Symmetry and Asymmetry in American Federalism

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The United States is usually seen as a symmetrical federal system. The original thirteen states each exercised the same powers and enjoyed the same representation in the Senate, and the U.S. Constitution guarantees that all states subsequently admitted to the Union join on an equal footing, with the same powers, representation, and prerogatives as the original thirteen. Article IV, section 3 of the Constitution, in empowering Congress to admit new states to the Union, does implicitly authorize it to establish the conditions under which they will be admitted. Acting under that authority, Congress inserted conditions as to the substance of state constitutions in the enabling acts by which it empowered prospective states to devise constitutions and apply for statehood. When state constitution-makers failed to meet those conditions or inserted provisions of which Congress or the President disapproved, they were able to block legislation admitting the state until the offending provisions were altered or removed. However, once states were admitted, they were free to resurrect the offensive provisions, as Arizona did with a provision authorizing the recall of judges.[1] Thus, newly admitted states enjoy the same discretion in constitutional design and in policy development as is available to all other states. Supreme Court rulings have confirmed their equal status, noting that any attempt by Congress to impose restrictions on a new state that deprive it "of any of those attributes essential to its equality in dignity and power with other States" would violate the Constitution.[2]

This understanding of the American federal system as symmetrical suffices, however, only if one restricts one's attention to the fifty states.[3] But both historically and currently the country has included component units whose competencies and functions differ from those of the states. These units include: (1) the nation's capital city, the District of Columbia; (2) Native American tribes, almost 600 of which have been recognized by the federal government;[4] (3) territories that were expected at some point to become candidates for statehood; and (4) territories that are expected to remain permanently in a lesser association with the American polity. The first three of these asymmetrical relationships were contemplated by the Constitution, which provides guidance as to the status of these units, the political powers they exercise, and the legal position of their residents. The legal status of the fourth category of component units is not expressly addressed in the Constitution, and some scholars have argued that it is incompatible with the overall constitutional design.[5]

The status of the four types of non-state component units is defined not only by the federal Constitution but also by federal statute, and in the case of Native American nations and some long-standing territories, by agreements between the federal government and those component units. Given the crucial role played by non-constitutional legal materials, it is perhaps not surprising that the status of these various non-state units has altered over time, in response to shifts in political perspective and in political power. The legal status and rights of those residing in these component units has likewise changed. This paper describes the current status of America's non-state component units, analyzes the factors that have prompted shifts in their status over time, and through a comparison of their status with that of the American states, highlights the implications of this asymmetry for American federalism. It also considers

problems that plague efforts to reconcile this diversity of federal arrangements with the federal Constitution and with prevailing political values in the society. To provide a baseline for comparison, this paper first reviews the constitutional status of the American states and of their citizens.

States and Their Citizens in the American Constitutional Order

The federal Constitution safeguards the position and powers of the American states. It protects state power first of all by conferring only limited powers on the federal government, and the Tenth Amendment confirms that all residual powers not prohibited to the states by the Constitution "are reserved to the States respectively, or to the People." Although the scope of federal power increased dramatically during the twentieth century, since the 1990s the U.S. Supreme Court has displayed a renewed interest in safeguarding state power and prerogatives and in curtailing federal overreaching.[6] Article VI, section 3 of the Constitution also grants extraordinary protection to the territorial integrity of the states, forbidding tampering with state boundaries not only by congressional legislation but also by the normal processes of constitutional amendment. The Constitution further secures to the states a role in the selection of federal officials and in the processes of the federal government. Initially, state legislatures selected senators, and even after the Seventeenth Amendment (1913) replaced this mechanism with popular election, the states still enjoy equal representation in the Senate. They also play a role in the Electoral College that selects the president. And as long as they do not discriminate on the basis of race, gender, or other factors, the states set eligibility requirements for voting in both national and state elections.[7] Finally, as Article V indicates, constitutional amendments require ratification by three-quarters of the states, so that the federal balance established in the Constitution cannot be altered without the concurrence of an extraordinary, geographically dispersed majority of the states.

Under the Constitution's system of dual citizenship, those born in the United States or naturalized are citizens of the United States as well as of the states in which they reside. Article IV, section 2 of the Constitution guarantees to "the Citizens of each State . . . all Privileges and Immunities of Citizens in the several States." Article IV, section 4 promises them "a Republican Form of Government." Finally, the Bill of Rights guarantees them a number of important rights, and Supreme Court rulings have gradually made almost all the safeguards of the Bill of Rights applicable to state, as well as federal, invasions of rights.[8]

The District of Columbia

Some federal systems locate the nation's capital in the country's major city and make that city a city-state, granting it the same status and powers as other component units of the federal system.[9] A prime example is Moscow, which has the status of a subject of the Federation and powers commensurate with that status. Some federal systems—for example, Canada and Switzerland--have chosen less prominent cities as their capitals, and these cities remain part of larger territorial units and thus subject to the control of those units, as well as of the federal government. The danger with such an arrangement is "that the government of the state or of the

capital city may interfere with the proper functioning of the central government."[10] To avoid this difficulty, the United States created an entirely new city as its capital, and it removed that city from the jurisdiction of the existing states. Article I, section 8, clause 17 of the Constitution confers on Congress the power “to exercise exclusive legislation in all cases whatsoever” within the District.

