluding not only the possibility of U.S. political existence resting on sheer arbitrariness, but also that of viewing the United States as an aggregation of separate and variegated political communities. Of course, states enjoy considerable sovereignty under the U.S. constitutional regime.<sup>36</sup> Yet, they are not self-standing polities. They are part of a broader political community, which establishes certain core principles that bind them.<sup>37</sup>

I am not supposing that the U.S. polity exists as a formal entity, only as a philosophical idea or construction. My guiding premise is that individuals, groups, and institutions in the United States behave and interact in ways that suggest that they form part of a community and that they adhere to certain fundamental principles. Political philosophy makes explicit these tacit norms. It does not anthropologically interpret an opaque social ritual, but rather develops a philosophical ideal on the basis of existing political practices and notions.

I will present three conceptions of the U.S. political culture. I will maintain that the third one is the most plausible. That is, it renders in the most appealing way the precepts underlying the Constitution, the laws, the interpretations and the political praxis in the United States. Yet, I will not dwell on this contention. My main concern will instead be to demonstrate that all three paradigms preclude an intense and one-sided official defense of the Puerto Rican national culture.

What are the consequences of infringing upon the prevailing political principles? Certainly, there is no express enforcement mechanism. Therefore, no institution will expressly bring charges or hold that Puerto Rico is in violation. Instead, the U.S. reaction will be diffuse. For instance, the federal Supreme Court might invalidate some Puerto Rican cultural policies that impinge upon those constitutional provisions and precedents that bear on the U.S.

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35. *See, e.g.*, U.S. CONST. arts. I-III; U.S. CONST. amends. I-X.

36. The United States Constitution constructs a federal government of limited powers, with all remaining powers delegated to the sovereign states and the people. *See, e.g.*, U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

37. *See, e.g.*, U.S. CONST. amend. XIV ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

political culture, such as the due process or equal protection clauses and relevant case law. Congress might, in turn, pass statutes overriding certain local measures in support of the Puerto Rican national culture or stonewall attempts to make Puerto Rico a culturally distinct state. The U.S. response to a breach need not come from one of the federal branches of government. It might instead take the form of a condemnation by U.S. public opinion of such Puerto Rican state action.

If the cultural agenda under consideration indeed runs counter to U.S. political norms, Puerto Rico is presently in breach. Inasmuch as most of federal law applies to Puerto Rico as a commonwealth, the island already belongs and owes allegiance to the U.S. political community.<sup>38</sup> Therefore, the insular government neglects crucial duties with its efforts on behalf of the Puerto Rican national culture.

The U.S. polity may be relatively benign with respect to the current transgressions. It may take into account not only that Puerto Rico is not a full member of the federation, but also that Puerto Ricans do not enjoy some of the most fundamental rights issuing from the U.S. political community, such as the right to vote in presidential and congressional elections.<sup>39</sup> Nonetheless, insofar as most of the federal law that delineates the U.S. political culture binds Puerto Rico, the United States could hold the island accountable for failing to comply with the underlying political principles. Of course, if Puerto Rico were to become a state, the pressure to uphold the norms would increase considerably.

### III. NATIONAL CULTURAL CONSENSUS IN PUERTO RICO

Puerto Rico has been a U.S. territory since 1898, when the United States wrested the island from Spain in the aftermath of the

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38. *See* *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 488 (1st Cir. 1989) ("To be sure, the compact between the federal sovereign and the people of Puerto Rico confers a measure of autonomy on the Commonwealth akin to statehood—but it has never been read to bestow so great a degree of autonomy as to authorize the Commonwealth to escape the burdens of federal laws, not within specifically-expected areas . . . which Congress chooses equally to apply to Puerto Rico when it legislates for the Nation as a whole. The critical datum is not whether the Commonwealth approves of the law, or endorses its goals and values, or has enacted legal or constitutional provisions antithetic to it.").

39. *See* *Igartua De La Rosa v. United States*, 229 F.3d 80, 83 (1st Cir. 2000) (The "Constitution of the United States does not confer upon United States citizens residing in Puerto Rico a right to participate in the national election for President and Vice-President."); *United States v. Acosta-Martinez*, 252 F.3d 13, 21 (1st Cir. 2001) (The "residents of Puerto Rico may not vote for President, . . . and may not elect representatives to the Congress.") (citing *Igartua De La Rosa v. United States* 229 F.3d 80 (1st Cir. 2000)).

Spanish-American War.<sup>40</sup> In 1917, the U.S. government proclaimed all Puerto Ricans U.S. citizens upon birth.<sup>41</sup> In 1952, Puerto Rico adopted, with the approval of the U.S. Congress, its present Constitution and became a “Free Associated State” or “Commonwealth” of the United States.<sup>42</sup>

Puerto Ricans thus attained a level of self-government equivalent to that of any state of the Union. They did not, however, acquire the right to participate in presidential elections or to send their own regular representation to the federal legislature.<sup>43</sup> They simply preserved the prerogative of designating a Resident Commissioner, who may speak but not vote in the House of Representatives.<sup>44</sup> Federal law continued to apply in Puerto Rico, unless Congress decided otherwise.<sup>45</sup>

Despite the constitutional settlement of 1952, the debate on the status of Puerto Rico has not come to an end. The profound disagreement on this issue persists to this day. Some Puerto Ricans want the island basically to remain a commonwealth of the United States. Others favor the full incorporation of Puerto Rico as the fifty-first state of the Union. A third group sees independence as the best option.<sup>46</sup> There are, needless to say, endless variations around these three formulas.

Puerto Ricans opted for the commonwealth choice in the first two plebiscites that the insular government organized in 1967 and

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40. See FERNANDO PICÓ, *HISTORIA GENERAL DE PUERTO RICO* 223–30 (1986).

41. See Jones Act, 39 Stat. 951 (1917).

42. See Act of July 3, 1950, Pub. L. No. 81-600, ch. 446, 64 Stat. 319 (commonly known as “Public Law 600” and empowering Puerto Ricans to adopt a constitution for their local government); Act of July 3, 1952, ch. 567, 66 Stat. 327 (current version at 48 U.S.C. § 731d (1982)) (approving the Puerto Rico Constitution as adopted by the Constitutional Convention of Puerto Rico).

43. See Berman, *supra* note 26.

44. See 48 U.S.C. § 891 (2000) (establishing the position of resident commissioner as an elected representative of Puerto Rico).

45. “The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States.” 48 U.S.C. § 734 (2000). See Acosta-Martinez, 252 F.3d at 18 (The creation of the Commonwealth granted Puerto Rico authority over its own local affairs; however, “Congress maintains similar powers over Puerto Rico as it possesses over the federal states.”) (quoting *United States v. Quinones*, 758 F.2d 40, 43 (1st Cir. 1985)); *id.* at 20 (“[The] default rule presumes the applicability of federal laws to Puerto Rico.”).

46. See generally, Associated Press, *No Decision Soon On Puerto Rico Status*, SAN DIEGO UNION-TRIBUNE, Dec. 30, 2002, at A13 (“Deep divisions remain over the relationship, with some wanting to maintain the status quo [commonwealth status], others supporting the call for statehood, and a smaller group backing full independence.”).

1993.<sup>47</sup> However, between the first and the second vote, support for this alternative dropped from 61% to 49%.<sup>48</sup> The decline suggests disenchantment with the status quo, particularly considering the fact that during the second plebiscite an improved commonwealth was at stake.<sup>49</sup> In contrast, the statehood option jumped from an approval rate of 39% to 46%.<sup>50</sup> The independence movement boycotted the first plebiscite and secured less than 4% of the votes in the second.<sup>51</sup>

Seeking to capitalize on momentum, a pro-statehood local administration organized a third plebiscite in 1998.<sup>52</sup> Puerto Rico thus faced the choice of being (1) a U.S. territory, (2) an associated republic, (3) a state of the Union, (4) an independent nation, and (5) none of the above.<sup>53</sup> This last category explicitly enabled citizens to exercise a right, which the Puerto Rico Supreme Court had previously established, to reject all the options presented in any plebiscite.<sup>54</sup>

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47. See Información, Plebiscito 93, Comisión Estatal de Elecciones de Puerto Rico, <http://www.ceepur.org/> (last visited April 2, 2004) (copy on file with Duke Journal of Comparative and International Law); <http://eleccionespuertorico.org/> (last visited April 2, 2004) (copy on file with Duke Journal of Comparative and International Law). See also Jose Trias Monge, *Jose Trias Monge, 83, Puerto Rico Chief Justice*, N.Y. TIMES, June 27, 2003, at C10 ("the commonwealth endured plebiscites in 1967 and 1993."). In the 1993 vote, the Popular Democratic Party obtained a plurality not for the current status but rather for an improved version. See John F. Talbot, *Puerto Rico Says "Yes" to Commonwealth Status*, INFO. ACCESS CO., Dec. 18, 1993, at 4 (observing that in the 1993 plebiscite: "[T]he Puerto Rican people had expressed a firm 'Yes' to their current position as a U.S. commonwealth, and had likewise said 'No' to becoming the 51st U.S. state . . . A key to the achievement of this 'Yes' vote was the surprising resurgence of the pro-commonwealth Popular Democratic Party . . . Even though the commonwealth vote failed to reach the coveted majority of 50 percent or more, the referendum made it sufficiently clear that, at least for now, Puerto Ricans have opted for an improved and 'culminated' commonwealth.").

48. See Información, Plebiscito 93, Comisión Estatal de Elecciones de Puerto Rico, at <http://www.ceepur.org/> (last visited April 2, 2004) (copy on file with Duke Journal of Comparative and International Law).

49. See *id.*; CARR, *supra* note 8, at 108 ("The Popular Democratic Party (PPD) favors the amendment of Commonwealth by a process now called 'culmination,' which will enlarge the autonomy Puerto Rico presently enjoys.").

50. See *id.*

51. See *id.*

52. See generally Juan Cavestany, *Los puertorriqueños rechazan por tercera vez la integración plena en Estados Unidos*, EL PAÍS (Madrid), Dec. 14, 1998, at 955; Julio Ghigliotti, *La quinta por mayoría absoluta*, EL NUEVO DÍA (Puerto Rico), Dec. 14, 1998, at 12; see also José Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 19 (1999).

53. See Información, Plebiscito 98, Comisión Estatal de Elecciones de Puerto Rico, at <http://www.ceepur.org/> (last visited April 2, 2004) (copy on file with Duke Journal of Comparative and International Law).

54. Sanchez Vilella v. E.L.A., 134 P.R. Dec. 503 (1993).

The results were clearly disappointing for the government. Statehood was unable to muster more than the 46% support it had attained in 1993.<sup>55</sup> Furthermore, slightly more than 50% of the voters embraced the “none of the above” category,<sup>56</sup> which the pro-commonwealth movement had advocated in order to repudiate full integration as well as the territorial definition of the current status.<sup>57</sup>

The statehood option was not the only loser in the electoral event. The independence ideal managed to perform even worse than in 1993, drawing less than 3% of the electorate.<sup>58</sup> Moreover, the first two choices bombed catastrophically, each registering less than 1% of the votes.<sup>59</sup>

It is noteworthy that the U.S. Congress has never offered Puerto Ricans a binding vote on the island's status.<sup>60</sup> The legislative bills that would have authorized such a referendum in 1993 and 1998 died without final action.<sup>61</sup> On the first occasion, the responsible committees of each chamber never sent the projects for a plenary

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55. See Información, Plebiscito 98, *supra* note 53.

56. See *id.*

57. See Mireya Navarro, *With a Vote for 'None of the Above,' Puerto Ricans Endorse Island's Status Quo*, N.Y. TIMES, Dec. 14, 1998, at A18 ("Popular Democratic leaders said they were forced to protest the referendum because the Government denied them participation in crafting the ballot definition of commonwealth and that it ended up unfairly portraying that status as one that does not even guarantee American citizenship, which Puerto Ricans have had since 1917.").

58. See Información, Plebiscito 98, *supra* note 53. See also Len DeGroot, *Puerto Rico: A Modern Island Rich in History*, MORNING CALL (Allentown, PA), July 21, 2002, at S16 (showing that in the 1993 plebiscite, independence garnered 4% of the vote, while in the 1998 plebiscite it garnered 3%).

