Modern self-determination law and the *fourth option:* International and United States Law

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Resumen: Conforme a las resoluciones de la ONU 1514 y 1541 (1960), usualmente se discuten solo tres formas de autodeterminación de los pueblos: la independencia, la integración y la libre asociación. En 1970, la Resolución 2625 amplió ese lenguaje, añadiendo una cuarta vía: "La adquisición de cualquier otra condición política libremente decidida por un pueblo". La Resolución 2625 y resoluciones posteriores plantean un marco de libertad de petición y negociación que no limita la búsqueda de soluciones razonables y realistas a las aspiraciones legítimas de progreso político, cultural y económico de un pueblo.

La monografía también discute estas normas desde la perspectiva del Derecho Constitucional de los Estados Unidos, concluyendo que ese corpus jurisprudencial también reconoce y permite diversas formas de organización política "soberana" más allá de los estados de la Unión, pueblos o jurisdicciones con diversos grados de autonomía, desde las tribus o naciones indias, hasta los Estados libres asociados, consistentes con el espíritu y letra de la Resolución 2625 y su progenie.

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Palabras clave: Derecho de autodeterminación; descolonización; soberanía inherente; pueblos; Derecho Constitucional de Estados Unidos; federalismo.

Abstract: "Under International and U.S. Constitutional Law decolonization is achieved solely via independence, full integration, and freely associated independence". UN Resolutions 1514 and 1541 (1960) and supposed Constitutional constraints are the oft-cited authoritative statements for this widely held, yet false proposition.

Res. 2625 (1970) amended Res. 1541 by adding a fourth decolonization route: "The emergence into any other political status freely determined by a people". This modern self-determination option is explained in detail in the monograph, including its pragmatic, case-by-case non-dogmatic approach.

As constitutional law goes, there are already various non-state sovereigns within the Federal Union. Indian tribes are jurisprudentially describes as *"distinct, independent political communities"* or *"dependent sovereigns"* The Commonwealths of Puerto Rico and the Northern Mariana Islands, among others, are also examples of federated non-state sovereigns peoples and jurisdictions with varying degrees of autonomy, that fit the norms espoused in Res. 2625 and its progeny.

Key words: International law of self-determination; decolonization; inherent sovereignty; peoples; United States Constitutional Law; federalism.

Self-determination legal discourse, in my country –Puerto Rico– and I presume elsewhere around the globe, is usually premised on the incorrect notion that only three means of exercising said right of peoples exist under Public International Law, namely, full independence, full integration, and freely associated independence, all only after a "transfer of sovereignty". United Nations Resolution 1514 (XV) and more specifically Resolution 1541 (XV)[1] (hereinafter, Resolution 1541), adopted in 1960, are the oft-cited authoritative statements for this proposition.

1 G.A. Res. 1541 (XV), UN GAOR, 15th Sess., Supp. Nº 16 at 29, UN Doc. A/4651 (1960); G.A. Res. 1514 (XV), 15 UN GAOR, 15th Sess., Supp. Nº 16, UN Doc. A/4684 (1960).

To dispel this myth, this monograph will show that under International Law, peoples are inherently sovereign for self-determination purposes and that modern self-determination parameters are substantially broader than the three-option menu usually offered. It shall also establish that the U.S. Constitutional Law can easily accommodate diverse forms of "sovereign" self-government for peoples which choose to live under their own government, within the United States federal system.

1. All peoples are inherently sovereign for self determination ends

As early as 1948, the Universal Declaration of Human Rights (UDHR), espoused the doctrine that the dependent political status of persons or the colonial nature of the territories where these persons lived does not have the effect of diminishing their rights or freedoms, for Nation-States are not the only subjects of International Law.[2] In its pertinent part, the UDHR reads as follows:

> *[e]veryone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind....* [f]urthermore *no distinction shall be made on the basis of the political, jurisdictional or international status* of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing *or under any limitation of sovereignty* (emphasis supplied).[3]

By 1962, at least one UN resolution specified that all peoples and nations –whether independent or not– enjoyed a type of sovereignty, independently from States "as a basic constituent of the right to self-determi-

2 *Universal Declaration of Human Rights,* G.A. Res. 217 A (III) (1948). On the legal status and effect of the Universal Declaration, one author points out that "[t]he Declaration […] is now considered to be an authoritative interpretation of the UN Charter, spelling out in considerable detail the meaning of the phrase "human rights and fundamental freedoms" [including the basis of self-determination law], which the member states agreed in the Charter to promote and observe...The [Declaration], as an authoritative listing of human rights, has become customary law, binding on all states, not only members of the United Nations. *See:* Sohn, Louis. The new International Law: protection of rights of individuals rather than States, *32 Am. U. L. Rev.* 16, 17 (1982).

3 *Id.*

nation". For example, the UN General Assembly, in its *Permanent Sovereignty over Natural Resources Declaration*,[4] (hereinafter, Resolution 1803) stated that:

> Bearing in mind […] of the status of permanent sovereignty over natural wealth and resources *as a basic constituent of the right to self-determination*, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of *peoples* and *nations* over their natural wealth and resources, due regard should be paid to the rights and duties of *States* under international law and to the importance of encouraging international co-operation in the economic development of developing countries, […].
>
> Declares that:
>
> 1. The right *of peoples and nations to permanent sovereignty over their natural wealth and resources* must be exercised in the interest of their national development and of the well-being of the people of the *State* concerned.
>
> […].
>
> 5. The *free and beneficial exercise of the sovereignty of peoples and nations* over their natural resources must be furthered by the mutual respect of *States* based on their sovereign equality.
>
> […].
>
> 7. *Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations* and hinders the development of international co-operation and the maintenance of peace.
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> 8. […] *States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.*

In this sense, since all peoples and nations are, as per the UDHR and Res. 1803, inherently sovereign regardless of their dependent or colonial status, no anterior or posterior metropolitan sovereignty transfers are required in order for them to self-determine validly.

4 G.A. Res. 1803 (XVII), 17 UN GAOR Supp. (Nº 17) at 15, UN Doc. A/5217 (1962).

2. The fourth option: Res. 2625 and subsequent state practice

The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (hereinafter Resolution 2625)[5] also known as the 1970 Declaration, is an

5 G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. Nº 28, at 121, UN Doc. A/8028 (1970). Since its adoption, Resolution 2625 has held significant political weight, and, as we shall see in this monograph, subsequent state practice has elevated it to customary law status. Resolution 2625 was adopted by the UN without objection, with no votes against (consensus, without recorded vote). A/8018, para. 61. Note that Resolution 1541, which is also usually granted customary law status, was passed without consensus by a vote of 69 to 2 (Portugal, South Africa against), with 21 officially recorded abstentions (including U.S. abstention), and Resolution 1514 suffered abstentions from Australia, Belgium, France, Spain, England and the U.S.A. During the General Assembly debates that culminated in Res. 2625's historic adoption, the United States, Canada, Guatemala and Colombia, fundamentally equated self-determination to free choice by a people on the pragmatic premise that self-determination units or territories "differed greatly, both in natural resources and wealth, size and population and *also in the aspiration of the peoples concerned"* and such aspirations had to be taken into account. Igarashi, Masahiro. *Associated statehood in International Law* 148 (2002). In fact, upon adoption, Richard H. Gimer, the U.S. alternative representative at the UN General Assembly, endorsed Resolution 2625 stating that "the United States is pleased now to observe that it considers the declaration […] to be an objective statement of relevant charter principles rather than a partisan document [...] [and that the] United States [is] glad that the declaration [UNGA 2625] recognizes the right of self-determination […]". *63 Dept .St. Bull.* 623, 625 (1970). Res. 2625's view of free choice of a people as the fundamental aspect of self-determination has been indirectly ratified by the International Court of Justice in the *Western Sahara* case: "circumstances required *simple compliance with the will of the people,* however it might be determined", Igarashi, *op. cit.* 15. The "freely expressed will of the peoples concerned" is the prerequisite to self-determination. *Western Sahara,* advisory opinion, *ICJ Reports* 32-33 (1975), <http://www.icj-cij.org/docket/files/61/9467.pdf>. [Emphasis provided]. Resolution 2625 has not only been described as "the most interesting use of the principle of self determination", *see:* Johnson, Toward self-determination - A reappraisal as reflected in the declaration on friendly relations, *3 Georgia J.I.C.L.* 149-50 (1973), the International Commission of Jurists has in fact set it apart as "the most authoritative statement of the principles of international law relevant to the questions of self-determination […]". *See:* Secretariat of the International Commission of Jurists, The events in East Pakistan, *8 International Commission of Jurists Review* 44 (1972); *See also,* <http://nsm1.nsm.iup.edu/sanwar/Bangladesh%20Genocide.htm>. For an opposing view asserting the need and/or requirement of prior "transfers of powers", negating the inherent sovereignty of peoples, and questioning the status of Res. 2625 as special self-determination law, *see:* Berríos, Rubén *et al. Puerto Rico. Nación independiente, imperativo del siglo XXI,* 175-179 (2010). *See also:* Corbin, Carlyle. Criteria for the cessation of transmission of information under article 73(e), *Overseas Territories Report, V* (5), August 2006: "[Res. 2625 recognized] *the emergence of differing and flexible self-governing political models, with the understanding*