The subordination of the District of Columbia to Congress underscores the District's distinctive status in American federalism. The American states exercise all powers not granted to the federal government or prohibited to them by the federal Constitution, and they do so without continuing federal oversight. These powers include the right to devise and operate their own systems of government, subject to constraints found in the federal Constitution. In contrast, the grant to Congress of "exclusive legislation" in the District has been interpreted to mean that local political authorities in the District can exercise only those powers expressly delegated to them by Congress, and that Congress can intervene whenever it wishes to veto the actions of District political officials.[11] Indeed, the very existence of the District's local government and the form that it takes are dictated by Congress.

During the first half of the nineteenth century, the District of Columbia enjoyed considerable home rule. Initially, this home rule was only partial: voters elected a twelve-member council, but the District’s mayor was appointed annually by the President. However, in 1812, the appointment of the mayor was vested in the popularly elected council, and in 1820 appointment of the mayor was replaced by popular election.[12] This system continued until 1871, when in the wake of financial scandals involving District officials, Congress effectively terminated self-government in the District. In 1871 it altered the system of self-government by providing for a governor and an eleven-member Board of Public Works, both appointed by the President, together with a twenty-two-member House of Delegates elected by voters. Three years later, Congress replaced this system with a temporary three-member commission, whose members were all appointed by the President, and in 1878 it made the commission system permanent, thus eliminating all election of public officials in the District. Numerous factors contributed to these changes, including racial prejudice. Slavery was abolished in the District in 1862, and by 1866 more than 30,000 ex-slaves had made their way to Washington, D.C. This influx, plus the extension of the vote to African Americans, ensured considerable black influence on the government of the District, and prompted a reaction by white officials.

Representative government did not return to the District until the 1970s. In 1967, frustrated by Southern and conservative resistance to reintroducing “home rule” in the District, President Lyndon Johnson used his reorganization authority to revamp the city government, replacing the three-member council with a single commissioner and a nine-member council appointed by the President. This separation of legislative and executive powers, together with a council more representative of the diversity of the District, was viewed as a step toward home rule. In 1973 Congress adopted a home-rule statute, with strong support from African-Americans and from the Democratic Party more generally. The statute provided for a mayor and a thirteen-member council, all elected by popular vote, the first elected local government within the District for almost a century.[13] This new government’s authority was broad but not

comprehensive—for example, it was prohibited from enacting an income tax on non-residents working in the District and from making any changes in the existing criminal code. Also, no council action could take effect until thirty days after enactment, so that Congress would have an opportunity to review and veto it. Although this veto power has been using sparingly, the threat of a veto undoubtedly affects the political calculations of council members considering legislation.

Yet in one important respect the District of Columbia's relationship to the federal government differs from that of states to the federal government. State governments can influence the federal government, because they enjoy political representation in those governments. Each of the fifty states has two senators and has representation in the House of Representatives based on its population. In contrast, the District of Columbia has no voting representation in the federal government. Because the Constitution prescribes that only states have congressional representation (Article I, section 8, paragraph 17), the political status of the District of Columbia cannot be changed except by constitutional amendment. The Twenty-third Amendment, ratified in 1961, marginally enhanced the political power of District residents, empowering them to vote in presidential elections and awarding the District the same number of votes in the Electoral College as it would have were it a state. But more dramatic efforts to eliminate the asymmetry have failed. In 1978, Congress proposed a constitutional amendment to give the District voting representation in Congress, but the amendment languished, securing ratification by only sixteen state legislatures prior to expiration of the seven-year ratification period.[14] Small wonder, then, that the slogan on license plates in the District of Columbia remains “taxation without representation.”[15]

Native American Tribes

The Europeans who came to North America adopted contradictory positions on the status of Indian nations. On the one hand, they recognized the tribes as sovereign entities by entering into treaties with them, and they acknowledged tribal property rights by purchasing land from them. On the other hand, they denied tribes the status of nations by purporting to have "discovered" an unoccupied continent, and they rejected Indian property rights by laying down claims to possess and rule the land that they "discovered."[16] This ambivalence about the status of Indian nations has persisted to the present day.