59. See Información, Plebiscito 98, *supra* note 53.

60. Editorial, *A Choice for Puerto Rico*, N.Y. TIMES, Mar. 9, 1998, at A18 ("Congress has repeatedly failed to give islanders a say on their political status."); John Hassell, *Puerto Rico at 50: A Matter of Status*, NEWHOUSE NEWS SERVICE, Oct. 31, 2002, at International (observing that "[o]ne reason the issue of Puerto Rico's political status has remained open for so long is that the U.S. Congress has refused to approve a binding vote to determine the island's future").

61. See Larry Rohter, *Puerto Rico's Identity, Up for a Vote*, N.Y. TIMES, Aug. 8, 1993, at E5 ("From 1989 through 1991 both the Senate and the House, urged on by the Bush Administration, debated legislation that would have established a binding plebiscite. In the end they failed to take action, fueling the suspicion here that Congress is simply unwilling to add a 51st star to the flag."). See generally Mireya Navarro, *Puerto Rico Rallies to Vote on Shift in Political Status*, N.Y. TIMES, Dec. 12, 1998, at A9 ("Congress, in turn, is sharply divided over whether to accept Puerto Rico as a possible state, and previous bills on self-determination have bogged down on questions about the political, cultural and economic cost of incorporating an island with 3.8 million Latin Americans as the 51st state.").

vote.<sup>62</sup> The second time around, the House of Representatives endorsed a bill on the issue, but the Senate shelved its own legislative proposal at the committee level.<sup>63</sup>

This lack of interest in scheduling a federal referendum is due to the reluctance in the U.S. legislature to risk a statehood victory. Congress's resistance to welcoming Puerto Rico to the Union rests principally not on racial or linguistic intolerance, but rather on a political and economic basis.<sup>64</sup> As a state, Puerto Rico would send, on the basis of its population, more U.S. Representatives to Washington than about 29 of the 50 existing states. Moreover, equal treatment to that of the states would enable the island to secure additional U.S. funding.<sup>65</sup> Due to its low standard of living, Puerto Rico would receive much more federal aid per capita than any other state in the Union.<sup>66</sup>

To a lesser extent, Congress's recalcitrance also rests on the perception that Puerto Rican cultural policies contravene the U.S. political culture. Congresspersons have accordingly complained about Puerto Rican statehood partisans' insistence on officially preserving the Spanish language and maintaining a separate international personality.<sup>67</sup> This kind of reservation has played a role—along with the stronger, political and economic concerns—in

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62. See Martin Tolchin, *Senate Panel Derails Bill on Puerto Rico Referendum*, N.Y. TIMES, Feb. 28, 1991, at A11 ("A Senate panel today derailed, and possibly killed, a bill to authorize a referendum that would enable Puerto Rico to choose its political future.").

63. *Top of the Times: A Review of the Week's News*, WASH. TIMES, Mar. 8, 1998, at A2 (observing that on March 4, 1998 "[t]he House [of Representatives] passed the Puerto Rico statehood bill by a vote of 209-208. It would require Puerto Ricans to vote on the status of the commonwealth by Dec. 31. The Senate has no plans to take up the bill."); Nancy E. Roman, *Lott Sees Bill For New State As Rushed; No Senate Action Set On Puerto Rico*, WASH. TIMES, Mar. 5, 1998, at A1 ("Senate Majority Leader Trent Lott vowed yesterday not to rush into a 'hornet's nest' with the Puerto Rico statehood bill that he says is unfairly tilted toward making the Caribbean island the 51st state. 'He sees no reason to bring it up this year and has no plans to schedule it,' his spokeswoman, Susan Irby, said yesterday.").

64. See Mireya Navarro, *Puerto Rico Rallies to Vote on Shift in Political Status*, N.Y. TIMES, Dec. 12, 1998, at A9 ("Congress, in turn, is sharply divided over whether to accept Puerto Rico as a possible state, and previous bills on self-determination have bogged down on questions about the political, cultural and economic cost of incorporating an island with 3.8 million Latin Americans as the 51st state."). *But see id.* ("[O]pponents of statehood have cited objections over issues of language.").

65. Larry Luxner, *Advocate Sees Independence Vote As 'Win-Win'*, WASH. TIMES, Mar. 31, 1996 at A8 ("Puerto Rico would . . . receive more funds from the federal government, per capita, than any state and would contribute much less.").

66. *Id.*

67. See Navarro, *supra* note 57, at A18 ("[In] Congress . . . opponents of statehood have cited objections over issues of language.").

the congressional failure to organize a plebiscite on Puerto Rico's status.

The U.S. Congress has at times attempted to justify its inaction by pointing to the lack of agreement among Puerto Ricans.<sup>68</sup> This kind of rationalization misses the mark on three grounds. First, there actually is an overwhelming, almost unanimous, feeling in Puerto Rico that Congress ought to authorize a binding referendum.<sup>69</sup> Second, U.S. lawmakers could contribute to the development of a local consensus on the island's status by spelling out what the options are, by presenting them to the Puerto Rican electorate, and by committing to honor the people's preference.<sup>70</sup> Finally, Puerto Ricans have reached considerable consensus on the essentials of U.S.-Puerto Rico relations. The three main political parties posit maintaining solid economic, civic, as well as military ties with the United States and, more significantly, structuring Puerto Rican collective life around the national culture.<sup>71</sup>

As already anticipated, I will probe precisely into this last point of convergence among Puerto Rican politicians and citizens. Indeed, most Puerto Ricans believe not only that the island should enjoy cultural autonomy vis-à-vis the United States, but also that their national culture is a public good, which their government should promote.<sup>72</sup> It is therefore no surprise that Puerto Rican political

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68. Chris Mooney, *Treasure Island; Puerto Ricans Can't Vote For Congress Or The Presidency. But They Can Write Checks. A Case Study Of What Happens When Politics Is All Money And No Voters*, AM. PROSPECT, Sept. 25, 2000, at 51 ("In the end, the internecine struggles between Puerto Rico's factions prevent a consensus on the most basic definitions of the island's choices. And such lack of agreement on terms is a tried and true recipe for congressional inaction.").

69. See Editorial, *Lott Should Get Out of the Way, Let Puerto Ricans Vote on Future*, SUN-SENTINEL (Fort Lauderdale), May 15, 1998, at A22 ("A recent poll shows 97 percent of Puerto Ricans want a chance to vote on their political status. On the mainland, 63 percent of American voters favor a referendum in Puerto Rico, a stunningly high figure.").

70. See *id.* (arguing that Congress must provide Puerto Rican's with a binding vote on the island's status in order to allow Puerto Rican citizens to arrive at a consensus and allow them to "resolve their most basic question in the manner of a functioning democracy").

71. Ivan Roman, *As Puerto Rico Celebrates, It Still Hears Angry Voices*, ORLANDO SENTINEL TRIBUNE (Florida), July 25, 2002, at A17 (observing that the three main political parties "continue to defend the commonwealth's ties to the United States while still allowing Puerto Ricans to preserve their language and culture").

72. See generally *Lealtades Divididas*, EL NUEVO DÍA (San Juan), May 2, 2002, available at [www.endi.com](http://www.endi.com) (last visited April 2, 2004) (copy on file with author) ("Both mainland and island Puerto Ricans identify strongly with their culture. For many of them, this culture is an important part of their identity.").



parties have virtually unanimously made the furtherance of the national culture a central part of their platform.

The Puerto Rican Independence Party, quite predictably, has striven to position itself as the political organization with the deepest commitment to the national culture. It insists that only with complete political sovereignty will it be possible to guarantee the survival and flourishing of the Puerto Rican way of life.<sup>73</sup> Nevertheless, the Party has been steadily losing support since the 1950s, partly due to the repression of its adherents by local and U.S. authorities,<sup>74</sup> but mostly because of the Puerto Rican economy's increased dependence on U.S. welfare. The success of the two other parties in presenting themselves as guardians of the national culture has been a *coup de grace*.<sup>75</sup> The Independence Party has thus faced the difficult task of convincing the population that, despite the apparently high financial cost, independence is the only means to attain national and cultural prosperity.

In contrast, the pro-commonwealth Popular Democratic Party has been extremely successful politically. It won every single election from the 1940s until 1968, and has come in first or second in every vote since then.<sup>76</sup> The Party supports keeping the current political status, though with increased sovereign powers for the island.<sup>77</sup> It maintains that free association is the only way in which Puerto Rico can preserve its national identity while having a permanent internal relationship with the United States.

A group of former independence advocates, the most prominent of whom was Luis Muñoz Marín, founded the Popular Democratic Party in 1938.<sup>78</sup> In light of the island's chronic underdevelopment, these individuals partly put aside their patriotic fervor and focused on

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73. See CARR, *supra* note 8, at 297; JOSÉ LUIS GONZÁLEZ, *EL PAÍS DE CUATRO PISOS Y OTROS ENSAYOS* 40 (1981) (There is a "good cultural reason to struggle for independence.").

74. See CARRIÓN, *supra* note 4, at 176.

75. The platform of the Puerto Rican Independence Party, not surprisingly, underscores the tardiness and questions the authenticity of the other parties' commitment to the national culture. PROGRAMA DEL PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO 86 (1996) ("Even those who in the past reduced culture to its folkloric expressions while promoting policies of assimilation and incarcerating those who defended our culture and nationality today proclaim themselves defenders of our culture and national identity.").

76. See *The World of Puerto Rican Politics*, at <http://www.prboriken.com/prpolit.htm> (last visited Apr. 2, 2004) (copy on file with author) (observing that the Popular Democratic Party was in political control of Puerto Rico from 1940–1968 and remains a dominant force on the island). See also CARR, *supra* note 8, at 110.

77. ALENIKOFF, *supra* note 8, at 87.

78. See HENRY WELLS, *THE MODERNIZATION OF PUERTO RICO* 123–27 (1969).

growing the economy. They concluded that political ties to the United States were essential to secure capital investment, to access the U.S. consumer market, and to continue receiving substantial financial aid from the U.S. federal government.<sup>79</sup> The Party's forefathers also saw in the United States mainland an open space that could help mitigate Puerto Rico's massive unemployment and overpopulation problem.<sup>80</sup>

The Popular Democratic Party's founders, however, did not altogether give up their nationalistic aspirations. They sought to preserve Puerto Rico's cultural identity and links to Latin America and Spain. They accordingly conceived a political status that enabled Puerto Rico to protect its national culture and develop its economy under the aegis of the United States.<sup>81</sup> Today, Party members regard commonwealth status as a permanent framework, which offers Puerto Ricans "the best of two worlds,"<sup>82</sup> i.e., the cultural sovereignty benefits of independence and the economic security of statehood. The Party contends that the Puerto Rican national legacy would be at risk with the full political incorporation of the island into the United States.<sup>83</sup>

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79. See Robert P. Walzer, *It's Status Quo, Statehood or Independence*, *NEWSDAY* (New York), Oct. 4, 1993, at 18 ("Yet the pro-commonwealth Popular Democratic Party claims in its campaign that Puerto Rico has 'lo mejor de dos mundos'—the best of two worlds—offering U.S. citizenship and relative financial security, along with self-government."). Muñoz Marín rejected independence because, "as an independent republic, Puerto Rico would pay U.S. customs duties as a foreign nation, losing privileged, duty-free access for its products to the huge stateside market." CARR, *supra* note 8, at 116. "He [also] once boasted that no other man could match him in extracting federal largess from a reluctant Congress. . . ." *Id.* at 113.

80. When the Party attained power, it supported the migration of millions of Puerto Ricans to the United States. See FERNANDO PICÓ, *HISTORIA GENERAL DE PUERTO RICO* 263–67 (1986) (describing the massive Puerto Rican migration to the United States since the 1950's). See generally MANUEL MALDONADO DENIS, *PUERTO RICO: UNA INTERPRETACIÓN HISTÓRICO-SOCIAL* (1987) (arguing that the colonial government itself promoted and encouraged emigration).