authoritative UN Resolution which restates the customary non-interference model and the principle of state sovereignty as the foundational aspects of the international legal framework; the rule of law and state equality as guarantors of international peace and security. Yet it also codifies the customary law of self-determination, and expands upon the language of prior resolutions, by adding a *fourth "decolonization" option*. In its pertinent part, it reads:

> […] The establishment of a sovereign and independent State, the free association or integration with an independent State *or the emergence into* ***any other political status freely determined by a people*** *constitute modes of implementing the right of self-determination by that people.* (Emphasis added.) […].

This *fourth option* is not specifically defined or crafted other than stressing the importance of the exercise of free will by a "people".[6] The three pronged formula of independence, integration or free association found in Resolution 1541 was thus "broadened (so as to make the options available open-ended) [including provision for] a closer relationship with the metropolitan power than does free association" a political status usually construed as a variant of independence: the language formulated in Resolution 2625 provides for "peoples (particularly small ones) who do not wish to create their own [independent] state. The formula therefore contains a specific guarantee for those peoples […]".[7]

Under Resolution 2625 and subsequent legal instruments, the modern principle of self-determination embraces the wider[8] right of all peoples to

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that the minimum level of political equality, and the attainment of a full measure of self-government, remained an essential prerequisite […]".

6 In the *Greco-Bulgarian Communities* case of 1930, the Permanent Court of International Justice gave the following definition of the "general traditional conception" of a community, which in contemporary usage could be called "a people": the 'community' is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other. Advisory opinion Nº 17, Greco-Bulgarian "Communities", *P.C.I.J. (ser. B)* Nº 30, at 21 (July 1930), *reprinted in* [1927-1932] *2 Hudson World CT. Rep.* 640, 653-54.

7 Igarashi, *op. cit.* 148-149 (2002).

8 *See:* Vogel, Howard. Reframing rights from the ground up: the contribution of the new Law of Self-Determination to recovering the principle of sociability on the way to a relational

"freely to determine, without external interference, their political status and to pursue their economic, social and cultural development"[9] as well as the duty of every State "to respect this right in accordance with the provisions of the Charter" (Principle 5, Resolution 2625). A people's self-determination, under Resolution 2625, can apply within the usual decolonization context (right to independence, secession of classic colonies), but it also has great relevance for multiple global *sui generis* situations, other than the run-of-the-

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theory of international Human Rights, *20 Temp. Int'l & Comp. L.J.* 443 (2006). This wide right does away with much of the traditional self determination external/internal typology for classifying claims of self-determination, given the very ample scope of geopolitical situations "by developing a richer and more nuanced framework for distinguishing among them and assessing their legitimacy". *Id., citing* Halperin, Morton; Scheffer, David & Small, Patricia. *Self-determination in the new world order* 47-48 (1992).

9 The focus on *options* or *formulas* is less useful than searching for workable government solutions to particular situations: that is, dealing practically and realistically with the multiple *situations* that make up the complex self-determination *problematique*. Though clearly *numerus apertus,* an author has provided a general categorization:

> 1. Anti-colonial self-determination. A claim [by] a territorial population under colonial rule or alien domination that seeks complete freedom or *more political power*. This differs from the conventional term, "external self-determination", to avoid confusion with separatist movements within the boundaries of existing states that seek to redefine their relationship with the central government as an "external" relationship [...].
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> 2. Sub-state self-determination. The attempt of a group within an existing state to break off and form a new state o*r to achieve a greater degree of political or cultural autonomy within the existing state* [...].
>
> 3. Trans-state self-determination. A self-determination claim involving the concentrated grouping of a people in more than one existing state [...].
>
> 4. Self-determination of dispersed peoples. The claims of peoples dispersed throughout one or more states [...].
>
> 5. Indigenous self-determination. The claims of [...] groups characterized by a distinct ethnicity and long historical continuity with a pre-colonial or pre-invasion society [...] [that] may inhabit a geographically concentrated area, cut across international boundaries, or be dispersed throughout an area, [which often require] greater sensitivity to political culture and traditions [...].
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> 6. Representative self-determination. A claim to "representative" self-determination results when the population of an existing state seeks to change its political structure in favor of a more representative (and preferably democratic) structure. By using the term "representative", we do not mean to deny to other types of self-determination claims the goal of more representation, or self-government, of the people involved. In fact, a goal of better representation can underpin self-determination claims of all types. Rather, we use "representative" here, for lack of a more descriptive term, to describe what is conventionally labeled with the potentially confusing term "internal self-determination". *Id, citing,* Halperin, *et al., op. cit*. at 49-52.

mill national liberation movement seeking full independence for a subjected colonial people, from an allegedly tyrannical, metropolitan regime.[10] It has been said that "this view makes it possible for incremental changes to be implemented rather than forcing parties to agree on definitive changes which can be too radical for some and insufficient for others. In this sense, self-determination should not be regarded only as an end, but also as a process by which parties adjust and re-adjust their relationship, ideally for mutual benefit".[11] A people's capacity to consent freely to a government type is the expression of its inherent collective sovereignty.

The modern international law of self-determination, as expressed in Resolution 2625 has been treated in greater detail by subsequent state practice. For example, the Helsinki Final Act*,* a common policy instrument adopted by the Organization on Security and Cooperation in Europe (OSCE),[12] reads:

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10 There is a wide array of possible status arrangements to answer the multiplicity of legitimate self-determination claims around the world. For instance, focusing only on non-separatist self-determination models, Hannum and Lillich "undertook 22 case studies [...] offering a wide range of examples of varying degrees of governmental autonomy and internal self-government. These studies, […] fell, albeit somewhat arbitrarily, into the three major categories of federal states, internationalized territories and territories of particular international concern, and associated states, along with a fourth, miscellaneous grouping. The entities surveyed were chosen because they represented a wide range of autonomy arrangements which, at least to some extent, have been recognized or seriously considered in international law". Hannum, Hurst & Lillich, Richard. The concept of autonomy in International Law, *74 AJIL* 858 (1980). *See also:* Igarashi, *op. cit.* 148 (2002) [In General Assembly debates culminating in the historic Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res 2625 (XXV) (1970), states "argued that non-self-governing territories *differed greatly,* both in natural resources and wealth, size and population and *also in the aspiration of the peoples concerned*"].

11 The implementation of the right to self-determination as a contribution to conflict prevention, *Report of Unesco International Conference of Experts,* Barcelona, November 1998, <http://www.unpo.org/content/view/446/83/>. *See also: Cf.* Daes, Erica-Irene. Striving for self-determination for indigenous peoples. In: *In pursuit of the right of self-determination: collected papers and proceedings of the First International Conference on the Right to Self-Determination & the United Nations.* Geneva 2000, at 50 [Y. N. Kly & D. Kly (eds.), 2001] ("The fundamental condition for realizing the right of self-determination in practice is trust between peoples").