Constitutional Foundations

When the American colonies declared their independence, the United States inherited the problem of how to relate to Indian tribes. The Articles of Confederation, the nation's first constitution, assigned Congress the responsibility for "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated" (Article IX, section 1). The federal Constitution of 1787 vested the power to deal with Indian tribes in the federal government exclusively.[17] Indeed, eleven Western state constitutions contain "disclaimer provisions," inserted as a condition for their admission to the Union, that expressly acknowledge their lack of

authority over Indian tribes.[18] The most direct grant of federal authority is found in the Commerce Clause (Article I, section 8, paragraph 3), which gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This clause reveals the distinctive position of tribes within the governing scheme--they are not simply foreign nations (otherwise inclusion of "with the Indian Tribes" would be redundant), but commerce with them is not simply domestic commerce either (otherwise, it would fall under "among the several States"). The only other mention of Indians occurs in the formula for apportionment of representation and direct taxes (Article I, section 2, paragraph 3), which excludes "Indians not taxed" from the population base. This rather obscure phrase, which reappears in the Fourteenth Amendment's discussion of representation (section 2), acknowledges Indian nationhood, at least obliquely. For it implies that Indians who were taxed, who had assimilated and become part of the American body politic, should be represented in government; whereas those who were not taxed would not be represented, because they were not part of the United States, but instead members of another nation. Other constitutional grants and prohibitions, although not focusing directly on relations with Indian tribes, confirm that such relations are exclusively the domain of the federal government. For example, agreements between the United States and tribes often take the form of treaties, and the Constitution both awards the treaty power to the President with the advice and consent of the Senate (Article II, section 2, paragraph 2) and prohibits states from entering into treaties (Article I, section 10, paragraph 1). The Constitution's reaffirmation of previously negotiated treaties (Article VI, section 1) is particularly important, because most of these treaties were with Indian tribes, thereby confirming that tribal sovereignty predated the Constitution and continued after its adoption. Similarly, Congress is given sole authority to govern territory belonging to the United States (Article IV, section 3, paragraph 2), thus enabling it to set rules for areas within the borders of the United States claimed by and occupied by Indian tribes, a power enhanced by the cession of state territorial holdings to the federal government. And, of course, the power to conduct military operations against external foes lay with the federal government (Article I, section 8, paragraph 11), as did the power to protect states against violence arising within their borders (Article IV, section 4).

Yet if the Constitution makes clear the federal government's exclusive authority to deal with Indian nations, it does not clarify the scope of federal power over those nations nor what powers (if any) they retain. Although such a constitutional division of authority is crucial in safeguarding the political rights of component units in federal systems, this omission is hardly surprising. Insofar as tribes were analogous to foreign nations, there was no reason for the Constitution to define their powers, any more than there was for the Constitution to have defined the powers of France or Great Britain. And whereas the Constitution needed to address the respective spheres of the federal and state governments, because its major aim was to reallocate powers between nation and state, it did not need to define the scope of tribal powers, because those powers were "both preconstitutional and extraconstitutional."[19] Only when the status of the tribes shifted from rough equals to "internal dependent nations" did the respective spheres of the federal government and tribes--or, put differently, the extent of tribal self-government free from federal direction or intrusion--emerge as a major issue.[20]

Self-Determination

Perhaps the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination--the power to determine the fundamental character, membership, and future course of their political society. The right of self-determination of tribal nations is inevitably limited by their "internal, dependent" status, but it is not effaced. As Chief Justice John Marshall noted in *Worcester* v. *Georgia*, "a weak state, in order to provide for its safety, may place itself under the protection of one more powerful, *without stripping itself of the right of government, and ceasing to be a state.*"[21] Moreover, Marshall insisted that this dependent status, together with the surrender of territory by Indian nations, imposed a fiduciary obligation upon the federal government.

This "trust relationship" appeared to promise the tribes federal support and protection. However, during the late nineteenth century, the promise of protection became a power to direct and control, based on claims of Indian incompetence and an insistence that it was in the Indians' interest to abandon their traditional ways of life and become "civilized." Thus, Congress sponsored efforts to assimilate Indians by supporting Christian missionaries seeking to convert and "civilize" the Indians, by banning tribal rituals, and by educating Indian youth at boarding schools so as to root out tribal customs and practices.[22] Congress also attempted to eliminate tribal patterns of communal land ownership, and it largely replaced tribal self-government with administration by the Bureau of Indian Affairs. In *United States* v. *Kagama* (1886) and *Lone Wolf* v. *Hitchcock* (1903), the Supreme Court upheld the extension of congressional power.[23] Speaking for the Court in *Kagama*, Justice Miller characterized the tribes as "the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights."[24] From this he concluded that Congress had plenary power to “protect” tribes, transforming the trust relationship from a shield for the tribes into a weapon for the federal government.