81. Muñoz Marín "stressed [the status'] economic and cultural advantages, especially as compared with what Puerto Rico's situation would be under either statehood or independence." HENRY WELLS, *THE MODERNIZATION OF PUERTO RICO* 328 (1969). "In spite of preserving United States citizenship, commonwealth status also maintained Puerto Rico's cultural autonomy, perhaps the greatest advantage of all, as Muñoz saw it." *Id.* at 240.

82. This was the Popular Democratic Party's slogan in the 1993 plebiscite, in which the Party promoted an improved version of the current political status as offering "the best of two worlds,' the benefits of statehood and independence without the disadvantages of these two political formulas." CARRIÓN, *supra* note 4, at 173; see also *id.* at 232; ALEINIKOFF, *supra* note 8, at 94.

83. See CARR, *supra* note 8, at 297.

The New Progressive Party, despite striving for the complete annexation of the island by the United States, has also managed to market itself as a defender of the national culture. Party leaders assert that the national culture and language are not negotiable.<sup>84</sup> In fact, the statehood movement became a serious contender in the political arena precisely with the foundation in 1967 of the New Progressive Party, which expressed a deep commitment to Puerto Rican values and traditions.<sup>85</sup> As signaled in the introduction, the Party propounds the transformation of Puerto Rico into not just another member of the Union, but rather into a different kind of constituent, that is, into a *jíbaro* state.<sup>86</sup> The *jíbaro* is the Puerto Rican peasant who became a national symbol in the nineteenth century.<sup>87</sup> The Party's idea is that even as a state, the island would be able to keep its own national character. Puerto Rico would be in a position to advance a national cultural agenda and even to have a certain degree of international recognition of its separate identity in sports and cultural events.

Relying on this nationalistic vision and capitalizing on the divisions within the Popular Democratic Party, the New Progressive Party instantly went beyond merely giving credibility to the statehood option and won the elections in 1968.<sup>88</sup> The Party's first President, Luis A. Ferré, thus became governor and ended the political hegemony of the Popular Democratic Party.<sup>89</sup> Since 1968, the New Progressive Party has taken turns with the Popular Democratic Party at governing the island and has made statehood the second preferred

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84. Carlos Romero Barceló, one of the founders of the New Progressive Party, as well as a former governor, has explicitly proclaimed that Puerto Rico's language and culture are not negotiable. See JOSÉ LUIS GONZÁLEZ, *NUEVA VISITA AL CUARTO PISO* 84 (1986); see also *id.* at 104; CARR, *supra* note 8, at 297 (stating that "it is significant that modern statehooders have had to acknowledge that Spanish will remain an official language if Puerto Rico becomes the fifty-first state"); ALEINIKOFF, *supra* note 8, at 93.

85. See CARR, *supra* note 8, at 145 ("Although many early statehooders were ruthless Americanizers, the PNP rejects with indignation the charge that it is indifferent to Puerto Rican culture."). *But cf. id.* at 267 ("All [parties other than the New Progressive Party] make the defense of Puerto Rican culture a center of their programs; a culture distinct from that of mainland America.").

86. See CARR, *supra* note 8, at 145.

87. See MANUEL ANTONIO ALONSO, *EL GÍBARO: CUADRO DE COSTUMBRES DE LA ISLA DE PUERTO RICO* 42 (1974).

88. See PICÓ, *supra* note 80, at 278.

89. See *id.* at 278.

formula, running closely behind the status quo option, and leaving the independence choice way behind.<sup>90</sup>

All of the three main political parties have made a thriving national culture a crucial goal of their political programs. As political parties, their very existence hinges on their capacity to read the preference of the Puerto Rican people. They have all embraced the national cultural objective because they have correctly sensed a broad consensus on this issue. “There is a very strong cultural nationalism,” Juan Manuel Carrión observed, “so strong indeed that even advertising companies exploit it to sell beer and cigarettes.”<sup>91</sup>

Most Puerto Ricans believe that their government should foment their national culture from within the U.S. constitutional system. Since 1968 they have consistently elected one of the two parties that favor this kind of arrangement.<sup>92</sup> In fact, the New Progressive Party and the Popular Democratic Party typically obtain a combined total of about 95% of the votes.<sup>93</sup> Even though it usually manages to send two or three representatives to the legislature, the Puerto Rican Independence Party has yet to win a single municipal election and the Party’s candidate for governor never receives the endorsement of more than 4% of the voters.<sup>94</sup>

I shall examine whether the prevailing political principles in the United States allow the kind of national cultural engagement advocated by the two principal parties in Puerto Rico. I will go through three conceptions of the U.S. polity and their corresponding set of political principles in order to ponder the extent to which they authorize the island’s state institutions to promote Puerto Rican national culture. I will present the three paradigms in order of increased persuasiveness and tolerance for diversity.

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90. *See id.* at 278–80.

91. CARRIÓN, *supra* note 4, at 2; *see also id.* at 30.

92. *See* <http://eleccionespuertorico.org/> (last visited April 2, 2004) (copy on file with author).

93. *See id.*

94. *See id.*

#### IV. PUERTO RICAN CULTURAL NATIONALISM AND THE U.S. POLITICAL COMMUNITY

##### A. The Nationalistic Model

Under this first paradigm, the U.S. social unity rests on a thick ethos or conception of the good.<sup>95</sup> In other words, citizens share an Anglo-American way of life, which structures their communal interaction. Public institutions must advance a national culture, but this national culture is that of the United States. Both state and federal authorities must devote themselves to this goal.

From this perspective, the Puerto Rican government must not only renounce its efforts on behalf of the local national culture, it must also join its federal counterpart in promoting the U.S. national culture. It must, for instance, make English the language of its bureaucracy, schools and universities, as well as business and public spaces. It must fund Anglo-American artistic projects. It must, in general, take steps to bring its citizens to learn and embrace U.S. traditions, customs, and ways.

Inasmuch as national culture encompasses legal practices, this nationalistic model would also require Puerto Rico to dismantle its civil law system and prostrate itself before the common law. The insular Supreme Court would have to renounce its efforts to recuperate and reinvigorate Puerto Rico's civil law tradition as part of the Puerto Rican national identity. It would have to overrule its precedents calling for an interpretation of the civil code on the basis

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95. Isaiah Berlin thus describes this kind of nationalism: "Common ancestry, common language, customs, traditions, memories, continuous occupancy of the same territory for a long period of time, were held to constitute a society. This kind of homogeneity emphasized the differences between one group and its neighbours, the existence of tribal, cultural or national solidarity, and with it, a sense of difference from, often accompanied by active dislike or contempt for, groups with different customs and different real or mythical origins; and so was accepted as both accounting for and justifying national statehood." Isaiah Berlin, *Nationalism: Past Neglect and Present Power*, in *AGAINST THE CURRENT* 333, 338 (H. Hardy ed., 1981). See also CHARLES TAYLOR, *RECONCILING THE SOLITUDES* 41 (1993) ("The ancient tradition of civic humanism stressed that self-government was only possible for a community where the members identified strongly with their public institutions, to use modern language, or where men loved the laws, to use the old terminology."); MICHAEL WALZER, *WHAT IT MEANS TO BE AN AMERICAN* 53 (1992) ("Most political theorists, from the time of the Greeks onward, have assumed the national or ethnic homogeneity of the communities about which they wrote. Prior to the work of Rousseau, theory was never explicitly nationalist, but the assumption of a common language, history, or religion underlay most of what was said about political practices and institutions.").

of civil law sources and at the expense of common law norms.<sup>96</sup> It would have to require that local courts not only read the existing legal codes as a collection of common law statutes, but also incorporate U.S. doctrine and case law into their analysis.

Within the nationalistic conception, Puerto Rico would also have to assimilate the U.S. economic and political culture. Doing so would cause no major trauma, since the island already follows, preponderantly, U.S. economic and political practices. First, the most prominent corporations operating on the island report back to headquarters in the United States.<sup>97</sup> In addition, other companies follow with equal vehemence U.S. business models.<sup>98</sup> Second, the Puerto Rican Constitution embraces U.S. forms of government. Like most states of the Union, Puerto Rico has a strong executive governor who is independent from the legislature, a Senate in which districts have equal representation, a House of Representatives with population-based mandates, and a Supreme Court with final jurisdiction over all cases decided by Puerto Rican tribunals.<sup>99</sup> Nevertheless, the local administration would have to keep in check autochthonous variations in the realm of economics and politics.

Under a nationalist construction, the U.S. political culture would formally converge with its Puerto Rican counterpart in accepting the legitimacy of state promotion of the national culture. Yet, it would invest that policy with a substantially different content. As already noted, it would identify the nation with the Anglo constituency and would require the Puerto Rican government to follow course.

If the Puerto Rican government failed to fulfill its obligations toward the U.S. national culture, the nationalistic community in the United States would intervene. This intervention would take the form of political pressure from the U.S. executive and legislative branches, sanctions from the federal courts, as well as heavy criticism within the U.S. public sphere. The United States would thus

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96. See *Valle v. Am. Int'l Ins.*, 108 D.P.R. 692, 738 (1979) (reversing all previous cases that had "solve[d] civil-law problems through common-law principles").

97. The Puerto Rican "government has successfully attracted and retained many high-technology capital-intensive manufacturers, including pharmaceuticals, computer, electronic, and scientific- and medical-instrument manufacturers. . . . Fifty-seven of the *Fortune 100* and 162 of the *Fortune 500* companies operate in Puerto Rico." ERNST & YOUNG, L.L.P., *DOING BUSINESS IN PUERTO RICO* 5 (2000).

98. In fact, Puerto Rico corporate law is modeled on U.S. business law. See Puerto Rico's General Corporations Law, 14 L.P.R.A. §§ 2601–3455 (Supp. 1997).

99. See arts. III–IV, Constitution of the Commonwealth of Puerto Rico (1952).

communicate to the Puerto Rican government the incompatibility of its policy with fundamental U.S. political principles.

Many opponents of statehood for Puerto Rico presuppose some version of this nationalistic conception of the United States. The extreme right in the United States and the radical left in Puerto Rico converge on this point. The former group feels that the Union should not admit a nationally divergent subgroup, such as that existing in Puerto Rico.<sup>100</sup> The latter contingent fears that the United States would compel the prospective State of Puerto Rico to renounce its national differences.<sup>101</sup> Both camps view the United States as an essentially homogeneous society that can tolerate no diversity.

However, this model hopelessly distorts U.S. reality. The Federal Constitution actually empowers the people to engage in their own pursuits of happiness, so long as they respect the basic norms of cooperation embodied in the fundamental laws of the land.<sup>102</sup> The post-Civil War constitutional reforms underscored that all groups had a right to their own self-realization, yet augmented the scope of the common purpose. This latter expansion continued throughout the twentieth century with the legislative and adjudicative construction of the welfare and solidarity state. Nonetheless, the U.S. Constitution has consistently secured broad spaces of freedom for particular communities to live their own ideas of the good life. The liberties

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100. See, e.g., Patrick J. Buchanan, *Statehood Involves 'Self-Determination' Not Only for Puerto Rico But Also for U.S.*, AUGUSTA CHRON., Sept. 21, 1998, at A5 (noting that supporters of Puerto Rican statehood would "have the United States swallow a nation with a separate culture, language and identity from our own, and to try to assimilate a people who will fight assimilation. . . . But just as Puerto Rico has a God-given right to remain Puerto Rico, America has a God-given right to remain America.").

101. See Rubén Berríos Martínez, *Definición y convergencia*, SITIO: PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO, at <http://www.pip.org.pr/artdef.htm> (last visited Apr. 2, 2004) (copy on file with author) (quoting Puerto Rico Nationalist Party founder Pedro Albizu Campos, "[i]t is impossible to transform this Spanish American nation into an Anglo-Saxon community. Statehood would therefore be an absurd option inasmuch as it would require the United States to destroy its national unity."); see also CARRIÓN, *supra* note 4, at 181 (stating that it is "utopian" to expect real respect for "national identities and ethnic differences"); *id.* at 207 (pointing to Louisiana and New Mexico as examples of states that lost much of their distinctive cultures after having become part of the United States).

102. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that the liberty guaranteed by the Fourteenth Amendment to the Constitution "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

that originally covered only religious denominations have come to encompass all kinds of associations, including ethnic groups.