12 *Conference on Security and Cooperation in Europe,* Final Act of Helsinki, 1 August 1975, *14 I.L.M.* 1398. The Helsinki Final Act, adopted by the (then) thirty five States of the OSCE included Canada and the United States as the only two non-European states. OSCE is a regional organization associated to the UN. One can say that the *fourth option* was in *statu nascendi* even before Resolution 2625. Even under earlier Resolution 1541, the international legality

> The participating States will respect the equal rights of peoples and their right to self-determination, […].
>
> By virtue of the principle of equal rights and self-determination of peoples, all peoples *always* have the right, in *full freedom*, to determine, *when and as they wish*, their internal and external political status, without external interference, and *to pursue as they wish* their political, economic, social and cultural development.
>
> The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and *self-determination of peoples* for the development *of friendly relations* among themselves as *among all States*; they also recall the importance of the elimination of any form of violation of this principle. [Emphasis supplied].

The Helsinki Final Act stresses that self-determination is a right of an ongoing[13] nature in which the people concerned "in full freedom [...] always have the right" to determine and pursue "when and as they wish" their internal or external status. According to Prof. Antonio Cassese, a leading scholar and former Presiding Judge of the International Criminal Tribunal

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of a particular associated state, depends fundamentally on the consent of the associate's population, the will of the people. *See:* G.A. Res. 1541, UN GAOR, 15th Sess., Supp. Nº 16, at 29, Annex, Principle VII, UN Doc. A/4684 (1960) *("Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed democratic processes").* Furthermore subsequent Res. 1541 practice, namely the 'Plan of the Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples', GA Res. 35/118, adopted 11 December 1980, *reaffirms* as one of its legal foundations "that all peoples have the right to self-determination [as a] fundamental human right [as per] the relevant provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". As such, the general and special norms found in Res. 2625 where, since early on, at least of the same level as those found in 1541, although clearly, in what regards specificity, *lex specialis* if you will, clearly the most specific catalogue of self determination "options" is found in Res. 2625.

13 "It is very important to think of self-determination as a process. The process of achieving self-determination is endless. This is true of all peoples - not only indigenous peoples. Social and economic conditions are ever-changing in our complex world, as are the cultures and aspirations of peoples. For different peoples to be able to live together peacefully, without exploitation or domination –whether it is within the same state or in two neighbouring states– they must continually renegotiate the terms of their relationships". Daes, *Striving for self-determination…, op. cit. See also:* Anaya, James. A contemporary definition of the international norm of self-determination, *3 Transnat'l L. & Contemp. Probs.* 131-64 (1993) (discussion of *constitutive* and *ongoing* aspects doctrines of self-determination).

for the former Yugoslavia, the phrase "in full freedom" has a democratic intent that reflects the eminently Western view that self-determination goes hand in hand with other fundamental, indivisible, universal, human rights and freedoms which must be ensured to all members of the people concerned.[14] Cassese also points out that States participating in the OSCE Conference "intended to put forth principles that would apply in their relations with one another. Thus, the Helsinki provisions on self-determination must be construed as being relevant *vis à vis* the peoples of [established states in] Europe [and within other member-states like the U.S. and Canada]".[15] Participating States clearly share this now customary[16] human rights-centered

14 Cassese, Antonio. *Self-determination of peoples: a legal appraisal.* 285-286 (1995). Cassese specifically points to ICCCPR articles 18, 19, 21 and 25 of the International Covenant on Civil and Political Rights, *infra,* which guarantee, respectively, freedom of thought and worship, expression, peaceful assembly and universal suffrage, although the concept includes the whole range of economic, cultural, as well as political human rights.

15 *Id.*

16 State practice, expressions and actions are relevant in establishing a customary norm of international law, binding upon states that have not "persistently objected' to said norm's creation". *Fisheries Case* (United Kingdom v. Norway) 1951, *ICJ Reports,* 131. Decisions of legally competent international bodies have repeatedly recognized the fundamental right to self-determination, including status options similar to those espoused in Resolution 2625. *See:* UNSC Resolution 1244 (1999), 10 June 1999 *(S/Res/1244*)(1999) (affirming through binding resolution the right of Kosovars to *autonomy, self-government and self-administration* within the Yugoslav Federation); *East Timor,* 1995 *I.C.J.* 90, 102 (characterizing "the right of peoples to self-determination" as "one of the essential principles of contemporary international law"); *Namibia,* 1971 *I.C.J.* 16, 31-32; *Cf. Aaland Islands Case* (1920) LNOJ Special Supp Nº 3, 28 ("the separation of a minority from a State of which it forms a part and its incorporation into another State can only be considered an exceptional solution, a last resort when a State lacks either the will or the power to enact and apply just and effective guarantees"). Multiple international treaties also recognize the right to self-determination. *See: infra* International Covenant on Civil and Political Rights ("ICCPR"); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, Preamble, art. 15, U.N.G.A. Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force Jan. 4,1969); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3. As mentioned, the U.S. participated in the unanimous consensus which adopted Resolution 2625 and the unanimous vote for the Helsinki Final Act. Also, Security Council Resolution 1244 (1999), affirming federated autonomy in Kosovo, mentioned above, was approved by a 14-0-1 legally binding vote, the U.S. in favor and China abstaining. <http://www.un.org/News/Press/docs/1999/19990610.SC6686.html>. The United States has been key in establishing this new international consensus. *See:* Williams, Paul & Jannotti, Francesca. Earned sovereignty: bridging the gap between sovereignty and self-determination, *40 Stan J. Int'l L.* 347, 353, n. 18 (2004).

view of self-determination law, as expressed in instruments like Resolution 2625, the Helsinki Final Act, as well as by other indicators that evidence the existence of legal self-compulsion by states.

Additional international practice has further strengthened these customary norms. For example, on the 27th of August 1991, the European Community, while convening a peace conference on Yugoslavia, established an Arbitration Committee to decide certain issues relating to the former socialist republics of Yugoslavia. The mandate given to the Committee was to decide pertinent issues by means of binding decisions. The Commission's opinions were delivered on the 14th of January 1991. In its analysis of self-administration and autonomy regimes, the Committee interpreted relevant aspects of modern self-determination law. Pellet explains:

> [The opinion of the Committee] invites a reflection […]: the scope of the self-determination principle as it is applied in ***particular contexts*** […] The Badinter Committee was thus correct to assert that […] […] one must recognize that within one State, various ethnic, religious or linguistic communities might exist. *These communities similarly would have […] the right to see their identity recognized and to benefit from "all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their national identity".* […] Article 1 of the two 1966 International Covenants on human rights establishes that "the principle of the right to self-determination serves to safeguard human rights". […] The ultimate objective would be to allow those persons who so wish to, to declare themselves as Serbs while retaining certain civil and political rights in the territories of Bosnia-Herzegovina and Croatia –for example the right to vote in local elections [...] *Such arrangements* […] *would have the immense merit of guaranteeing the rights of peoples – and the individuals of whom they are composed–,* while avoiding the fragmentation and weakening of States. […] *This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act*; it was cited by the Hague Conference on 7 September 1991 and is enshrined in the draft Convention of 4 November 1991 drawn up by the Conference on Yugoslavia. [Emphasis provided].[17]

17 *See:* Pellet, Alain. The opinions of the Badinter Arbitration Committee, a second breath

Furthermore, the *Vienna Declaration and Program of Action,* adopted by the World Conference on Human Rights in 1993, with a strong consensus of 160 sovereign States, is another recent expression of these norms. It expressed:

> *Recognizing and affirming* that *all human rights derive from the dignity and worth inherent in the human person*, and that the *human person* is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms [...] Solemnly adopts the Vienna Declaration and Programme of Action. [...].
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> In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations.
>
> Human rights and fundamental freedoms are the *birthright of all human beings*; their protection and promotion is the first responsibility of Governments.
>
> 2. All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. [...].
>
> 8. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. *Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives*. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and

for self-determination of peoples, *3 EJIL* 178 (1992), <http://207.57.19.226/journal/Vol3/No1/art12-13.pdf>. Note that ine the particular case of Kosovo, a province which declared its independence from Serbia, the International Court of Justice delivered an advisory opinion on 22 July 2010, opining by a vote of 10 to 4 that "the declaration of independence of the 17th of February 2008 did not violate general international law", as something akin to free speech, however the declaration did not constitute a new state of Kosovo *per se* most countries that do not recognise Kosovo s would not be doing so as the ruling could set a precedent of endorsing secession and fragmentation. Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. Advisory opinion, *I.C.J. Rep.* 2010 (22/07/2010).

promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world. [...].