With the enactment of the Indian Reorganization Act in 1934, federal policy shifted from assimilation to Indian self-determination through the revival of tribal governments. During the 1950s, policy shifted again, this time toward "termination," that is, the unilateral ending of the special relationship between tribes and the federal government. During the presidency of Richard Nixon (1969-1974), policy shifted back once more to self-determination, and more recent presidents have followed Nixon's lead, at least rhetorically, in championing self-determination, reemphasizing the trust relationship, and repudiating termination.[25] Nevertheless, the prevailing case law recognizes no constitutional limits to congressional power to act as trustee for Indian nations, and thus the tribes' right to self-determination seems a matter of congressional grace rather than a matter of right, subject to the vagaries of policy shifts.

Authority Over a National Territory

During the late eighteenth and early nineteenth centuries, the American desire to expand beyond the Atlantic coastline collided with Indian territorial claims. Initially, the purchase of land from Indian nations helped finesse the question of ownership.[26] But the American appetite

for expansion soon outran the tribes' willingness to relinquish their holdings, and thus the question of Indian land rights could not be avoided. The Supreme Court under John Marshall outlined a doctrine of limited tribal land rights. In *Fletcher* v. *Peck* (1810), it argued that tribes possessed a "right of occupancy" rather than full title to the land, although tribal consent was nonetheless required before the right of occupancy was extinguished.[27] Elaborating in *Johnson* v. *McIntosh* (1823), it concluded that the tribes' "power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle [of] discovery."[28]

Subsequent congressional legislation diminished even this limited tribal authority over the disposition of Indian lands. In 1887 Congress enacted the Dawes Act, which provided for allotment of tribal lands in severalty to individual Indians and the sale of surplus lands to white homesteaders. Whatever the motivations underlying the Dawes Act–and these ranged from the conviction that Indian progress required individual ownership of land to the desire to open Indian land to non-Indians– its effects were disastrous. Before this policy was abandoned, federal sale of "surplus" lands plus the sale of holdings by individual Indians reduced tribal land from 138 million acres to 52 million acres. The loss of communal control over land and its use also undermined the authority of tribal governments. By opening the reservations for settlement by non-Indians, it destroyed close-knit tribal communities, jeopardized the separate development sought by Indian nations, and undermined their efforts to maintain traditional lifestyles. From a practical standpoint, the fact that reservations included large numbers of non-Indian residents--in some instances even a majority of the reservation population--complicated the tribes' exercise of political and judicial jurisdiction. As Charles Wilkinson has noted, "With the land base slashed back once again and with strange new faces within most reservations, tribal councils and courts went dormant. The BIA [federal Bureau of Indian Affairs] moved in as the real government."[29]

Authority to Institute a Government

Indian nations had instituted their own governments prior to the European colonization of North America, and they never surrendered their authority to create and re-create their political institutions. The federal Constitution does not restrict the form that those governments take: whereas it mandates that state governments be "republican," it imposes no such requirement on tribal governments.[30] But in practice, by the late nineteenth century the BIA had largely displaced traditional Indian governments as the effective governing authority in Indian country. To reverse the transformation of Indian nations from self-governing peoples to administered subjects, Congress in 1934 adopted the Indian Reorganization Act (IRA), which sought to reinvigorate Indian self-government by encouraging tribes to draft constitutions. Yet even under the IRA the scope of tribal authority was limited. If a tribe voluntarily subjected itself to the IRA (and most tribes did), it was obliged to submit its constitution for approval by the BIA, and any subsequent amendment or revision of the constitution was also subject to BIA approval.

Authority to Conduct Foreign Affairs

One attribute of nationhood is the power to enter into agreements with other sovereign nations through government-to-government negotiations. Since Independence, Indian tribes

have entered into almost 400 treaties with the United States; and after 1871, when the United States formally renounced treaty-making with tribes, it continued to negotiate bilateral agreements ("treaty substitutes") that were approved by both houses of Congress.[31]

However, as Chief Justice Marshall indicated in *Johnson* v. *McIntosh*, the doctrine of discovery, under which the European colonizers claimed title to territory occupied by Indian tribes, diminished the treaty-making authority of Indian nations.[32] One element of the doctrine of discovery was that the European power that discovered and occupied a territory gained exclusive title to the land. The country that held title could transfer the land to another country, as Britain did in ceding territory to the United States at the conclusion of the Revolutionary War. However, the Indian tribes, as mere occupants of land under the authority of one sovereign, could not transfer it to the authority of another sovereign. Thus, although Indian nations could enter into agreements to dispose of land they occupied, the doctrine of discovery decreed that they could only dispose of their holdings to the country that held title to the land. Indeed, as Marshall explained, the limit on Indian treaty-making went beyond the conveying of land:

> They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[33]