Beyond these historical and juridical arguments, philosophical considerations of weight militate against the nationalistic paradigm. In general, a diverse society acts unfairly when it foists the majority's conception of the good on everybody else. It thus oppresses minorities and dissidents.

If there is a justification for this kind of subjugation, it must involve extremely compelling reasons. The authorities may not impregnate official structures with the majority's culture out of whim or narcissism, let alone hegemonic ambition. They must instead show that the common culture faces a serious risk that calls for a collective response, that they have not adopted overbroad measures, and that they have preserved sufficient space for the cultural self-determination of underprivileged and dissenting subgroups.<sup>103</sup>

The federal government of the United States could not make the claim that the majority Anglo culture is endangered with the least credibility. It may therefore not endorse, embrace, or saddle that culture on its citizens. It may only rely on reasons of expediency or convenience to support the continued use of the English language and the common law approach in U.S. political and legal institutions. Though justified, this bias towards the majority culture imposes compensatory obligations on the polity. For instance, the government should adopt a tolerant language policy.<sup>104</sup> It should refrain from declaring English the official language or categorically precluding its employees from using foreign languages. Moreover, it should encourage bilingual programs in school and at work. It should generally treat divergent national cultures with tolerance and openness.

In sum, Puerto Ricans need not embrace anything like a mainstream U.S. *Weltanschauung* to join the Union. Neither the local nor the federal government has the authority, let alone the obligation, to coerce Puerto Ricans to give up their differences. On the contrary, the state has a duty to enable Puerto Ricans, as well as other national groups, to follow their own life plans.

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103. Of course, nationalistic communities typically make no excuses and offer no explanations. They promote a particular way of life simply because it is that of their members, or at least of a majority thereof. See Berlin, *supra* note 95.

104. José Luis González expressed grounded skepticism about the willingness of the United States to show this kind of flexibility on language matters. GONZÁLEZ, *supra* note 84, at 104.



In rejecting the nationalistic conception, I have appealed to the notion that the United States does not propagate a national ethos. The implication is that individuals and collectivities in the United States may basically go their own ways, but not necessarily that they may invoke the assistance of their government to this end. I will now specifically determine whether any official engagement on behalf of national culture is legitimate. To do so, I will work through first a liberal and thereafter a pluralist portrayal of the U.S. political community.

## B. The Liberal Alternative

Under a nationalistic interpretation, U.S. communal principles would not allow Puerto Rican public institutions to foment the local conception of the good. This subsection will move on to a liberal construction, drawing on the views of John Rawls and Jürgen Habermas. The question will be not only whether the ensuing norms are valid, but also whether they would condone the official promotion of the Puerto Rican national culture.

After providing a philosophical justification for the principles of political liberalism, Rawls develops the notion of an “overlapping consensus.”<sup>105</sup> Through this concept, he explains the stability of—and provides additional reasoned support for—a society organized around the previously defended norms. The principles of political liberalism specify a basic set of liberties, such as the right to vote, to express opinions, to exercise religion, or to a fair wealth distribution. These norms rest on a thin conception of the good and are therefore compatible with multiple conceptions of the good life. Individuals and groups who do not share a full-fledged religious or philosophical interpretation can nonetheless pledge allegiance to the same politically liberal institutions.<sup>106</sup>

Of course, the complete justification that each person or community has for upholding these institutions will vary depending on the underlying comprehensive doctrine. Yet, the different rationales will converge on the same principles. The stability of a society built along these lines stems from the fact that people adhering to different religions and philosophies will tend to be loyal, inasmuch as the main institutions rest on broadly shared norms. Only

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105. See generally RAWLS, *supra* note 31, at 133–72.

106. See *id.* at 135 (“[P]olitical liberalism supposes that there are many reasonable comprehensive doctrines with their conception of the good, each compatible with the full rationality of human persons.”).

individuals that embrace unreasonable religious or philosophical perspectives, which deny the fundamental norms of political liberalism, will not join the principled convergence.

In elaborating his theory, Rawls is thinking of the problem of divergence in philosophical and religious doctrines. Yet, one can bring the concept of an overlapping consensus to bear on the issue of ethnic heterogeneity within a single society.<sup>107</sup> One would thus probably end up in the vicinity of Habermas's notion of constitutional patriotism.<sup>108</sup>

Habermas contends that national diversity, which ineluctably characterizes modernity, need not give rise to insoluble crises or to anomie. For the modern state may integrate its citizens not on the basis of common national language, ethnicity, or culture, but rather through a shared political culture.<sup>109</sup> In other words, the state acts exclusively on the basis of a general set of norms—democratic principles, the rule of law, and human rights—to which a very heterogeneous citizenry can assent. Beyond this political culture, the state agenda takes no particular content—religious or national. Citizens come together through and identify with a constitution embodying that political culture.<sup>110</sup> “A liberal political culture,”

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107. Rawls insinuated that even though he focused primarily on the issue of religious toleration, his political liberalism bears on other basic problems such as "race, ethnicity, and gender." *Id.* at xxx–xxxi (1993); *see also id.* at 154.

108. *See* JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS [BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY] 651 (1992) [hereinafter, HABERMAS, FAKTIZITÄT]; JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE 143, 263–64 (1996) [hereinafter HABERMAS, DIE EINBEZIEHUNG]. Dieter Henrich attributed the term "constitutional patriotism" to Dolf Sternberger. DIETER HENRICH, NACH DEM ENDE DER TEILUNG: ÜBER IDENTITÄTEN UND INTELLEKTUALITÄT IN DEUTSCHLAND 74 (1993).

109. Habermas advocated identifying the nation state with the "political culture in which the constitutional principles can take root" and which does not need the support of "an ethnic, linguistic, and cultural origin common to all state citizens." HABERMAS, FAKTIZITÄT, *supra* note 108, at 642.

110. In Habermas's own words: "The state citizens' nation finds its identity not in ethnic or cultural commonalties but rather in the praxis of citizens, who exercise actively their democratic participatory and communicative rights. Here the republican component of state citizenship detaches itself completely from the membership in a pre-political community integrated through lineage, a shared tradition, and a common language." HABERMAS, FAKTIZITÄT, *supra* note 108, at 636; *see also id.* at 643 ("Democratic citizenship need not be rooted in the national identity of a people. Yet, it demands the socialization of all citizens in a common political culture, independently of the diversity of the various cultural life forms."); *id.* at 659 ("Within the constitution of a democratic legal state, a variety of life forms may coexist with equal rights. They must, to be sure, overlap in a common political culture, which remains open to participation by different life forms.").

Habermas affirmed, "is simply the common denominator of a *constitutional* patriotism, which as such intensifies the appreciation of the diversity and the integrity of the various coexisting life forms in a multicultural society."<sup>111</sup>

Rawls discusses political liberalism with the U.S. experience in mind. Habermas explicitly mentions the United States as an instance of the post-national state he describes.<sup>112</sup> From these perspectives, U.S. society does not impose a comprehensive national perspective, but rather proposes a Rawlsian overlapping consensus or a Habermasian constitutional patriotism.<sup>113</sup> U.S. laws and the Constitution bind federal authorities to a set of norms generally corresponding to the political liberal principles and the political culture referred to by Rawls and Habermas, respectively.

This U.S. liberal society is not merely an open arena in which members organize their collective affairs. It also possesses a strong normative content, with which citizens identify, which they perceive as reasonable, and which requires impartiality on the part of public institutions. This mandate precludes the official endorsement of a particular national culture. Yet, a liberal government creates space for citizens to further their own national culture. It not only permits private cultural manifestations, but it also protects them against aggression by any person or entity.

The U.S. Constitution certainly appears to endorse this kind of liberalism. On the one hand, it contains general provisions on democracy and broad individual rights.<sup>114</sup> It thus grants individuals and groups wide cultural autonomy. On the other hand, it contains

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111. HABERMAS, *FAKTIZITÄT*, *supra* note 108, at 642–43.

112. Habermas maintained that "the example of multicultural societies such as Switzerland or the United States shows that a political culture, from which fundamental constitutional principles may stem, need not in any way rest on an ethnic, linguistic and cultural origin common to all state citizens. A liberal political culture is simply the common denominator of a *constitutional* patriotism, which as such intensifies the appreciation of the diversity and the integrity of the various coexisting life forms in a multicultural society." HABERMAS, *FAKTIZITÄT*, *supra* note 108, at 642–43; *see also* HABERMAS, *DIE EINBEZIEHUNG*, *supra* note 108, at 137.

113. Interestingly enough, an early supporter of Puerto Rican statehood, José Celso Barbosa, advocated an "intelligent patriotism," which in some ways appears to parallel the notion of constitutional patriotism. He wrote: "Fatherland is not just the land where one is born. Our liberties and rights are fatherland too." José Celso Barbosa, *Conversación familiar*, in *ANTOLOGÍA DEL PENSAMIENTO PUERTORRIQUEÑO: 1890–1970* (Eugenio Fernández Méndez ed., 1975). However, Barbosa pleaded for the Americanization of Puerto Ricans and the imposition of the English language in Puerto Rico. *Id.* *See generally* CARRIÓN, *supra* note 4, at 212–13.

114. U.S. CONST. arts. I, II, & IV and amends. I–X, XIV, XIX, & XXVI.

an Equal Protection Clause, which forbids official discrimination.<sup>115</sup> The government must therefore act without bias and, presumably, refrain from siding with any one of its national subgroups.

All states of the Union share and express in their own constitutions a similar conception of the government's proper role. Furthermore, the Constitution itself imposes the same political culture on the states. It establishes—at least under the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause—that the states must honor most of the Bill of Rights contained in its first ten Amendments.<sup>116</sup> For example, the rights to freedom of expression and of conscience, against unwarranted searches and seizures, and to privacy apply to the states as well as to the federal government.<sup>117</sup> Moreover, the Equal Protection Clause literally binds the states. Therefore, the earlier argument against official bias in favor of a particular national culture would appear to bear first and foremost on the states. It would also affect Puerto Rico as a state or a commonwealth.

Accordingly, the U.S. federal government has no business coercing individuals in Puerto Rico into giving up their national culture or embracing a U.S. alternative. On the contrary, it has a duty to guarantee their right to preserve their national distinctness. By the same token, the government of Puerto Rico has no obligation to

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115. U.S. CONST. amend. XIV.

116. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (fifth Amendment bar against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (sixth Amendment right to a criminal trial by jury); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (sixth Amendment right of a defendant to present witnesses); *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967) (sixth Amendment right to a speedy trial); *Griffin v. California*, 380 U.S. 609 (1965); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (fifth Amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth Amendment right to assistance of counsel); *Robinson v. California*, 370 U.S. 660, 667 (1962) (eighth Amendment ban on cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (fourth Amendment exclusionary rule); *NAACP v. Alabama*, 357 U.S. 449 (1958) (first Amendment freedom of association); *In re Oliver*, 333 U.S. 257, 278 (1948) (sixth Amendment right to a public trial); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (first Amendment ban on the establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (first Amendment free exercise of religion); *Gitlow v. New York*, 268 U.S. 652 (1925) (first Amendment freedom of speech and press). The Supreme Court has chosen not to extend some parts of the Bill of Rights to the states. *But c.f.* *Hurtado v. California*, 110 U.S. 516, 538 (1884) (fifth Amendment right to indictment by a grand jury does not apply to the states). *See generally* Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1230 (2002) ("Today, virtually all of the Bill of Rights has come to apply with equal vigor against state and local governments. The only major exceptions are the Second Amendment, the Third Amendment (which rarely arises in modern adjudication), the Fifth Amendment grand jury requirement, and the Seventh Amendment's rules regarding civil juries.").

117. *Id.*

inculcate anything like a U.S. national ethos, let alone to eradicate the Puerto Rican national culture.

Liberals would maintain just as steadfastly that the government of Puerto Rico may not promote a purportedly authentic Puerto Rican way of life. They would vehemently censure such a policy as discriminatory. From this point of view, individuals that do not share the subsidized culture, such as Anglo-Americans, would be entitled to remonstrate. People that reject the official interpretation or any kind of support for national culture would also have a right to complain, for the cultural measures in question would infringe upon U.S. political culture. Such measures would violate basic liberty and equality principles. According to these liberal norms, public institutions should not foment the national culture of one subgroup at the expense of all.