67. Special emphasis should be given to measures to assist in the strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable. In this context, assistance provided upon the request of Governments for the conduct of free and fair elections, including assistance in the human rights aspects of elections and public information about elections, is of particular importance. Equally important is the assistance to be given to the strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and to the real and effective participation of the people in the decision-making processes. [...]. [Emphasis supplied].[18]

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18 UN Doc. A/CONF. 157/23 (1993). Multiple recent UN Resolutions cite Resolution 2625, *inter alia:* A/RES/50/133, 'Support by the United Nations System of the Efforts of Governments to promote and consolidate new or restored democracies'; A/RES/55/2 'Millennium Declaration' (2000); A/RES/61/34 'Report of the International Law Commission on the work of its fifty-eighth session' (2006); A/RES/61/39 The rule of law at the national and international levels (2006); A/RES/61/166 'Promotion of equitable and mutually respectful dialogue on human rights'; A/RES/61/169 'The right to development'; A/RES/63/189 'Promotion of a democratic and equitable international order' (2009). Modern self determination reaches beyond the West, to the Near East. *See:* 'The right of the Palestinian people to self-determination' (2009), A/RES/63/165. This recent UN Resolution states, in its pertinent part that:

> *The General Assembly, Aware* that the development of friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, is among the purposes and principles of the United Nations, as defined in the Charter, *Recalling*, *in this regard*, its Resolution 2625 (XXV) of 24 October 1970 entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations", *Bearing in mind* the International Covenants on Human Rights, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights on 25 June 1993, […] 1. *Reaffirms* the right of the Palestinian people to self-determination, including the right to their independent State of Palestine; 2. *Urges* all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination.

The statutory construction and order of this resolution is not without importance. It places Resolution 2625 before and on top of other instruments such as the ICCPR and Res. 1541, and cites it in full form, while only mentioning the others. In the Palestinian context, the General Assembly explicitly chose to use Resolution 2625 *regarding* the notion that the de-

The legal policy enshrined in these international instruments is straightforward: Resolution 2625 and its progeny protect the integrity of successful democratic States, while accommodating the wishes and collective human rights of sub-state national communities –peoples–, as a matter of prudence and preservation of the rule of law. All persons hold inherent human rights which must be protected, including the recognition and peaceful realization of their collective political aspirations. The International Community has no interest in creating incentives for global fragmentation, instability, economic uncertainty or other situations that are violative of universal human rights.[19] Thus, international law is quite open to democratic

velopment of friendly relations among nations is based on respect for the principle *of equal rights and self-determination of peoples*. As such, it only *bears in mind* other instruments when it declares that the Palestinian people have a right to self determination, implying an enhanced or augmented relevance of Resolution 2625 in modern self-determination contexts.

19 *See:* Danspeckgruber, Wolfgang. *The self-determination of peoples: community, nation and State in an interdependent world*. 367 (2002): "The permissibility of self-determination leading to situations other than full independence is, in particular, expressly recognized in General Assembly Resolutions [...] [Independence, free association, integration] and the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. [...] While in direct terms those passages relate to the right of a people to self-determination it would seem to be an *a fortiori* proposition in relation *to the broader* **principle** *of self-determination* [...]. Independence [...] is for many communities not always the best solution. [...] [I]t is felt that providing for self-administration, communities may feel their aspirations to self-determination are adequately met and they are no longer compelled to seek full independence. [...] There is no advantage to be gained by insisting on [...] excluding other kinds of status if, in particular circumstances they would grant a community all it wants in order to be able to acknowledge its distinctive characteristics [...]". Note also, that the UN General Assembly, for example, recognized the Palestinian Liberation Organization (PLO) as the "representative of the Palestinian people", even though said people lacks its own state, in Resolution 3210 and Resolution 3236, and granted the PLO General Assembly observer status on November 22, 1974 in Resolution 3237. The UN Security Council has recognized PLO participation in Security Council debate, a privilege usually restricted to UN member states. <http://www.un.int/palestine/seventies.shtml> *See also:* A/RES/3237 (XXIX): GA bserver status; A/RES/43/160: designation "Palestine"; A/RES/43/177: right to circulate communications without intermediary; A/RES/52/250: right to participate in general debate and additional rights. Note, also, that on 20 October 2009 the UN granted the International Olympic Committee, a Swiss corporation or non-state juridical person, UN General Assembly observer status. *See:* A/RES/64/3. Among other *sui generis* non-state entities that are UN observers figure the International Committee of the Red Cross and the International Parliamentary Union and the Sovereign Military Order of Malta. Besides the prestige, Observer Status in the General Assembly (GA) entails certain important privileges: 1. Access to meetings in addition to general meetings, such as High-level Summit meetings; 2.

solutions that balance the sovereignty of peoples with the maximum possible preservation of existing States.[20] One might say that the minimum purpose of law is to preserve peace and order, but in more developed societies, such as western-styled democracies, the purpose of that basic stability should be

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The right to address the General Assembly in the floor and to present documents; 3. Better insight into the work of Committees and opportunities for advocacy. *See generally: Secretary-General's Report on Observer Status at the UN General Assembly* 199/12, <http://www.wfuna.org/atf/cf/%7B84F00800-D85E-4952-9E61-D991E657A458%7D/SGReportonObsStatusatGA16April20102.pdf>. Regarding the rise of other licit transboundary non-state actors, particularly "non-state sovereign entrepreneurs" *see:* Brauer, Jurgen & Haywood, Robert. *Non-state sovereign entrepreneurs and non-territorial sovereign organizations.* United Nations University-World Institute for Development Economics Research (2010), <http://www.wider.unu.edu/publications/working-papers/2010/en_GB/wp2010-09/_files/82967192285675604/default/2010-09.pdf>. Note also that a recent Brookings Institute study published jointly with the Centre on International Co-operation at New York University, explains that in order to face 21st century problems, a legalistic, rigid, 19th/20th century notion of sovereignty seems rather ill-equipped to deal with many modern problems. As such, the study considers flexible schemes that allow for common agenda, shared risks, and other ways of dealing with the asymmetric and unpredictable issues of today and the future such as terrorism (one could say that *Al Qaeda's* strength is precisely that it is a diffuse transnational cooperative), international drug flows, transboundary pollution, and pandemic viruses, whether of the organic or the computer type, among others. Classic external sovereignty –such as military might– although still useful, seems more appropriate for a relatively stable and perhaps gone predictable world, such as Cold War bipolarity. Evans, Alex; Jones, Bruce & Steven, David. Confronting the long crisis of globalization: risk resilience and the international order, *Brookings/CIC* (2009).