At the beginning of the twentieth century, the Supreme Court in *Lone Wolf* v. *Hitchcock* undermined the authority of even those treaties that tribes were permitted to negotiate.[34] Rejecting a challenge to congressional action in violation of a treaty, the Court concluded that Congress could unilaterally abrogate treaties with Indian tribes by subsequent legislation, because it had "plenary power" in Indian affairs. This ruling in effect made U.S.-tribal treaties binding only on the contracting tribe. In addition, *Lone Wolf* insinuated that even when Congress enacted general regulatory laws that did not specifically mention tribes, these laws might be interpreted to override treaty commitments by implication, thereby jeopardizing tribal prerogatives. In recent years the federal judiciary has sought to avoid this result by reading statutes in the light of the special trust relationship between tribes and the federal government, as well as in light of the federal commitment to tribal self-government. Thus, it has generally refused to abrogate treaty rights in the absence of explicit statutory language indicating a congressional intent to do so.[35]

Authority to Administer Justice

Self-government includes the power to administer civil and criminal justice within the boundaries of the political society. Indeed, according to one scholar, this jurisdiction represents "the cornerstone of tribal sovereignty."[36] For Indian tribes, however, this power is limited. For cases exclusively involving tribal members, tribes for most of the nineteenth century retained criminal and civil jurisdiction. Thus in 1883 in *Ex Parte Crow Dog*, the Supreme Court

recognized the exclusive power of tribes to make criminal laws and punish Indians who committed crimes against other Indians in Indian territory.[37] For cases involving non-Indians or members of other tribes, the United States and Indian nations by treaty apportioned jurisdiction between their sets of courts. The Choctaw and Chickasaw Treaty of 1866, for example, gave those tribes both civil and criminal jurisdiction over non-Indians as well as Indians within their territory.[38]

Since the late nineteenth century, however, tribal authority to administer justice has come under attack. Congress responded to *Crow Dog* by enacting the Major Crimes Act (1887), which withdrew tribal jurisdiction over major crimes (such as murder, rape, and robbery) regardless of whether the victim and/or the alleged perpetrator was an Indian, placing this jurisdiction in the federal courts.[39] That same year, the Secretary of the Interior created Courts of Indian Offenses under the Bureau of Indian Affairs, which were designed to replace traditional Indian courts. In 1953 Congress adopted Public Law 280, which authorized six states--Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin--to exercise criminal and civil jurisdiction in Indian country and authorized other states to likewise assume jurisdiction.[40] Acting on that invitation, nine additional states had claimed jurisdiction under Public Law 280 before Congress amended the Act to require tribal consent for state assumption of jurisdiction.[41] In the Indian Civil Rights Act of 1968, Congress restricted the authority of tribes to develop their own standards of due process by extending various guarantees of the Bill of Rights--including most of the Fourth, Fifth, and Sixth Amendments--to Indian country. It also limited the jurisdiction of tribal courts to sentences not exceeding one year's imprisonment and a $5,000 fine or both.[42] Finally, in *Oliphant* v. *Suquamish Indian Tribe* (1978), the Supreme Court ruled that Indian nations have no general criminal jurisdiction over non-Indians even in Indian country.[43]

Territories on the Road to Statehood

At the time the Constitution was adopted, the United States owned substantial territory outside the thirteen original states, and during the nineteenth century it acquired additional territory by purchase (e.g., the Louisiana Purchase and Alaska), by annexation (e.g., Texas and Hawaii), and by war (e.g., California and much of the American southwest). For those territories within the continental United States, the expectation was that they would become states once they had a sufficient population to qualify for statehood.[44] Thus, the asymmetry implicit in their non-state status was viewed as a temporary disability, to be cured with admission to the Union. With this in mind, Congress authorized the creation of elected legislatures in the territories as soon as their population warranted it, believing that this experience in self-government was a useful preparation for statehood.

Congress's power to create territorial legislatures rested on Article IV, section 3 of the Constitution, which gives Congress general legislative authority over the territories, empowering it to "make all useful rules and regulations" for them.[45] The Supreme Court has held that Congress's authority over federal territories is "general and plenary" and that Congress has "full and complete legislative authority over the people of the territories and all the departments of the

territorial government."[46] Thus, as with the District of Columbia, congressional delegations of power determined the degree of self-government exercised in the territories prior to statehood, and that power—once given—could in principle be withdrawn. As the Supreme Court noted in *Thompson* v. *Utah*, Congress can make "a void act of the Territorial legislature valid, and a valid act void."[47]

However, congressional power over territorial inhabitants was not unlimited, as Congress could not invade their constitutional rights. As the Supreme Court noted, "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies . . . to be ruled and governed at its own pleasure [or] governed by Congress with absolute authority."[48] Birth in the territories conferred United States citizenship, and the rights of territorial residents included all rights enjoyed by citizens of the United States, except those rights tied to residency within a state. They thus had the protections of the Bill of Rights, but not the right to elect members of the House of Representatives. This was not a problem for territories that were incipient states, but it proved more controversial for territories that were not candidates for statehood and remained in a position of permanent subordination.