Puerto Rican authorities might respond by pointing out that well over 90% of the population supports their cultural policies.<sup>118</sup> Yet, liberals would not be impressed. They would note that U.S. political culture aims, first and foremost, at protecting individuals. "Each person," affirmed John Rawls, "possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."<sup>119</sup> No matter how many Puerto Ricans endorsed the official cultural agenda, liberalism would disallow it as a violation of the prerogatives of minorities and dissidents.<sup>120</sup>

Making the monetary contributions to the government's cultural effort voluntary not only would create a risk of too many defections, but would also have little effect on the liberal critique. According to liberalism, cultural outsiders and dissenters could legitimately reject the official endorsement of the majority culture even if they received generous exemptions. They could object to their government's promotion of a cultural perspective that is alien to them. They could complain about the symbolism and about the discrimination, irrespective of who is footing the bill.

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118. State officials might observe that Puerto Ricans support only political parties that actively promote the national culture.

119. JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

120. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 194 (1977) (arguing that "[a] right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done"); see also *id.* at 269 (arguing that "if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so").

To recapitulate, Puerto Ricans need not commit national cultural suicide to be part of the United States. They may remain faithful to their nationality, as individuals and even as a group. What they may not do within a liberal framework is recruit their political institutions in this effort. In doing so, they would impinge upon the U.S. liberal political culture. From this perspective, the Puerto Rican desire to have a local government that solidly foments the national culture is incompatible with the legitimate wish of Puerto Ricans to remain within the U.S. federation.

### C. Towards Pluralism

Liberalism's ban on the cultural policy in question does not end the discussion, since one may reject the liberal standpoint. In fact, the rejection may appeal precisely to liberalism's insufficient openness to cultural differences. Thus, one may have independent theoretical reasons to move to a model that may be more amenable to the Puerto Rican government's efforts on behalf of the national culture.

The objection I have in mind focuses on liberalism's apparent indifference to various national cultures.<sup>121</sup> It censures the liberal message that national subgroups may devote themselves (on their own) to their culture, but they should not expect any government support. It insists that the political community should instead expressly appreciate and promote the different ethical cultures and pluralism in general. It maintains that a post-national U.S. society should transform or perhaps even transcend its liberal premises. It thus posits a pluralist conception of political community.

Embracing this kind of pluralism, Michael Walzer insists on the legitimacy of active official encouragement of national groups. He suggests that government, particularly in the United States, may embrace pluralism and focus on promoting diversity. The authorities may, accordingly, subsidize ethnic or national minorities. They need not be indifferent to national cultural issues or adopt a policy of non-intervention.<sup>122</sup>

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121. Rawls rejected the allegation that political liberalism is indifferent to the value of comprehensive doctrines. RAWLS, *supra* note 31, at 150, 172. If it were, it would be in opposition to them and therefore not capable of achieving an overlapping consensus. *Id.* at 150. Political liberalism therefore neither asserts nor denies the truth or the value of any particular doctrine. *Id.* It could therefore view them generally as valuable and therefore move towards the pluralism that I explicate in this section. For an interpretation of liberalism that affirmatively values national groups, see TAMIR, *supra* note 20, at 3.

122. MICHAEL WALZER, ON TOLERATION 37 (1997); *see also id.* at 34 (suggesting subsidies and matching grants as examples of positive state support of multiculturalism).

Walzer maintains that the threat to social unity in contemporary immigrant societies, such as the United States, is not that subgroups, including those based on nationality, are too prominent and pull the community apart.<sup>123</sup> He contends, on the contrary, that the weakness of these associations hinders broad societal cohesion.<sup>124</sup> His reasoning unfolds as follows. In the United States, the only unifying force is a common political culture. Citizens typically participate in the institutions that embody the shared principles of democracy, legality, and human rights not as individuals, but as members of particular subgroups, which may rest on union, gender, religious, or national affiliation. In other words, participation in the broader collective spectrum usually takes place through these civic associations, which act as representatives of their constituency. Moreover, these subgroups serve as a training ground for political engagement inasmuch as their members become inter-subjectively active within their ranks. Social solidarity has been breaking down because these associations and the citizens' links to them have been disintegrating.

Walzer, hence, believes that the government must help reinvigorate these associative subgroups.<sup>125</sup> In thus renouncing its indifference to the collectivities organized around specific concepts of the good life, the state would enhance the vibrancy of political life. I would add two general points to Walzer's account. First, promoting national subgroups contributes not only to civic engagement, but also to individual and collective well being, as well as to social stability. Secondly, the argument for such a pluralist societal agenda may be reflexive or deontological in addition to instrumental or teleological. In other words, society should buttress its ethical minorities in order to respect their rights, as well as to attain its own particular ends. These communities are entitled to recognition in the sense popularized by Charles Taylor. Taylor elucidates the concept as follows:

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123. *See id.* at 101–12 (suggesting alternative causes of social dissociation, such as rising divorce rates, growing teen pregnancy, and increasing geographic mobility). Julia Kristeva, in contrast, pointed out that the accentuation of sexual, national, and religious identities undermines personal freedom and increases divisiveness. JULIA KRISTEVA, *NATIONS WITHOUT NATIONALISM* 2–3 (1993).

124. *See* WALZER, *supra* note 122, at 101–12 ("It is the weakness of [cultural] associations, not their strength, it seems to me, that threatens our common life.").

125. *See* Michael Walzer, *Pluralism and Social Democracy*, 45 *DISSENT* 47, 53 (1998) ("The singular, universal political community requires a particularistic associational life; the associations require the political framework of state power.").

The recognition I am talking about here is the acceptance of ourselves by others in our identity. We may be “recognized” in other senses—for example, as equal citizens, or right bearers, or as being entitled to this or that service—and still be unrecognized in our identity. In other words, what is important to us in defining who we are may be quite unacknowledged, may even be condemned in the public life or our society, even though all our citizens rights are firmly guaranteed.<sup>126</sup>

By recognizing its subgroups, therefore, the polity gives them their due and treats them with respect, beyond strategic or even altruistic calculations.

These reflections lead to a rejection or, rather, to a modification of the liberal principles that I expounded on before. Society should not simply condone its national subgroups. It should promote them because doing so is generally beneficial, as well as morally correct. Pluralism constitutes not just a fact,<sup>127</sup> but actually a good and a right. In fact, Habermas seemed to take a pluralist position when he advocates a constitutional patriotism that “intensifies the appreciation of the diversity and the integrity of the various coexisting life forms in a multicultural society.”<sup>128</sup>

Of course, it is ultimately up to individuals themselves to decide whether they want to bond with or distance themselves from a given community. The government may not coerce people into participating in any of these collectivities. It may, at best, provide resources and create favorable background conditions. The groups themselves must fire up their membership’s imagination. Only then will they be in a position to reproduce their way of life and bring their particular perspective to society-wide political deliberation. Accordingly, Habermas cautions that it is pointless for the state to try to guarantee the survival of cultural communities as if they were endangered species.<sup>129</sup> If the peoples concerned are not themselves

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126. CHARLES TAYLOR, *RECONCILING THE SOLITUDES* 190 (1993). A people’s demand “for recognition in the sense that I am using the term,” Taylor wrote, is “a demand that such people be acknowledged and valued for what they are.” *Id.* at 92. *See generally id.* at 48, 52, 58, 142–43, 162, 169, 188, 190–96.

127. Rawls explained that “political liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines, including both religious and nonreligious doctrines.” RAWLS, *supra* note 31, at XXVI; *see also id.* at 24, 27, 36, 135, 144 (asserting that a “permanent feature of the public culture of democracy” is toleration of diverse social positions, be they religious, political, or philosophical).

128. HABERMAS, *FAKTIZITÄT*, *supra* note 108, at 642–43.

129. *See* Jürgen Habermas, *Multiculturalism and the Liberal State*, 47 *STAN. L. REV.* 849, 850 (1995) (“There cannot be a ‘preservation’ of cultures in the same sense as most of us advocate the preservation of animals or other species. The reproduction of traditions and cultural forms



willing to fight for their own continued existence, any official effort will be hopeless.

Both Walzer and Habermas believe that the authorities must remain impartial or neutral when engaging in cultural politics. Though the government need not be "perfectly indifferent to group culture," Walzer insists that it must be "equally supportive of all groups."<sup>130</sup> "The ethical content of a political integration that unifies all citizens," Habermas maintains, "must remain 'neutral' with respect to the different ethnic and cultural communities, which coalesce internally through their own conception of the good."<sup>131</sup> Walzer and Habermas do not mean, of course, to take back what they assert about the state's cultural engagement. Nor do they intend to maintain that the government must provide absolutely equal support to the various groups. Their idea is instead that the official assistance to national subgroups must be equal in relative terms. Thus, a traditionally disadvantaged community may receive more aid than a historically privileged one.

Pluralism, accordingly, regards neutrality as a crucial and complex concept. It demands, as just pointed out, government impartiality with respect to cultural communities and their conceptions of the good. However, it rejects a neutral attitude about the value of this multiplicity of viewpoints and of diversity in general. It constructs a substantive conception of the good, which neither converges with nor excludes the interpretations of the legitimate ethnic collectivities, around this value. It thus distances itself critically from liberalism.

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is an achievement which can be legally enabled, but by no means granted. Reproduction here requires the conscious appropriation and application of traditions by those native members who have become convinced of these traditions' intrinsic value. The members must first come to see that the inherited traditions are worth the existential effort of continuation."); *see also* HABERMAS, *DIE EINBEZIEHUNG*, *supra* note 108, at 259. Walzer would endorse this Habermasian contention. He declared: "Pluralism has in itself no powers of survival; it depends upon energy, enthusiasm, commitment within the component groups; it cannot outlast the particularity of cultures and creeds." MICHAEL WALZER, *WHAT IT MEANS TO BE AN AMERICAN* 65 (1991). Walzer asserted further that "early pluralists . . . were surely right to insist that [ethnic vitality] should not artificially be kept alive, any more than it should be repressed by state power." *Id.* at 74; *see also id.* at 76-77 ("A state committed to pluralism . . . cannot do anything more than see to it that those opportunities [for group organization and cultural expression] are *available*, not that they are used. . .").

130. WALZER, *supra* note 122, at 37; *see also id.* at 34 ("Given the logic of multiculturalism, state support must be provided, if it is provided at all, on equal terms to every social group.").

131. HABERMAS, *DIE EINBEZIEHUNG*, *supra* note 108, at 266.

The U.S. Constitution incarnates this pluralist vision. It certainly allows the government to protect subgroups in order to enhance citizens' well-being, political participation, and collective peace.<sup>132</sup> More significantly, the Thirteenth, Fourteenth, and Fifteenth Amendments embody a powerful mandate to recognize African-Americans and all other ethnic communities.<sup>133</sup> The Supreme Court has explicitly upheld official privileges for certain groups in order to make up for past discrimination and has acknowledged the promotion of diversity as a legitimate governmental goal.<sup>134</sup>

The United States, conceived as a pluralist state along these lines, may engage in and allow official support for Puerto Rican culture. Under this logic, federal and local governments may invest in and promote Puerto Rican national culture to a greater extent than they do in the case of other national groups. To be sure, they would have to show that the culture has historically suffered substantial discrimination or that it is in a position of systematic disadvantage vis-à-vis other cultural manifestations.<sup>135</sup>

Nonetheless, the insular state may not act as the executive committee of national culture. It would thus encroach upon the pluralist notion of neutrality. It would show too much partiality

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132. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) ("[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin [and] 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) ("[T]he Voting Rights Act [constitutes] a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live."); *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 396 (1998) ("The primary objective of the National Labor Relations Act is to secure labor peace.").

133. U.S. CONST. amends. XIII–XV.

134. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 & 314 (1978) (holding that where there is a "judicial, legislative, or administrative finding of constitutional or statutory violations" against "members of . . . victimized groups . . . the governmental interest in preferring members of the injured groups at the expense of others is substantial." The Court further held that "the interest of diversity is [a] compelling [state interest] in the context of a university's admissions program."). See also *Adarand Constructors, Inc. v. Federico Peña, Sec'y of Transp.*, 515 U.S. 200, 236 (1995) (stating that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it" so long as the legislation in question is narrowly tailored to further this compelling interest).

135. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337–38 (2003). The Court underscored that it had "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination" and held "that the Law School has a compelling interest in attaining a diverse student body." *Id.* at 2338.

towards one of its national groups and would have excessive control over national culture. If the federal government supported or consented to this kind of policy, it would make itself an accomplice in violation of U.S. political principles.

Naturally, every state of the Union devotes some of its resources to promoting the history and traditions of its residents. Yet, the Puerto Rican policy at issue transcends this general practice quantitatively and, especially, qualitatively. It involves not just nominal subsidies to homegrown folklore and art, but rather a concerted attempt to uplift a particular national culture.<sup>136</sup> It has no precedent in the United States. Pluralism empowers the insular government to subsidize Puerto Rican national culture to make up for past discrimination, but not to see itself as the representative of that culture in any special sense. It must embody on rigidly equal terms the goals shared by all persons residing in Puerto Rico. It has to be the collective voice and arm of natives of the United States and all other U.S. citizens that happen to live on the island, as well as Puerto Ricans. It has as much leeway as, say, the State of New York has, when it comes to defending Puerto Rican national culture. In other words, it may provide extra support for its Puerto Rican community only insofar as necessary to make up for prior injustices or to advance a compelling state interest. It must otherwise remain impartial.

A governmental policy of partiality toward a particular cultural perspective violates pluralist principles not simply because it does not benefit all disadvantaged groups on equal terms. It also fails to allow sufficient distance between government and the main ethnic community. The pluralist state may not fully embrace any of its subgroups.<sup>137</sup> It may not take over their perspective or make their interests its own. The local government engages in precisely this kind of identification with Puerto Rican national culture. It takes charge of defining the cultural agenda. This kind of official assertion transcends pluralism, in which private individuals or groups ultimately bear the responsibility of promoting national cultures.

Local authorities might try to justify a Puerto Rican cultural exception on the grounds that Puerto Rico is the only major

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136. *See, e.g.*, 18 L.P.R.A. § 1195 ("The Institute of Puerto Rican Culture is hereby reorganized as an official, corporate and autonomous entity whose purpose is to preserve, promote, enrich and diffuse the cultural values of the Puerto Rican people, and achieve a broader and fuller awareness thereof.").

137. *See* 18 L.P.R.A. § 1198 (Broadly and meticulously empowering the "Institute of Puerto Rican Culture" to carry out the cultural "public policy.").

territorial unit in the United States inhabited almost exclusively by citizens with a distinct national culture.<sup>138</sup> This fact does not, however, entitle the insular government to side with its Puerto Rican constituency. Those advocating a pluralist standpoint would actually go out of their way to ban partiality towards the Puerto Rican majority under these circumstances. Any such bias would constitute an injustice against overwhelmingly outnumbered minorities, such as Anglos and other ethnic subgroups residing on the island. Pluralists would agree with liberals that the interests of the majority may not displace the rights of minorities.

The free and associated state, or a future fully integrated state of Puerto Rico, obviously cannot simply disregard the wishes of 90% of the people it represents. It must, nonetheless, ignore all requests that that constituency makes as a national or ethnic unit against the will of all others. Otherwise, it would be in breach of the pluralist political culture. It may, therefore, attend to the needs of the Puerto Rican majority only on matters that do not involve the establishment of a national culture. In fact, pluralists would predict that Puerto Ricans would not vote as a block on these non-cultural issues. From this perspective, Puerto Ricans would break down in the same way as the rest of the citizenry does.<sup>139</sup>

Of course, the pluralist state would allow and even subsidize efforts by Puerto Ricans to live and reproduce their national culture. It would thus officially acknowledge and encourage them on a par with other national groups, such as Italian-Americans or Irish-Americans. Yet, in the words of former Governor Rafael Hernández Colón, many Puerto Ricans seem to want not simply the status of "another minority group in a pluralist society," but rather that of a "nationality, a different people."<sup>140</sup> They appear to have an interest

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138. Juan Manuel Carrión avers that "the fundamental problem that the statehood movement has always faced is the repudiation by many Americans of the idea of admitting as a federal state a culturally different entity such as Puerto Rico." CARRIÓN, *supra* note 4, at 168.

139. Walzer believes that majorities in pluralist societies, such as the United States, are contingent and ever shifting. "American majorities," he declares, "are temporary in character and differently constituted for different purposes and occasions. . . ." WALZER, *supra* note 122, at 30; *see also* CARLOS NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 126–27 (1996) ("In a working democracy, it is essential that the majority never be a definite group of the population but only a construction which refers to individuals who change constantly according to the issue at stake.").

140. Salomé Galib Bras, *Ante el Congreso la batalla por la nacionalidad puertorriqueña*, *EL NUEVO DÍA* (San Juan), Jan. 31, 1993 (quoting statement by former governor Rafael Hernández Colón at the 1991 congressional hearings on the Puerto Rico Plebiscite Bill). Hernández Colón does not fully realize, however, that this claim is as difficult to accommodate within the current

not merely in public notice and general subventions, but rather in an intense identification with their national culture on the part of the current free associated state or a future federal state of Puerto Rico. This aim runs counter to pluralism.

Pluralist political principles would not allow for an "Institute of Puerto Rican Culture," strictly speaking. They would at most authorize an "Institute of Culture," which would simply promote cultural expression on the island irrespective of ethnic or national identification. Such a body would have no categorical right to exclude Anglo cultural projects, just as the state of Montana may not refuse funding for Greek-American or African-American events. The contention that the excluded groups traditionally have no significant presence in the territory, and are therefore not really part of the collective ethnic identity, would be irrelevant. The local governments in Puerto Rico and Montana, respectively, would have no business delineating and watching over anything like a purely "Puerto Rican" or "Montanan" state culture.

The pluralist political culture would also condemn Puerto Rico's language policies. The free and associated state, or a future state of Puerto Rico, would have to renounce its efforts to keep Spanish as the vernacular. It would not be able to take measures to encourage the use of Spanish in everyday life. For it would thus show too much bias in favor of and identification with the Puerto Rican majority. It would be entitled to conduct its business (including public school teaching) in Spanish on grounds of expedience or of compensation for historical or structural disadvantages, but not as part of an attempt to protect or embrace the national culture. Incidentally, U.S. pluralism would likely impose similar restrictions on the current states of the Union—even if the Spanish-speaking community attained majority status in any one of them.

To sum up, U.S. pluralism proscribes state support of Puerto Rican national culture beyond the aid afforded other groups or beyond the amount that compensation for past discrimination would require. It forbids the insular government to present itself as principally representing Puerto Ricans. It calls on local authorities to avoid siding with the overwhelming majority. Puerto Rico is in violation of principles of U.S. political culture, inasmuch as the

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free associated state as within a future state of Puerto Rico. *See also* CARRIÓN, *supra* note 4, at 180 (Americans "do not want us the way we are and the resistance against the attempt to dissolve us as a people with national aspirations to convert us into another one of the ethnic minorities in the North American imperial conglomerate continues to be very strong.").

insular government preferentially subsidizes and intensely identifies with Puerto Rican national culture. As long as the island remains part of the United States, the local authorities should honor the prevailing political principles. By upholding its cultural policy, Puerto Rico actually forsakes the U.S. polity.

## V. THE LEGITIMACY OF PUERTO RICO'S NATIONAL CULTURE POLICY

I have argued that a policy of official partiality towards, and identification with, Puerto Rican national culture collides with U.S. pluralism. Insofar as the insular government adopts such a course of action, Puerto Rico remains outside U.S. political culture and adheres to its own political principles. In this section, I will explore the extent to which these norms are philosophically sound.

Why should authorities, in Puerto Rico or anywhere else, do more than merely allow a particular ethnic community to develop its national culture on its own, or at most offer it some subvention? Does the proposed official cultural program not amount to treating that group as an endangered species? If the members are not willing or able to preserve their national culture by their own devices or even with some state aid, why should the government feel an obligation to step in? Would such a policy not be patronizing and ultimately doomed to fail, inasmuch as the beneficiaries themselves do not have the motivation or the means to sustain their own national culture?<sup>141</sup>

To begin answering these queries, one has to understand the specific predicament that a threatened national culture may face. Granted, if the members of the national subgroup have themselves no real interest in their own culture, it is illegitimate and hopeless for the government to try to take their place.<sup>142</sup> Nevertheless, the situation might be dramatically different. For instance, the people may perceive their national culture as a public good whose survival is a matter of fundamental concern for them and, yet, face a collective action problem. In other words, even though they will jointly influence the flourishing of the national culture, they may make individual choices that prevent them from fully realizing their common aim. They may not be able to coordinate their actions and may, as a consequence, end up bringing about an outcome that they recognize as suboptimal or even disastrous.

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141. See HABERMAS, *supra* note 108.

142. *Id.*

A national community may thus confront a prisoner's dilemma or a free rider problem.<sup>143</sup> When the members simply act on their immediate preferences, they may unknowingly or unwillingly undermine their shared culture. Their discrete decisions may have the effect of an "invisible hand" that, unlike that celebrated by Adam Smith,<sup>144</sup> brings about collective doom. Consequently, they may have to band together as a polity and undertake extreme measures to protect their national culture. As pointed out in section III, Puerto Ricans have only supported political parties that favor strong state intervention to prop up their culture.

They appear to feel that they cannot provide enough protection on their own through private donations and personal engagement. They seem to want their government to embody their collective will to foment the national culture. A cultural policy that thus elicited not indifference or reluctance, but rather approval and cooperation from the people, would have legitimacy and real prospects for success.

The popular endorsement of the Institute of Puerto Rican Culture and the Puerto Rican Atheneum provides a case in point. People apparently sense that because of diseconomies of scale or unfair competition, the insular culture is at a comparative disadvantage in relation to imported alternatives. Of course, individuals could support local cinema, literature, music, dance, and art simply by paying a hefty price. Yet, many may be willing to do so only if they have some kind of reassurance that the rest of the citizenry will chip in, too, and therefore that their sacrifice will make a difference. They may fear that without widespread support, the national culture will ineluctably deteriorate. Others may feel tempted to free ride or may experience *akrasia*—that is, weakness of will—at the moment of truth. Puerto Ricans who fall into any of these categories may all come together and demand that their government help them realize collectively what they cannot achieve individually. They may specifically urge the authorities to tax them in order to subsidize the national cultural industry.

When they call on their government to embrace their national culture, people may not only be attempting an act of collective defense. They may also be demanding that state institutions identify

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143. In the classic prisoner's dilemma, it is individually rational but collectively irrational for two isolated codefendants to confess. R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* 95 (1957).

144. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 423 (1937).

intensely with their national culture. They may be striving for a public life that expresses their identity. They may be seeking a political and legal order that they can call their own, that principally reflects their perspective, and that speaks their language.

Puerto Ricans seem to be making a claim of this sort when they insist that insular bureaucracies operate in Spanish and embody the national character. Of course, expediency and consistency support this demand too. For instance, government business must take place in Spanish in part because an overwhelming majority of the population possesses fluency in no other language. Similarly, the local Supreme Court has resolved to rescue and purge the Puerto Rican civil law tradition,<sup>145</sup> to some extent, because a legal system that randomly mixes common law and civil law elements functions irrationally and unpredictably. Nonetheless, most justifications for projecting the national culture into political and legal institutions invoke the danger of “transculturation,”<sup>146</sup> rather than that of incoherence. The underlying idea is that the institutionalization at stake represents a valuable means to protect a menaced national culture. This kind of argument would survive even against irrefutable proof that Puerto Rican politics and law would mesh more sensibly with the U.S. superstructure if they shed their nationalist nostalgia.

In thus institutionalizing the national culture, as opposed to merely subsidizing it, the authorities take on a task that simply lies beyond the reach of private citizens. Ordinary people, even if they organized themselves perfectly, would not be able to bring the political and legal apparatus to incarnate the national identity. State action ineluctably has to play a crucial role.