20 *See:* Noutcheva, Gergana; Tocci, Nathalie; Coppieters, Bruno; Kovziridze, Tamara; Emerson, Michael & Huysseune, Michel. *Europeanization and secessionist conflicts: concepts and theories, journal of ethnopolitics and minority issues in Europe* (2004). ("[A] common state with a single international personality satisfies the wish of the international community to limit the multiplication of micro-states and to protect the principle of territorial integrity. [...] A federacy, or associated state, is a political arrangement where a smaller unit is linked to a larger unit in such a way that it retains a degree of self-government without [...] necessarily having political representatives in the government of the large unit"). <http://www.ecmi.de/jemie/download/1-2004Chapter1.pdf>. *Cf.,* McWhinney, Edward. *Self-determination of peoples and plural-ethnic states in contemporary International Law: failed States, nation-building and the alternative, federal option.* 133 (2007). *See also: Max Planck Encyclopedia of Public International Law,* <http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e873>: "[T]he *principle* of self-determination certainly has considerable federalist potential. […] [A]s the composition of most States is heterogeneous and pluralistic, the essence and spirit of self-determination would be well served if […] political autonomy was granted within the State. In this sense, the creation of the new structures of group interaction and representation, based on compromise rather than confrontation, seem to be better suited to accommodate all parts of pluralistic societies".

economic prosperity and protection of individual freedoms,[21] guaranteed by political, constitutional, administrative, judicial or other national, supranational or international institutions and fora.[22] In this sense, the result of the act of collective sovereignty, the act of democratically self-determining one's future as a people, within Resolution 2625's paradigm, must be to enhance the well being of the individuals that make up that people: it is less concerned with juridical formulae than with improving the condition of individuals, their "individual sovereignty", if you will. This "individual sovereignty" can exist when there is a real individual chance for a dignified life, for liberty,

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21 Hannum, Hurst. Rethinking self-determination, *34 Va. J. Int'l L.* 10 (2005). ("[...] people[s] who claim the right to [external] self-determination [secession] have been pushed to that position because of violations of 'ordinary' human rights, such as the right to be free from arbitrary arrest or the right to use one's own language. It is when a group's identity is threatened -- by denial of the group's existence, seizure of its lands, or denigration of its culture -- that salvation is sought through...self-determination"). The opposite is also true. To the extent that a metropolitan State is progressively fair, liberal, democratic and representative of peoples living within its territory, its domination will be also progressively less "colonial and alien" and demands for extreme forms of self-determination will lessen and perhaps end. *See: Cf.,* Gros, Héctor. *Implementation of United Nations resolutions relating to the right of peoples under colonial and alien domination to self-determination.* A study prepared by a special rapporteur (New York: United Nations, 1981) [E/CN.4/Sub.2/405].

22 Peoples are increasingly invoking Resolution 2625's fourth option in competent international fora. *See:* Testimony by the President of Puerto Rico's Popular Democratic Party before the UN Special Committee on Decolonization 5th & 6th Meetings (June 2009) (Emphasizing that UN Resolution 2625 states that in addition to integration, separation and self-association any other political status freely determined by a people is a way of exercising the right of self-determination; defending the right of the Puerto Rican people to develop the Commonwealth [Estado Libre Asociado] based on the sovereignty of the people and based on principles of mutual consent, citizenship, non-territoriality, […] and the sovereign power of the people for self-determination). <http://www.caribbeanbusinesspr.com/news03.php?nt_id=31758&ct_id=1>; full *text* at <http://www.ppdpr.net/blog/?n=135>; <http://www.un.org/News/Press/docs/2009/gacol3193.doc.htm>. *See also:* Special Committee on Decolonization 4th Meeting, 6/06/2002, GA/COL/3064, <http://www.un.org/News/Press/docs/2002/gacol3064.doc.htm>. *Also see:* A/C.4/62/SR.6. In hearing testimony from the representatives of Gibraltar in the same UN forum, Peter Caruana, Chief Minister of Gibraltar asked the UN if it had any "real seriousness of purpose and intent in finishing its work [...]" and whether id did or did not "accept that a *fourth way* was declared by the General Assembly in Resolution 2625 (XXV) [...], namely that any status freely determined by the people of the territory in an act of self-determination is a valid model of decolonisation? The Special Committee cannot avoid taking and clearly stating a position on this important question, and should now do so". <http://www.gibraltar.gov.gi/latest_news/press_releases/2007/133-2007.pdf>.

freedom of movement and action, prosperity and relative happiness. The sum of the collective individual goods (the collection of free, self-realized, self-owning citizens) is conceptually inseparable from the common, public good of the whole, which as a result, is also factually free.

3. Modern self-determination law is United States Federal Law

The modern self-determination principles embodied in Resolution 2625 and subsequent instruments have been expressly incorporated into United States federal law.[23] Specifically, in June 1992, following the U.S. Senate's advice and consent to the President's ratification, the United States became a full party[24] to the International Covenant on Civil and Political Rights (hereinafter, the ICCPR) which had been formally adopted by the United Nations in 1976.[25] The ICCPR, in article 1, states:

> (1) [A]ll peoples have the right to self-determination. By virtue of that right they *freely determine* their political status and freely pursue their economic and cultural development; (2): All peoples may, for their own end freely dispose of their natural wealth and resources without prejudice

23 The United States is legally bound to "take judicial notice of, and to give effect to, in the absence of any treaty" to the Law of Nations. *The Paquete Habana*, 175 U.S. 677 (1900). As such, the Law of Nations, or customary international law, is United States law. Customary international law is created via the consistent usages and practices of sovereign States in conjunction with the *sine qua non* requirement that such usages and practices are being performed and carried out of juridical obligation, not mere comity or a sense of moral duty, so called *opinio juris. See:* art. 38 §1(b) Stat. I.C.J., 76 Y.B.U.N. 1052. Note also that U.S. Federal case-law has often cited Resolution 2625 as a *key* document in the human rights and self-determination context of peoples context, and as evidence of customary international law. *See: inter alia, United States v. Yousef*, 327 F.3d 56 (2003); *certiorari denied*, *Yousef v. United States*, 540 U.S. 933 (2005); *Continental Illinois Corp. v. Commissioner*, 94 T.C. 165 (1990), *Halliburton Co. v. Commissioner*, 93 T.C. 758 (1989); *Morgan Guaranty Trust Co. v. Republic of Palau*, 924 F.2d 1237 (1991); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984); *Filártiga v. Pena-Irala*, 630 F.2d 876 (1980).

24 As such, the United States, transcended the already applicable, but sometimes cryptic and difficult to prove obligations of customary international law when it voluntarily accepted the clearly spelled out treaty text, <http://www.iilj.org/courses/documents/U.S.SenateResolutiononTheRatificationoftheICCPR.pdf>.

25 ICCPR, 16 Dec. 1966, 999, U.N.T.S. 171; I.C.E.S.C.R, 16 Dec. 1966, 993 U.N.T.S. 3. <http://www2.ohchr.org/english/law/ccpr.htm>.

> to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

A provision closely related to ICCPR art. 1, namely article 47, provides that "[n]othing in the present Covenant shall be interpreted as impairing *the inherent right of all peoples* to enjoy and utilize fully and freely their natural resources". Note that both articles 1 and 47 closely follow the spirit and language[26] of prior instruments, including Resolution 1803 and Resolution 2625,[27] particularly given the specific references to *"inherent* rights of peoples" over their natural resources in art. 47 and the right to "*freely determine* and pursue their political status and their economic and cultural development" present in art. 1.[28]

4. We the people and non-state sovereigns

These federally incorporated self-determination international law norms are not at all foreign to the U.S. constitutional tradition. A basic tenet of U.S. constitutional philosophy is that "the people" delegate their power –their

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26 *See:* Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331, reprinted in *63 Am.J.Intl.l.* 875 (1969). The U.S. is a signatory, yet the Senate has not yet ratified this Convention. However, according to the Restatement, an authoritative U.S. law treatise, the U.S. "accepts the Vienna Convention as... constituting a codification of the customary law governing international agreements". *American Law Institute, 1 Restatement (Third) of the Foreign Relations Law of the United States* 145 (1987). In any case, the United States' public act of signature is not without legal effect. Article 18 distinguishes between a third party stranger to a treaty and one who has signed but not ratified a treaty, forbidding the signatory from acting against the "objects and purposes" of that treaty. So, as a matter of international law the U.S. is not only bound by the custom the Vienna Convention crystallizes, but its subscription of the treaty creates further obligations that strengthen, and perhaps increase the scope of those customary obligations.