Territories Not on the Road to Statehood

Although territories within continental North America were candidates for statehood, expectations as to the eventual status of those non-contiguous territories acquired at the turn of the twentieth century (e.g., Hawaii, Puerto Rico, and the Philippines) were less clear. And in fact, the outcomes varied, with Hawaii being admitted as a state, Puerto Rico eventually being accorded "commonwealth" status, and the Philippines being granted independence after World War II. During the last 150 years, the United States has also acquired various other offshore territories, such as Guam, the Northern Marianas Islands, the U.S. Virgin Islands, and American Samoa. The relations between these territories and the federal government vary considerably, as does the legal status of those residing in them. None of these island territories has representation in Congress, and their residents cannot vote in American elections. The residents of some territories have American citizenship, but those in other territories do not. Even those with American citizenship do not necessarily enjoy the full protections of the Bill of Rights. The anomalies reflect the absence of clear constitutional guidelines for the government of these territories, which leaves things to be decided by congressional legislation. As will be seen, the legal position of those territories not on the road to statehood raises serious questions from a federalism perspective.[49]

Puerto Rico

The most important of these offshore territories is Puerto Rico, which the United States acquired in 1898 in the Treaty of Paris that concluded the Spanish-American War.[50] Article IX of the treaty confirmed that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."[51] The scope of this congressional power was soon challenged in *Downes* v. *Bidwell* (1901), the most famous of the so-called Insular Cases and the one that established the framework for congressional and

judicial thinking about the nation's island territories and the rights of their inhabitants.[52]

At issue in *Downes* was the constitutionality of a congressional statute that imposed a duty on goods from Puerto Rico. In challenging the statute, Downes argued that it violated the Constitution's "uniformity clause" (Article I, section 8, paragraph 1), which requires that "all Duties, Imposts, and Excises shall be uniform throughout the United States." Because no duties would have been charged on goods originating elsewhere in the United States, Downes argued, Congress could not impose a duty on Puerto Rican goods. But the Supreme Court disagreed. The uniformity clause did not apply, a five-member majority insisted, because Puerto Rico was not part of the United States. Rather, in contrast to states or the territories on the North American continent, it was an "unincorporated" territory; and for such territories, the justices held, Congress had discretion as to whether or not to extend the full protections of the Constitution, including the guarantees of the Bill of Rights. In this instance it had simply chosen not to extend such protection. More generally, the Court concluded that the status of these unincorporated territories—and of their inhabitants--rested entirely with Congress. Congress could extend American citizenship to those born in unincorporated territories, or it could withhold it. It could place an unincorporated territory on the road to statehood, grant it independence, or—as Chief Justice Fuller noted in his dissent—"keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[53] *Downes* thus established a new type of federal relationship in that Puerto Rico—and other unincorporated territories—were treated differently from the District of Columbia, from Indian nations, and from territories on the road to statehood.[54]

Although the legal theory enunciated in *Downes* remains settled law, the degree of self-rule accorded Puerto Rico has changed over time. In 1900 Congress established a government in which the executive and upper house of the legislature were appointed by the President and the lower house elected by Puerto Rican voters. In 1917 it extended United States citizenship to Puerto Ricans. In 1950 Congress enacted a statute authorizing a "compact" between the United States and Puerto Rico, under which the island would adopt a constitution acceptable to Congress and assume "commonwealth" status. Under the compact that proceeded from this legislation, residents of Puerto Rico exercise broad powers of self-government, although control over the island's foreign policy remains with the United States. Like other territories, Puerto Rico and its residents remain subject to federal legislative and executive processes. The Supreme Court has ruled that Congress has the powers to grant, or withhold constitutional guarantees from Puerto Rican residents and can treat them differently from residents of the American states in dispensing benefits or imposing burdens.[55] Thus, Puerto Rico benefits from exemptions on federal taxes, but is burdened by restrictions on the amount of refined sugar that it can export to the United States market and on the welfare payments its residents receive from the federal government.[56] Although they are United States citizens, residents of Puerto Rico cannot vote in federal elections. In *Igartua de law Rosa* v. *United States* (2000), a federal district court invalidated this restriction, but that ruling was quickly reversed by a federal court of appeals.[57]

Initially, plebiscites in Puerto Rico endorsed the island's intermediate status between statehood and independence. In a 1967 plebiscite, 60.5 percent of voters chose the

commonwealth option, 38.9 percent statehood, and less than 1 percent independence; and in 1993, 48.6 percent favored the commonwealth option, 46.3 percent favored statehood, and only 4.4 percent chose independence.[58] However, in a 1998 plebiscite, less than 1 percent endorsed the status quo, with 46.6 percent favoring statehood, and 50.3 percent choosing "none of the above." This last alternative was in fact understood as an endorsement of an "enhanced" commonwealth status, nowhere listed on the ballot, under which the island would have greater sovereignty than a state, including control over immigration and foreign trade and a power to nullify the operation of federal laws on a case-by-case basis. Under this option, Puerto Rico would forego the advantage of representation in Congress in order to obtain greater autonomy and a permanent association with the United States, confirmed by a compact alterable only by mutual consent. This quasi-confederal arrangement has not been endorsed by the United States Congress, however, and there is serious question about its compatibility with the Constitution. For one thing, the Constitution specifies the range of potential relationships between the federal government and component units of the federation; for another, it does not countenance treaties between the federal government and component units of the federation.[59]