Hence, an official subvention or institutionalization of the national culture need not constitute an elitist or pointless gesture against the will or indifference of the people. It may instead empower Puerto Ricans to realize goals that they cherish, but cannot carry out individually. Obviously, the fact that Puerto Ricans need and want state assistance in order to effectively promote their cultural heritage does not in itself sufficiently justify the insular government’s

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145. *See, e.g.,* Valle v. Amer. Inter. Ins. Co., 108 P.R. Dec. 692 (1979) (Spanish), 8 P.R. Offic. Trans. 735 (English) (“Nowadays, it seems unnecessary to reiterate that, in Puerto Rico, the law in the field of damages is governed—both in form and in content—by the civil law system. . . . Consequently, all cases cited which tend to solve civil law problems through common-law principles are reversed.”).

146. *See, e.g.,* JOSÉ TRÍAS MONGE, SOCIEDAD, DERECHO Y JUSTICIA 28 (1986); *see also id.* at 21, 33, 107–08.



effort. As already noted, liberals and even pluralists would repudiate the official measures as unfair to those who are not part of, or want no part, in the national culture. They would chastise the policy at issue for violating the all-important principle of impartiality.

Charles Taylor attempts to provide a response to this charge, when he endorses Quebec's ardent defense of its national culture. He maintains that such a policy is legitimate so long as it does not violate fundamental rights.<sup>147</sup> For instance, the authorities may privilege the main national group when they regulate commercial speech or public school instruction on history. Yet, they may not do the same when intervening in the area of voting rights or freedom of religion.

Drawing a line between rights that are fundamental and those that are not is not only difficult, but also at times arbitrary. Further, if the basic charter of rights includes anything like an equality or anti-discrimination principle, then the disparate treatment that Taylor condones would not pass muster under a liberal interpretation of the norm.<sup>148</sup> Therefore, one should give up the quest for a universal set of basic principles and instead formulate a defense of the national cultural policies at issue from a perspective that transcends both liberalism and pluralism.

Rather than defining some areas in which society may discriminate and others in which it may not, one should start by declaring all official partiality suspect. Such an approach, which reflects a strong concern regarding possible discrimination against

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147. "A society with strong collective goals can be liberal," Taylor notes, "provided it is also capable of respecting diversity, especially when this concerns those who do not share its goals, and provided it can offer adequate safeguards for fundamental rights." TAYLOR, *supra* note 126, at 177. Taylor would "call for the invariant defense of certain rights, of course. There would be no question of cultural differences determining the application of habeas corpus, for example." Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM AND 'THE POLITICS OF RECOGNITION' 61 (Amy Gutman ed., 1992). Generally, "the rights in question are conceived to be the fundamental and crucial ones that have been recognized as such from the very beginning of the liberal tradition: rights to life, liberty, due process, free speech, free practice of religion, and so on." *Id.* at 59; *see also* TAYLOR, *supra* note 126, at 176. Yet, his conception distinguishes "these fundamental rights from the broad range of immunities and presumptions of uniform treatment that have sprung up in modern cultures of judicial review" and is "willing to weight the importance of certain forms of uniform treatment against the importance of cultural survival, and opt sometimes in favor of the latter." Taylor, *The Politics of Recognition*, *supra*, at 61; *see also* TAYLOR, *supra* note 126, at 176. Similarly, Joseph Raz and Avishai Margalit maintain that the right to self-determination is conditional on the national group respecting "the basic rights of its inhabitants, so that [the group's] establishment will do good rather than add to the ills of this world." Joseph Raz & Avishai Margalit, *National Self-Determination*, in ETHICS IN THE PUBLIC DOMAIN 125, 143-44 (Joseph Raz ed., 1994).

148. *See, e.g.*, RAWLS, *supra* note 119; DWORKIN, *supra* note 120.

minorities and dissidents, underlay my discussion of the nationalist model in the U.S. context. I noted that a policy of partiality towards a particular national culture should rest on solid reasons. I suggested, specifically, that the authorities must demonstrate that the national culture faces a danger calling for an official response, that they have narrowly tailored their measures to the existing threat, and that they have sufficiently preserved citizens' cultural autonomy.

Consequently, an official identification with the majority culture will not be justified in all cases. Only polities that meet the established conditions may take sides in cultural politics. Other societies will not have this prerogative. An official bias will be particularly unacceptable if the dominant culture carries with it a history of oppressiveness towards others.

The Puerto Rican political community may assert, certainly more credibly than its U.S. counterpart, that a menace exists and requires a collective response. In addition to having suffered brutal oppression by the forces of occupation during the first half of the twentieth century,<sup>149</sup> Puerto Rican culture today must struggle for survival within U.S. borders, despite its minority status, and faces awesome economic and social disadvantages.<sup>150</sup> Consequently, the local government may perform a reassurance and coercion role, through subsidies or taxes, in order to keep its citizens on board and in line. By the same token, Puerto Ricans may call upon their representatives to establish an official national language or maintain the national character of political and legal institutions. Of course, the government would always have to show that its cultural measures are not overbroad. Thus, while it could reasonably require that judicial proceedings take place in Spanish, a ban on court translators for Anglos would certainly exceed the needs of cultural protection.

As a final requirement, the insular government would have to create sufficient breathing room for the cultural self-determination of

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149. "If the reaction was often violent, so was the process of cultural assimilation subsumed in the concept of 'Americanization.' Rejected as full members of the American political community, consigned as political orphans to the limbo of an unincorporated territory, from 1898 to the late 1920s the Puerto Ricans were the objects of a campaign of cultural assimilation—above all evident in the enforcement of the use of English in the educational system—on a scale practiced by few other imperial powers." CARR, *supra* note 8, at 279–80.

150. U.S. mass culture has an overwhelming and threatening presence throughout the world and certainly more so in the territory of Puerto Rico. "Since the 1940s, Americanization has no longer been imposed from above; [it] is an attitude that seeps up from below. Its instruments are the American supermarket and television; its missionaries, the emigrants returning from the mainland." *Id.* at 288.

minorities and dissenters. It would have to guarantee that those who have no interest in joining the national crusade may pursue their own cultural options. It must uphold not only these persons' right to cultural autonomy, but also their human dignity in a Kantian sense.<sup>151</sup> In other words, it would have to recognize their cultural identity, as well as steer clear of protecting the national culture. To be sure, the government may impose burdens on them in its pursuit of that goal. Yet, it may not completely disregard their status as persons worthy of respect.

If the Puerto Rican government proscribed Anglo cultural events or private schools in English, it would trample upon the autonomy rights of the U.S. native minority. Of course, such measures would most likely also be excessive. Yet, even if they were necessary for the protection of the national culture, they would not pass muster because of their repressive effect on cultural self-determination of ethnic subgroups.

In a sense, the insular effort in this realm is nothing but an extension of the compensatory subvention of disadvantaged communities under pluralism, however, the favored group in the situation under consideration is not a minority, but rather an overwhelming majority. More significantly, the Puerto Rican government does not look after other underprivileged subgroups in relatively equal terms. It instead focuses on Puerto Ricans and makes their needs and aspirations its own. It serves as a vehicle of Puerto Rican collective self-realization and thus transcends the pluralist political culture.

Even if primarily committed to the national culture, the Puerto Rican government certainly has a duty to take into account the interest of all ethnic groups, particularly those that are disadvantaged. The pluralist arguments for redressing past discrimination and for encouraging diversity apply with special urgency to a society with a national cultural agenda. The Puerto Rican government must therefore reach out to traditionally disadvantaged groups, such as Dominicans, as well as make it possible for other communities, such as Spanish, Cuban, or Anglo subgroups, to thrive culturally.

Such an official defense of the Puerto Rican national culture would ultimately not simply be nationalist, but also progressive. First, it would seek to place the national culture in a position of equality

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151. IMMANUEL KANT, *GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN*, Werke, Bd. IV (1975).

(rather than hegemony) vis-à-vis other cultures. It would, in this sense, have a reparatory rather than an authoritarian aim. Second, it would interpret the national culture inclusively instead of exclusively. It would thus enthusiastically incorporate the contributions of other national subgroups. Finally, it would value the cultural autonomy of individuals and divergent groups in the way I have just described.

#### VI. COMING OUT OF THE CLOSET: BILATERAL ASSOCIATION AND ASYMMETRICAL FEDERALISM

The U.S. laws and constitutional provisions that enact the pluralist principles in question bind Puerto Rico as a commonwealth, as much as they would if it were to become a state. Therefore, it is already in violation for its partial cultural policy. As I have already speculated, the ambiguous relationship between mainland and island probably explains the lack of full enforcement thus far. Nonetheless, the U.S. political community presently exerts some pressure and would certainly intensify its coercive mechanisms if Puerto Rico joined the Union. The United States would have powerful political and legal arguments on its side. Puerto Rico's cultural policy is illegitimate, as well as at risk, under the existing status and would be more so under ordinary statehood.

By embracing an official national culture, Puerto Rico effectively opts out of the U.S. political community and into a polity of its own. It rejects U.S. pluralism and endorses nationalism, hopefully of a progressive nature. This choice does not automatically preclude Puerto Rico from staying legitimately within the United States. Yet, the relationship between the two peoples would have to take a special form in order to accommodate two substantially different political communities. It would have to come to allow the two divergent sets of political principles or political cultures, each reasonably defensible within its own context, to coexist side by side.

The United States would be in a position to fully recognize Puerto Rican cultural distinctness by becoming a multinational state. According to Michael Walzer, this kind of solution offers the only hope of democratic and egalitarian survival for "composite states" with "groups of people who share some but not all of the characteristics of a distinct historical community and who retain a strong territorial base."<sup>152</sup> Walzer's formula seems to bear upon the

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152. WALZER, *supra* note 129, at 56 ("Thus autonomy may be an alternative to independence, loosening the bonds of the composite state a way to avoid their fracture. Instead

case at hand. Puerto Rico constitutes a community not only with a history and territory separate from those of the United States, but also with its own peculiar political culture. Construed multinationally, the United States would permit Puerto Rico to remain a commonwealth or even become a state without giving up the intense official bias in favor of the insular national culture. Puerto Ricans would be in a position to achieve recognition, domestically as well as internationally.

One path to this destination would consist in interpreting the United States as a union of nations, with each state representing a separate polity and having the opportunity to decide on its own matters of political principle, however, the United States has clearly rejected this model, although it once might have constituted a real option.<sup>153</sup> The various states did not maintain separate ethnic identities, in part due to the intense internal mobility characteristic of the United States.<sup>154</sup> Nor did they evolve into independent political cultures, mostly because the federal Constitution commits them to a robust set of common principles.<sup>155</sup> The Union thus constitutes a single political community.

The United States therefore does not amount to a confederation of discrete nations or polities, and would not realistically fit a reinterpretation as such. Puerto Rico may not legitimately remain part of the United States as a regular state or commonwealth and preserve its separate and conflicting political culture. It must instead forge a special binational relationship with the Union. The island

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of sovereignty, national and ethnic groups may opt for decentralization, devolution, and federalism; these are not incompatible with self-determination, and they may be especially appropriate for groups of people who share some but not all of the characteristics of a distinct historical community and who retain a strong territorial base. Whether composite states can survive as federations is by no means certain, but it is unlikely that they can survive in any other way—not at least, if they remain committed (even if only formally) to democratic government or to some sort of social egalitarianism.”).

153. José Luis González comments that some statehood supporters mistakenly believe that the United States is a republic of republics. GONZÁLEZ, *supra* note 84, at 24. The U.S. Constitution not only creates a federal government with supreme authority in its areas of competence over the states, but also imposes a thick set of political principles on them, most conspicuously through the Fourteenth Amendment. As already noted, the U.S. Supreme Court has extended almost the entire Bill of Rights to the states. *See supra* note 116.

154. To be sure, Walzer conceives of the United States as a “union of nationalities.” WALZER, *supra* note 129, at 9. Yet, those nationalities are rather informal groups, which live dispersed throughout the country and do not constitute corporate political units. In other words, they do not have any kind of official self-government. Therefore, Walzer does not mean the states of the Union.

155. *See supra* note 116.

would converge with the fifty states, not on their common political principles, but rather on some shared ideals of political and economic solidarity. In particular, Puerto Rico would be exempt from the political culture promulgated by the U.S. Constitution and statutory code.