27 The ICCPR was presented at the UN in 1966 and adopted in 1976, and Resolution 2625 was adopted by consensus in 1970. In a sense, Resolution 2625 is part of the context of the ICCPR and also part of its subsequent practice. Articles 31(2) and (3) of the Vienna Convention on the Law of Treaties, *supra*.

28 Note also that although the Senate attached a series of declarations and reservations when providing its advice and consent to the ICCPR, particularly the claim that articles 1 to 27 where "non self executing", the only proviso attached to article 47 was that "the right referred to in article 47 may be exercised only in accordance with international law" not diminishing, and perhaps augmenting its protective scope. *Id.*

sovereignty– to the several states of the Union, and part of that power to the federal government via the Constitution. That is the paradigm at the heart of United States legal tradition since at least 1776,[29] when the duly convened and assembled people of the Thirteen Colonies "[assumed] the station to which the Laws of Nature […] entitle them", and *declared* that:

> Governments are instituted *among Men*, deriving their just powers from the *consent* of the governed, --That whenever any Form of Government becomes destructive of these ends, it is *the Right of the People* to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. [Emphasis provided].[30]

In this sense, *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819), for example, expresses that when:

> "In order to form a more perfect union", it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to *the people*, and *of deriving its powers directly from them*, was felt and acknowledged by all. [Emphasis provided].

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29 *See:* Sullivan, Jake. The tenth amendment and local government, *112 Yale L.J.* 1935 (2003), <http://yalelawjournal.org/images/pdfs/220.pdf>. *See also: Kansas v. Marsh*, 126 S. Ct. 2516, 2531 (2006) *(Scalia, concurring):* "When we correct a state court's federal errors, we return power to the State, and to its people". *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947): "[...] The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action [...] was taken. [...]". *See:* Bacon, Selden. How the tenth amendment affected the fifth article of the Constitution, *16 Va. L. Rev.* 771, 791 (1930) (Arguing 10th Amendment requires that only the ultimate sovereign, *the People,* assembled in a constituent convention, and not state legislatures, can ratify amendments which delegate new powers to the federal government).

30 *Declaration of Independence* <http://www.archives.gov/exhibits/charters/declaration.html>. The Founding Fathers of the United States, in using constituent conventions to ratify the Constitution, built on the accepted and legitimate notion of popular sovereignty. Tribe, Laurence. *American Constitutional Law* 2 (2nd ed. 1988) ("That *all* lawful power derives from *the people* […] is the oldest and most central tenet of American constitutionalism").

These principles were later codified in the ninth[31] and tenth[32] amendments.

In this sense, there should be few conceptual complications in allowing lesser or higher degrees of integration, autonomy and/or legal

31 *See: Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, *concurring*): "The Ninth Amendment [...] lends strong support to the view that the liberty protected by [due process] from infringement by the Federal Government […] is not restricted to rights specifically mentioned in the first eight amendments. [...] The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions". *Griswold* intertwined substantive due process and ninth amendment jurisprudence in resolving the constitutionality of a Connecticut statute that prohibited the use or assistance in use of contraceptive devices. *United Public Workers, supra,* and Judge Goldberg's rationale in *Griswold,* reminds us that the Constitution protects unenumerated fundamental political and electoral rights retained or held by the People, that the government cannot take away without constitutional consequence. Justice Black, in his famous dissent in *In re Winship,* 397 U.S. 358, 385 (1970), called this "the most fundamental individual liberty of our people--the right of each man to participate in the self-government of his society" and "the basic concept of the essential dignity [...] of every human being -- a concept at the root of any decent system of *ordered liberty* [...] left primarily to the individual States under the Ninth and Tenth Amendments" described in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758 (1985).

32 *"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*". (10th Amendment). *See: Alden v. Maine*, 527 U.S. 706, 762 (1999): Congress lacks delegated power to abrogate the sovereign immunity of the states and thereby allow state citizens, through federal statutes to sue their respective states in state courts. Sovereign immunity is a *pre-constitutional* right that is retained by the states, because, in the Court's words: "sovereign immunity from suit was 'a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution". Note that, although not a State, Puerto Rico, as sovereign, is immune from federal damages actions brought by its employees under the Fair Labor Standards Act. *Rodriguez v. P.R. Fed. Affairs Admin.*, 435 F.3d 378, 549 U.S. 812, *certiorari denied* (2006) ("reading the law to intrude more profoundly on Puerto Rico's sovereignty than on that of the states would contradict Congress's manifest intent. The FLSA fails to overcome Puerto Rico's immunity. Puerto Rico's sovereign immunity in federal courts parallels the states' 11th Amendment immunity. *See: e.g.*, *Ortiz-Feliciano v. Toledo-Davila*, 175 F.3d 37, 39 (1st Cir. 1999). Under U.S. Constitutional Law, the term "the people" is not ethnically charged as it is under international law. "The people" only refers to the members of the political community, as source of political legitimacy. *See: United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990): "the people" protected by the fourth amendment, and by the first and second amendments, and to whom rights and powers are reserved in the ninth and tenth amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community". *See also: District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

sovereignty to non-state (the term state is used here in the municipal U.S. statehood sense) peoples, since ultimately, all legitimate sovereign power rests in *the people*.

An obstacle usually placed against pragmatic political status solutions is the idea that U.S. federalism only recognizes the full integration and assimilation (U.S. statehood) model as a permissible. Obvious cases that prove the opposite are, of course, the Commonwealth of the Northern Mariana Islands[33] the Federated States of Micronesia/Republic of the Marshall Islands,[34] the Republic of Palau,[35] the District of Columbia, potentially,[36] and the Commonwealth of Puerto Rico itself, as precursor, all of which have lesser or higher degrees of authority and self-rule.

The resulting status of the Commonwealth of the Northern Mariana Islands (CNMI) is of particular interest in what regards the *fourth option* as an expression of modern self-determination law, fully within the municipal constitutional structure of the U.S. The people of the CNMI democratically determined to remain in political union and within U.S. jurisdiction and the U.S. agreed so in a pact or covenant. The United Nations legally validated the

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33 <http://www.cnmilaw.org/covenant.htm>. The Federated States of Micronesia/Marshall Islands and the Republic of Palau are wholly independent and sovereign states that entered into treaties of association with the U.S. In a way, this is not unlike the original status of sovereign Indian nations, which where at first legal co-equals with the federal government, but where subsequently and gradually *federalized* through treaties, and now are constitutional subjects or "dependent sovereigns". Of course one fundamental distinction is that the people of the former Pacific UN Trust Territories were understandably more legally sophisticated at treaty negotiations than the original *first peoples* of America, and the U.S. government, was arguably less driven by base instincts when it negotiated with the peoples of Micronesia. *See generally: Cf. United States v. Wheeler*, 435 U.S. 313 (1978); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

34 <http://www.fsmlaw.org/compact>.

35 <http://www.ustr.gov/assets/World_Regions/Southeast_Asia_Pacific/The_Pacific_Isls/asset_upload_file852_12902.pdf>.

36 House of Representatives voting status of DC, and the test of the constitutionality of the DC House Voting Rights Act, (H.R.157/S.160) are issues that if and when they become legally ripe, shall hold significant implications on the democratic aspirations of non-state political entities –and the legal relevance of the conceptual ultimate sovereignty of the people– within the U.S. federal system. <http://www.dcvote.org/advocacy/dcvra_111thmain.cfm>. Modern self determination law has not turned a blind eye to the District of Columbia case. *See:* Final Washington DC Declaration of the OSCE Parliamentary Assembly and the Resolutions Adopted at the Fourteenth Annual Session (2005), Chapter III, Section 58, on page 8:58; <http://www.dcvote.org/pdfs/oscejuly2005finalresolution.pdf>.

new CNMI status as an exercise of the right to self-determination.[37] Thus, according to the competent international authorities, the people of the NMI enjoyed the inherent sovereignty to contract into that apparently beneficial and mutually convenient arrangement, and evidently did so.[38]

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37 *See:* Trusteeship Council Resolution 2183 (LIII), S/18124, 3 June 1986; Security Council Resolution 683 (1990), S/RES/683 (1990), 22 December 1990, <http://unbisnet.un.org>. Under the CNMI/USA Covenant, in general, federal law applies and is supreme in said commonwealth. However, the CNMI is outside the customs territory of the United States and, although the internal revenue code does apply in the form of a local income tax, the income tax system is largely locally determined. According to the CNMI/USA Covenant, federal minimum wage and federal immigration laws "will not apply […] except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement". <http://www.doi.gov/oia/Islandpages/cnmipage.htm>.