Other Territories

A quick review of the political status of the other territories under U.S. control—American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands—reveals that many of the same issues that have arisen in Puerto Rico's relationship with the United States have surfaced in these other territories as well.[60]

American Samoa

The United States acquired title to American Samoa as part of the Washington Convention of 1899, an agreement among Germany, Great Britain, and the United States dividing up islands in the Pacific. Like Puerto Rico, Samoa is classified as an "unincorporated" territory, but its inhabitants are "American nationals" rather than American citizens. Were the American Constitution to be fully applied in the island, its requirement of a republican form of government would conflict with local customs and laws relating to political rule, and its equality guarantees with legal preferences for native Samoans. Indeed, American citizens from outside Samoa cannot even enter the territory without permission from the local government, and permanent residence for non-Samoans is extremely difficult to obtain.[61] Congressional policy toward the island has been characterized as a "contradictory mixture of benevolent paternalism directed at educating and reforming on the one hand, and a protectionistic, conservative attempt to preserve the Native ties to the land and way of life on the other."[62] What is clear, however, is that this policy is neither rooted in the Constitution nor based on a formal expression of the will of the Samoan populace.

Guam

Spain ceded Guam to the United States as part of the Treaty of Paris in 1898. When Congress adopted the Organic Act of 1950, the people of Guam became citizens of the United

States. However, as in other territories, this citizenship does not carry with it full political rights. Guamanians cannot vote in presidential elections, elect representatives in Congress, or serve on juries. The island's residents have sought commonwealth status, such as is enjoyed by Puerto Rico and the Northern Marianas Islands. But their efforts to obtain it have foundered on their insistence on a compact alterable only by mutual consent (echoing the Puerto Rican demand for "enhanced" commonwealth status) and on local control over immigration to the island. Further complicating the status of the island has been a local effort to limit participation in a plebiscite to determine Guam's future to Chammaros, the indigenous people of the island.

Northern Marianas Islands

In 1947 the United Nations placed the Northern Marianas Islands, along with other Pacific islands, under the trusteeship of the United States. In 1975 the inhabitants of the islands voted in favor of becoming an American commonwealth and negotiated a more permanent arrangement with the United States. The compact creating the commonwealth awarded American citizenship to the inhabitants of the Marianas. It also acknowledged the supremacy of federal laws applicable to the islands, while securing to the people of the islands a "right of local self-government" over "internal affairs in accordance with a Constitution of their own adoption."[63] Among these internal affairs are presumably immigration and workers' salaries, as the compact expressly indicates that federal provisions on immigration and on the minimum wage will not apply without mutual consent. Officials within the Northern Marianas have argued that the compact limits congressional authority over the islands beyond these specific matters, but this argument—which resembles Puerto Rico's argument for "enhanced commonwealth" status--has not proved persuasive.

U.S. Virgin Islands

The United States purchased the Virgin Islands from Denmark in 1917, without any opportunity for the inhabitants of the islands to voice their approval or disapproval of the transfer of authority. Residents of the islands were awarded United States citizenship in 1927, but this did not secure them full political rights as long as they remained on the islands. Although the Organic Act of 1936 granted them limited local self-government, they cannot vote in presidential elections, elect representatives in Congress, or serve on juries. The Organic Act of 1954 formally confirmed the islands' status as an "unincorporated" territory, meaning that not all federal laws or all parts of the Constitution apply in the islands. Less than one-third of the islands' residents voted on an oft-postponed referendum to consider the status of the islands, and it appears likely that the Virgin Islands will continue in their present status for the foreseeable future.

Analysis

This paper's description of the asymmetrical elements in American federalism leads to several observations.

The Impetus for Asymmetry

Asymmetry in federal systems is usually introduced to take account of differences in geographical position, politico-social structure, and/or ethnicity among the component units.[64] In the case of the United States, these factors have all played a role. Geographical position mattered in the case of island territories; differences in style of life and traditional forms of governance influenced the treatment of Indian tribes; and differences in ethnicity affected the status of Puerto Rico and other islands. However, typically--particularly in multi-ethnic federations--it is the component units that seek distinctive (asymmetrical) arrangements as a means of recognizing and accommodating diversities. In the United States, in contrast, the asymmetrical arrangements were devised by and imposed by the federal government, and these steps were taken to serve national objectives, not the distinctive needs of the component units. Thus the creation of the District of Columbia ensured that the national capital would not be under the influence or control of a state. And the constitutional provisions dealing with Native American tribes enabled the federal government to deal with a problem not of its own creation, namely, the existence of internal, dependent nations within the country's borders. The constitutional provisions for territorial government established an orderly procedure whereby sparsely inhabited territories could be governed until population growth qualified them for statehood. And the asymmetrical arrangements devised for Puerto Rico and other island territories were instituted because the federal government did not wish to accord them and their inhabitants the same status enjoyed by territories and American citizens on the North American mainland.