This kind of settlement is conceivable regardless of whether the island remains a commonwealth or becomes a state. As a commonwealth, Puerto Rico would have to move the federal Congress to declare key legal and constitutional provisions inapplicable in the Puerto Rican context and to empower the island to go its own way. As a state, Puerto Rico would have to negotiate an alteration of the U.S. federation so as to gain a similar kind of immunity for itself. I will examine each these two options independently.

Under the first scenario, the Commonwealth of Puerto Rico would not only acquire space to survive as a separate political community, it could additionally overcome the current democratic deficit, to which I alluded earlier, and truly attain the status of a free and associated state. Accordingly, Congress would no longer unilaterally define the relationship between mainland and island. Instead, both communities would enter a truly bilateral pact, alterable only by mutual consent. This agreement, which would underlie the federal enactment on Puerto Rico, would specify the areas and terms of convergence, as well as divergence. Most relevantly, it would empower the insular government to engage itself on behalf of the national culture along the lines previously described. Of course, in order to function as a true democracy, Puerto Rico would have to acquire a right of revision over locally applicable congressional laws.

Under the second alternative, a State of Puerto Rico would define itself as a distinct polity. It would have a different bond to the Union than that of the other states. The U.S. Constitution would have to change to acknowledge the island's uniqueness. Some parts of the document would not apply to Puerto Rico, or would call for a special interpretation in the insular context. The United States would not be able to interfere with Puerto Rico's national cultural policy. Puerto Rico would finally become a genuine *jíbaro* state.

Both of these formulas would render express and secure the implicit terms of the present relationship. Accordingly, the insular government would have explicit authority to continue (and even intensify) its current cultural policies. It would be able to maintain Spanish as the official language. It would have the right to preserve

the Puerto Rican Culture Institute, as well as the state funding of the Puerto Rican Atheneum. It would be entitled to retain its tax incentives for Puerto Rican arts. It would be in a position rightfully to keep the island's international profile in matters of culture and sports.

The bilateral association enactment and the constitutional amendment, respectively, could actually go further than the present practice in recognizing Puerto Rico's status as a separate political community. They could require the federal authorities to fully respect Puerto Rico's own constitutional principles, including those that prohibit the death penalty and electronic surveillance.<sup>156</sup> They could empower Puerto Rico to regulate commercial speech for the benefit of the Puerto Rican language and culture, while escaping the strictures read into the First Amendment by the U.S. Supreme Court. They could declare the Sixth Amendment right to a criminal jury inapplicable to the island so as to allow Puerto Rico to fully develop its civil law personality. They could grant Puerto Rican government immunity from suits under the Fourteenth Amendment or the Privileges and Immunities Clause by Anglophone U.S. citizens demanding the provision of all services in English, or challenging the insular state's systematic bias in favor of the Puerto Rican national perspective. Finally, they could limit the U.S. federal government's monopoly on foreign policy,<sup>157</sup> in order to make it possible for Puerto Rico to enter into international agreements not only to assert the island's political personality internationally, but also to reconnect with Latin America.

In the end, the two options under consideration would afford Puerto Rico the same exclusive jurisdiction over insular cultural policy, in a broad sense. In principle, the two arrangements could overlap entirely in their allocation of powers between the federal and the local government. The main difference would be in the mechanisms through which the Union would exercise its authority.

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156. See P.R. CONST. Art. II, § 7 ("The death penalty shall not exist."); P.R. CONST. Art. II, § 10 ("Wire-tapping is prohibited. . . . Evidence obtained in violation of this section shall be inadmissible in the courts."). Under the current commonwealth status, the U.S. Court of Appeals for the First Circuit has held that federal statutes imposing the death penalty and allowing wiretapping apply in Puerto Rico, local constitutional prohibitions notwithstanding. *United States v. Acosta Martínez*, 252 F.3d 13, 17–21 (1st Cir. 2001); *United States v. Quiñones* 758 F.2d 40, 41–43 (1st Cir. 1985). Of course, federal enactments would prevail over the local constitution all the more clearly if Puerto Rico became an ordinary state.

157. See U.S. CONST. art. I ("No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state, or with a foreign power, or engage in war . . . .").

As an enhanced commonwealth, Puerto Rico would have to consent to the laws and orders emanating from the federation. A binational body could adjudicate disputes on the terms of the relationship. Under the statehood alternative, the U.S. Congress, with equal Puerto Rican representation, and the U.S. President, in whose election Puerto Ricans would participate, would legislate and directly execute in all delegated, noncultural matters. The Federal Supreme Court could settle controversies regarding the distribution of powers.

Coincidentally, Charles Taylor also contemplates an asymmetrically federal setup when he proposes accommodating Quebec within a Canadian “bi-national state.”<sup>158</sup> Like the postulated State of Puerto Rico, Quebec would have a special relationship to the rest of the country, different from that of all other provinces and allowing intense local measures on behalf of Quebecois national culture.<sup>159</sup> Uniting the entire society would be a commitment to a general set of human rights as well as to economic coordination and solidarity. Puerto Rico and the United States might converge along similar lines. Analogous to Taylor’s Canada, the United States would exist as a Union of fifty states at one level, and as confederation of two states, with radically different political cultures, at another level.

Of course, Puerto Rico would run into enormous obstacles in trying to attain either bilateral association with, or asymmetrical federalism within, the United States. As already noted, the U.S. Congress has persistently dragged its feet when confronted with the Puerto Rican question. Federal lawmakers have a keen aversion to Puerto Rican statehood, due to the expenses and power sharing involved. An asymmetrical arrangement for a future state of Puerto Rico would run into even more adamant opposition because it would reek of special treatment and create a dangerous precedent. In fact, it would ultimately infringe upon the very idea of a federation of equals. If Quebec has not been able to achieve true binationalism, Puerto Rico—with infinitely less political clout within the United States than Quebec within Canada—faces terrible odds at becoming an idiosyncratic state in the sense just outlined.

The bilateral associative alternative would also be hard to sell, though certainly less so. Proponents would still have to move U.S. legislators out of their calculated inertia. They would face resistance similar to that confronted by an asymmetrical statehood lobby

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158. TAYLOR, *supra* note 126, at 102.

159. *Id.* at 52–57.



because they, too, would seem to be looking for a sweet deal and setting a bad example. Other territories, or perhaps even some states, might be tempted to ask for the same kind of treatment. From the lawmakers' perspective, the only significant advantage that a freely associated Puerto Rico would have over a *jibaro* state would be that it would not impinge upon the notion of a federation of equals.

More generally, if two nations are so divided in terms of their political culture (let alone their social culture), there appears to be little point in attempting to forge a single country out of them. They could honor their broad convergence in matters of human rights and economic policy through international agreements. They would thus not have to surmount the immense obstacles involved in setting up the binational arrangements just discussed.

Genuine political integration requires convergence on a thick political culture.<sup>160</sup> What distinguishes an international alliance from a nation state is precisely that the former embraces a relatively abstract assortment of political principles, whereas the latter endorses a very specific set. Therefore, domestic political cohesion is rather complete, while its global counterpart is only partial. Of course, no clear-cut criteria exist to establish when an entity has sufficiently coalesced in matters of politics to constitute a nation state. Yet, when two communities diverge in their basic political norms, they are evidently not in a position to form a coherent polity. The United States and Puerto Rico provide a case in point.

Consequently, neither a bilateral association nor an asymmetric federation would truly integrate Puerto Rico and the United States politically. Island and mainland would remain separate polities. To some extent, they would be deluding themselves by pretending to constitute a single political unit.

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160. On this analysis, the European Union may ride on a thin political convergence only so long as it remains an association of sovereign states. Under such circumstances, it will suffice to have broad democratic guidelines and a general convention of human rights. In order to become a nation state, the Union would have to achieve full political integration around a well-developed political consciousness. Habermas, accordingly, refers to the need for "a Europe-wide *political* culture" and explains that "[a] European constitutional patriotism must . . . coalesce out of the various nationally and historically impregnated interpretations of the same universal principles of law." HABERMAS, *FAKTIZITÄT*, *supra* note 108, at 561. Europe would thus have to come together politically to the extent Switzerland has. "The case of Switzerland," Habermas avers, "demonstrates that such a common political and cultural self-understanding can stem from the cultural orientation of different nationalities." *Id.* Needless to say, if it ever reaches this stage, the European Union will have to face up to the specter of internal nationalist independence movements striving for secession in order to enact a different political culture.

However, a genuine commitment to the national culture would require the two Puerto Rican parties that favor keeping the island within the United States to push for a binational solution along the lines suggested. Needless to say, neither of these political organizations has explicitly adopted this kind of approach. Both have embraced the end of promoting Puerto Rican culture without making concrete proposals on how to overcome that goal's tension with U.S. political principles. They have thus demonstrated not only their failure fully to reflect upon their ideals, but also their reluctance to talk straight with their constituency, and especially with the U.S. leadership, about their seemingly unrealistic ambitions.

A separatist movement bent on tight contact points with the United States would run into difficulties of its own. It, too, would have to shake up an entrenched status quo. By the same token, it would have to convince U.S. authorities that it is neither unfairly asking for preferential treatment, nor setting a dangerous precedent. Of course, it would confront fewer hurdles on this front than the group vying for free association, let alone that striving for asymmetric federalism. Moreover, it would not head into its counterparts' coherence problem, inasmuch as it would not be trying to keep two distinct polities within the same political boundaries. As its main challenge, however, it would have to convince a reluctant Puerto Rican citizenry of the advantages of independence.

## VII. CONFIGURING CONVERGENCE AND DIVERGENCE

Puerto Rico's deep official commitment to the national culture clashes with federal political principles. It encroaches specifically upon the requirement that the state remain neutral with respect to different ethnic groups. This conflict takes place not only under a nationalistic or liberal interpretation of the U.S. political culture, but even under a pluralist construction. Viewed as a community devoted to a most appealing pluralism, the United States welcomes differences on its territory. Yet, it cannot allow particular subgroups to use the state apparatus to promote their national culture. Therefore, Puerto Rico would have to give up its thoroughly partial cultural engagement in order to have a legitimate place within the U.S. Constitution.

Of course, Puerto Ricans overwhelmingly expect their government to continue embracing the national culture. They have no intention of giving this demand up. In fact, their three main political parties have relentlessly promised to stand by them on this issue. Moreover, the policy at stake is justified insofar as Puerto

Rican culture faces a genuine threat calling for a collective response, the authorities narrowly tailor their measures to overcome the danger in question, and dissident as well as minority groups have space to exercise their cultural autonomy.

In order to overcome the inconsistency between U.S. pluralism and the Puerto Rican cultural agenda, the relations between mainland and island must change radically. Puerto Rico must gain exemption from U.S. political principles, as well as the right to constitute a separate polity. It must thus enter either bilateral association or an asymmetric federation with the United States.

To be sure, both alternatives would run into immense obstacles, such as strong opposition from the U.S. establishment. They would seem to grant special privileges to Puerto Ricans and to establish a dangerous precedent, which other states might feel tempted to follow. Furthermore, the peoples of the United States and Puerto Rico could more sensibly establish a similar relationship as sovereign nations with substantial international ties. Needless to say, it is for these two communities to make the final decision, democratically and without coercion, as to how closely they want to intertwine their destinies.

To close the deliberative circle, I end this conclusion on the same note as the introduction. Puerto Ricans almost unanimously share the conviction that the national culture is not negotiable. Moreover, they broadly agree that the island should maintain some kind of interdependence with the United States on matters of economics, immigration, defense, and citizenship. Opinions diverge only on how exactly to set up these interconnections. In this sense, the political disagreement in Puerto Rico is about details. The debate typically heats up because partisan politicking distorts the stakes and presents the three status alternatives as fundamentally at odds with each other. The discussion would unfold more constructively if it did not first focus on the three competing formulas, but rather on the right mix of competence sharing with the United States. Once the peoples of Puerto Rico and the United States reach a consensus on this issue, they will agonize less over whether they want to interrelate as asymmetrical federates, as free associates, or as sovereign nations. They would perceive the question as pertaining to form rather than content. Only then would the U.S. apprehensions and the Puerto Rican divisiveness regarding this issue wane, at least to some extent.