38 Not unlike the people of the CNMI and the Commonwealth of Puerto Rico, the people of Gibraltar have voted in a referendum to remain within United Kingdom jurisdiction. In that case the Kingdom of Spain's argues that historical and treaty-based territorial integrity and sovereignty claims supersede the will of the Gibraltar people to remain under Britain. Spain calls an act of self-determination that does not fall within the old tripartite model *"colonialism by consent". See:* <http://www.un.org/News/Press/docs/2009/gacol3192.doc.htm>. Similar statements are made by anti-commonwealthers in Puerto Rico, regarding those who pursue close ties with the U.S., but not statehood, and without relinquishing Puerto Rican national identity. *See:* Berríos, *op. cit*. For an interesting in depth study of modern decolonization *modo brittanico,* but in the Caribbean, *see:* Cox-Alomar, Rafael. Britain's withdrawal from the Eastern Caribbean 1965-1967: a reappraisal, *The Journal of Imperial and Commonwealth History, 31*(3) at 74 (2003). A perhaps even more interesting prospect shall be the final political status of Curaçao, after a yes win on the 15 May 2009 full autonomy referendum. The Netherlands boasts very sophisticated and progressive self determination and constitutional reform processes and Aruba, for example, is already considered an autonomous "country" within a seemingly federal Kingdom of the Netherlands. *See:* <http://www.minbzk.nl/english/subjects/aruba-and-the/new-status-for-the>. As small island-states go, autonomous solutions, that is, non-independent status formulae under modern self determination law, have tended to fare better than fully sovereign independence, as per some reports. In a 2006 study of non-independent island jurisdictions, a GDP of U.S. $17416 was reported, whereas small sovereign island states reflected a lower combined GDP of U.S. $8463. McElroy, Jerome & Pearce, Kara. The advantages of political affiliation: dependent and independent small island profiles, *The Round Table, The Commonwealth Journal of International Affairs, 95*(386), 529-539 (2006), McElroy and Pearce report similar results in other important socioeconomic indicators, including life expectancy, infant mortality, unemployment rate, labour force, and many others, the non sovereign entity always performing better, sometimes substantially, than the independent small island state. S*ee:* comparative tables <http://www.saintmarys.edu/~jmcelroy/Table%201.htm>, <http://www.saintmarys.edu/~jmcelroy/Table%201-1%20Appendix.htm>.

In any case, the recognition of sovereign entities other than fully integrated –fully assimilated– states within the larger Federal-State is not new to the Constitution at all. In fact, the concept has a long tradition, as old as U.S. history itself. It is a legal fact that Native American peoples are "*distinct, independent political communities, which retain all aspects of their sovereignty not withdrawn by treaty or statute or by implication as a result of their status". See: United States v. Wheeler*, 435 U.S. 313 (1978); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).[39] Perhaps the most fundamental principle of the law governing the relationship between the United States and Native American tribes is the principle that the inherent powers vested in Native American peoples are "unique aggregations possessing attributes of sovereignty over both their members and their territory". *United States v. Mazurie*, 419 U.S. 544, 557 (1974).[40]

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39 Under the Indian Self-Determination and Education Assistance Act (ISDEA), as amended, (25 U.S.C. 450, *et seq.*) it is United States official policy to assure maximum Indian self-determination and participation in the direction of educational as well as other federal services to Indian communities, so as to render such services more responsive to the needs and desires of those communities. 25 U.S.C. 450a(a). The ISDEA directs the Secretaries of the Interior and Health and Human Services to enter into contracts or grants with Indian tribes and organizations to plan, conduct, or administer programs that the Secretaries are authorized to administer for the benefit of Indians. ISDEA, allows tribes great flexibility in administering their own programs and services with minimal federal governmental intervention. [Title III, Pub. L. Nº 100-472, 102 Stat. 2296 (1988)]. The participant tribes sign a *self-governance compact* with the government and are allowed to redesign Bureau of Indian Affairs programs and redistribute funding according to tribal priorities. [Pub. L. Nº 102-184, 105 Stat. 1278 (1991)]. In recent decisions, the U.S. Supreme Court has recognized the inherent right of tribes to tax non-Native Americans doing business within their territories, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Supreme Court has also upheld the right of tribal courts to make the initial determinations as to the scope of their own jurisdiction. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

40 "Federal Indian Law has obvious tangency to public international law. In 1994, a United States government delegation in Geneva expressed its "support for the basic goals of the [UN] Declaration [of Rights of Indigenous Peoples] and added that since the 1970's, the U.S. Government has supported the concept of self-determination for Indian tribes and Alaska natives within the United States". Anaya, James. *Indigenous peoples in International Law,* at 86 (1996). Said UN Draft Declaration codifies a related, but independent corpus of nascent self-determination law applicable to indigenous groups and minorities within established States. *See also: Explanation of vote* [against] *by Robert Hagen, U.S. Advisor,* on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly (released by the U.S. Mission to the United Nations, September 13, 2007): ("Under United States domestic law, the United States government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples. In our legal system, the federal government has

Additionally, if under the "Territories Clause" of the Constitution,[41] Congress enjoys so-called "plenary" legal power to act over certain non-state areas, as it is often expressed, it must surely equally possess unfettered power to act liberally.[42] Thus it can surrender or "dispose of", wholly or perhaps partially, and/or cede, delegate, relinquish, return, restore or recognize authorities and competences –sovereignty– to such non-state areas.[43]

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a government-to-government relationship with Indian tribes. In this domestic context, this means promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions. At the same time, the United States will continue its work to promote indigenous rights internationally"). <http://www.us-mission.ch/Press2007/0917RightsIndigenousPeoples.html>, <http://www.un.org/esa/socdev/unpfii/en/drip.html>.

41 The Territories Clause (art. IV, Sec. 3, cl. 2) establishes that "Congress shall have power *to* **dispose of** *and make* **all** *needful Rules and Regulations respecting the Territory* [of[the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State. [Emphasis provided.] This power, however should be understood as congressional power over federal non-movable real estate, land and terrain, not absolute power over human beings, let alone "peoples".

42 *See, for example,* Horey, Joseph. The right of self-government in the commonwealth of the Northern Mariana Islands, *4 Asian-Pac L & Policy J* 180, at 228 n. 151 (2003) ("It is one of the ironies of history that, while the intent of the Insular Cases was to provide flexibility for future imperial expansion, ... their effect in the [Northern Mariana Islands] has been to provide flexibility in the establishment of an autonomous island government".); Laughlin, Stanley, Jr. *The Law of United States Territories and Affiliated Jurisdictions* § 10:10 at 181 (Law Co-op 1995) ("Ironically, the [non] incorporation doctrine which originally legitimated popular desire to fulfill America's manifest destiny now provides the theoretical basis for assuring a large measure of territorial self-determination") *Cf. Boumediene v. Bush*, 553 U.S. 723 (2008). ("[…] the Court *devised in the Insular Cases doctrine that allowed it to use its power sparingly and where it would be most needed").*

43 "Some scholars have argued that the Insular Cases […] gave Congress *carte blanche* during the heady days of imperialist expansion, and now that broad license can repair the damage of a colonial legacy by authorizing a unique constitutional arrangement, this time purportedly in the interests of the people of Puerto Rico. In this way, goes the argument, the doctrine of territorial incorporation can promote self-determination instead of imperialism. As T. Alexander Aleinikoff puts it, "The infamous Insular Cases recognized the need for congressional flexibility in handling the unanticipated situation of Empire. When that flexibility is now, by mutual consent of metropole and colony, exercised to *restore* dignity and self-government, why should congressional power suddenly be read narrowly?". *For an opposing view, see:* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation, 72 Chi. L. Rev.* 797 (1993). *See also: Examining Board v. Flores de Otero*, 426 U.S. 572, 596-597

The U.S. Congress' constitutional and pre-constitutional[44] authority to fashion special governance mechanisms for non-state sovereigns within its jurisdiction is well understood, and was recently validated by the Supreme Court. In U.S. v. Lara, 541 U.S. 193 (2004), for example, Justice Breyer, speaking for the majority, recently stated that:

> […] Congress' statutory goal-to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State-is not an unusual legislative objective. The political branches, drawing upon analogous constitutional authority, have made adjustments to the autonomous status of other such dependent entities–sometimes making far more radical adjustments than those at issue here. See, *e.g.*, Hawaii-*Hawaii* v. *Mankichi*, 190 U.S. 197, 209-210 (1903) (describing annexation of Hawaii by joint resolution of Congress and the maintenance of a "Republic of Hawaii" until formal incorporation by Congress); Northern Mariana Islands-note following 48 U.S.C. § 1801 ("in accordance with the [United Nations] trusteeship agreement … [establishing] a self-governing commonwealth … in political union with and under the sovereignty of the United States"); the Philippines–22 U.S.C. § 1394 (congressional authorization for the president to "withdraw and surrender all right of … sovereignty" and to "recognize the independence of the Philippine Islands as a separate

(1976), ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union […] Congress *relinquished* its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States").

44 *See:* Fletcher, Matthew. Preconstitutional Federal Power, *82 Tul. L. Rev.* 509 (2007). <http://turtletalk.files.wordpress.com/2008/08/preconstitutional-federal-power.pdf>. The Supreme Court has recognized that the federal government enjoys pre-constitutional authority –authority not derived from the enumerated powers of the Constitution, but inherent authority derived from the very fact of national sovereignty–. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316, 318 (1936), *inter alia,* recognized that presidential authority in a foreign affairs context may be a "necessary concomitant [...] of nationality" that existed since before the ratification of the Articles of Confederation and the Constitution. The source of sovereign power derived not from the states "since the states severally never possessed international powers, [and] such powers could not [therefore] have been carved from the mass of state powers but obviously were transmitted to the United States from some other source". That source can be "the people". *Curtiss* then lends some support to the domestic legal viability of the concept of "inherent sovereignty of peoples" as a natural, pre-constitutional, aspect of *peoplehood.*

and self-governing nation"); Presidential Proclamation No. 2695, 60 Stat. 1352 (so proclaiming); Puerto Rico-Act of July 3, 1950, 64 Stat. 319 ("[T]his Act is now adopted in the nature of a compact so that people of Puerto Rico may organize a government pursuant to a constitution of their own adoption"); P.R. Const., Art. I, §1 ("Estado Libre Asociado de Puerto Rico"); see also *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank N.A.*, 649 F.2d 36, 39-41 (CA1 1981) (describing various adjustments to Puerto Rican autonomy through congressional legislation since 1898).

Furthermore, Congress can legitimize foreign affairs activities by the constituent parts of the federation, even though most of those constituent parts were never independent nations, –they were not 'externally' sovereign so as to act freely in the international arena–.[45] Under the "compacts clause", art. II sec. 10, of the Constitution Congress can *consent*[46] to state implemen-

45 Like many territories that went on to become states of the Union, jurisdictions such as Puerto Rico and the CNMI were never independent states (perhaps *de facto* 'sovereigns' under their aboriginal governments, but the *terra nullius* doctrine legally in force during colonization does not allow for such line of argument) before attaining their actual status. It does not follow, however, that they did not come to hold significant powers of self-government. For example, Puerto Rico came under the U.S. flag in 1898. But by that time, although haphazardly, had already achieved some self-rule and autonomy. Liberal Spanish Crown decrees had extended to Puerto Rico: male universal suffrage, and right to *full representation* in the Spanish Parliament by 1869. The Kingdom's Constitution's progressive bill of rights was extended to the people of Puerto Rico in 1873. In 1897 a relatively advanced 'Autonomic Charter' was extended to Puerto Ricans. It granted a local parliament composed of two chambers: the locally elected House of Representatives, and a 15-member Council of Administration, of which 7 members were royally appointed and the rest locally elected. The island had say in regional economic treaties. And the Autonomic Charter was not amendable except after official request of the Insular Parliament, by law. *See:* Trías, José. *Puerto Rico: the trials of the Oldest Colony in the World 9,* 16 (1997). Many yearn for that lost autonomy, which was a precursor to the current autonomy regimes in Spain, and a few are even discussing the merits of loyal Puerto Rico reunified with the Mother Country as the 18th Autonomous Community of the Kingdom, alongside Basque Country (Euskadi), Catalonia, Galicia, Andalusia and the rest. *See: generally,* draft essay by González, F. *Descolonizando a Puerto Rico en el siglo XXI: la opción española,* at <http://www.scribd.com/doc/18406476/Descolonizando-a-Puerto-Rico-con-su-reincorporacion-a-Espana-como-Comunidad-Autonoma->; <http://www.facebook.com/topic.php?uid=114620068551117&topic=46>.

46 The Supreme Court has also held that consent can be implied from congressional acquiescence (prior inaction, or *a posteriori* ratification), at least regarding interstate compacts that do not impermissibly encroach upon Federal Supremacy: *Poole v. Fleeger*, 36 U.S. (11 Pet.)

tation of traditionally federal prerogatives, such as foreign relations powers, and in some cases, U.S. states can even wage defensive war, without any congressional consent.[47] Congressional inaction can also be interpreted as acquiescence to agreements or compacts by U.S. jurisdictions with foreign States.[48] Congress can thus legally redistribute foreign relations powers bestowed to it by the People via the Constitution to other components of the Union. Congress holds authority, as delegated by the People, to partially restructure the allocation of competences in the U.S. Federation; the People's sovereignty is never abrogated, and in any case, it can be restored by Congress as per the Constitution.

5. Conclusion

Resolutions 2625, and related subsequent international legal instruments, open the largely imaginary conceptual lock regarding the alleged three-pronged road to licit self-determination and "decolonization". As inherently sovereign, peoples, not excluding those within the U.S. constitutional system, have the power and legal right to democratically convene and self-determine without prior authorization or "sovereignty transfer". Strict predetermined self-government formulae have no place within a modern international legal paradigm that explicitly allows for creative answers to case-specific situations and political aspirations. As such, self determination can be viewed as an ongoing pursuit by a people of progressively higher echelons of civilization as it democratically deems fit, and the concomitant obligation of all other peoples and States to respect that aspiration and pursuit. The *fourth option* is not really a "status formula" in the old 1960s sense: in its modern form

185, 209 (1837); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 85-87 (1823); *Virginia v. West Virginia*, 78 U.S. 39 (1878); *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

47 Art II Section 10. "[...] No *state* shall, *without the consent of the Congress*, [...] enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay". *See: Holmes v. Jennison*, 14 Pet. 540 (1840); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

48 One author expresses: "States have always had an effect on U.S. foreign relations [even without express Congressional consent], and they are now bolder than ever. Some state activities sound exactly like diplomacy. In addition to symbolic political ties and routine economic transactions, states establish offices overseas, launch trade and investment missions, sign bilateral and multilateral agreements, and participate in international summits. [...]".Swaine, Edward. Negotiating federalism: state bargaining and the dormant treaty power, *9 Duke L.J.* 1127, 1130, 1131, 1138, 1278 (2000).

it is the legal corpus of the fact that politically and democratically possible status arrangements might be just as diverse as the peoples in concern themselves, in their collective pursuit of life, liberty and happiness, freely determine.

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