Although there have been some unsuccessful efforts by component units to craft asymmetrical relationships (e.g., the campaigns for enhanced commonwealth status in Puerto Rico, Guam, and the Northern Marianas), asymmetrical federalism in the United States has been asymmetry from the top. The autonomy enjoyed by component units has always been a gift of the federal government, not a matter of legal entitlement.

The Importance of Legal Safeguards

One obvious lesson of the history recounted in this paper is that if one wishes to secure some measure of autonomy for component units, it is not enough to rely on the good faith of the federal government. Constitutional protections for such autonomy are vital. These protections might take various forms. One possibility is that component units might be accorded representation in the councils of the federal government, so that their concerns could be voiced and their needs addressed in federal legislation. Thus, in the United States, state governments were directly represented in the Senate, at least until the Seventeenth Amendment replaced election by state legislatures with direct popular election. Even now the argument in the United States for limited judicial review of federalism disputes rests in part on the purported adequacy of the Senate as a political guarantor of state interests.[65] As we have shown, Indian tribes have no representation in the federal government, perhaps in part because of their anomalous constitutional position: they are not simply component units but also national entities. Similarly, neither the District of Columbia nor American territories enjoy representation in Congress. Lack

of a voice in the councils of the federal government means that these component units cannot protect their interests directly but must reply on the support of political allies, which is not always forthcoming.

A second form of constitutional protection for the autonomy of component units involves *express* recognition of that autonomy: the powers of component units could be constitutionalized. These constitutional protections may be only "parchment barriers," but they can serve as a deterrent to federal invasions of powers, and they can provide a basis for judicial enforcement of constitutional limits.[66] In the United States, constitutional guarantees of state authority have helped the states maintain their vitality despite the expansion of federal power. In contrast, the Constitution expressly recognizes that congressional authority over the District of Columbia and over American territories is plenary. And the absence of guarantees of tribal authority in the federal Constitution has buttressed the conclusion that congressional power over the tribes is likewise plenary. This in turn has encouraged the federal government to invade tribal prerogatives, sometimes to serve the interests of the non-Indian citizenry but often to "civilize" or "protect" the Indian population.

This expansion of federal authority in turn highlights a third form of constitutional protection, namely, the power of component units to consent to--or refuse to consent to--changes in their legal relationship with the federal government. The American states have that power, and thus constitutional amendments divesting them of powers have been rare. In contrast, tribes, territories, and the District of Columbia lack that constitutional safeguard, and thus fluctuations in the power they have exercised have depended exclusively on the political perspective of the federal government. The abortive campaigns by political forces in Puerto Rico and other islands for "enhanced" commonwealth arrangements, in which compacts between the United States and component units could not be unilaterally breached by either government, reflect a recognition of the importance of this factor.

The Influence of Ideas

If the degree of autonomy accorded to non-state component units in the United States is a matter of congressional discretion, what determines how Congress exercises that discretion? One important factor appears to be the legal/constitutional relationships already existing within the federal system. History reveals that these practices and the body of ideas underlying them provide guidance for--and perhaps persuasive influence on--the exercise of congressional discretion.

The scope of home rule in the District of Columbia illustrates the operation of this factor. The District's relationship to Congress in important respects resembles that of local governments to state governments in the United States, and this analogy helps explain the fluctuations in the actual powers granted to the District over time. More specifically, Congress's willingness to permit "home rule" in the District has tracked changing patterns of thought and practice relating to American local governments more generally. During the eighteenth and early nineteenth centuries, American local governments exercised broad powers without significant state

interference or direction, continuing a tradition that had developed during the colonial era. Although the legal doctrine underlying this practice was not fully elaborated, the presumption seemed to be that the power of local self-government was inherent, rather than a power delegated by state governments. Often these local governments were directly represented in the state legislature, with apportionment tied to municipal or county lines, which served both to recognize the local units' status as governmental entities and to enable them to protect their interests.[67] During the period when ideas of local autonomy were regnant, the District of Columbia too enjoyed considerable home rule. But during the mid-nineteenth century, legal theory reconceptualized local governments as entities "whose powers derived from and were subject to the sovereign state legislature." This understanding of states as unitary sovereigns and local governments as subordinate units was formalized in legal doctrine in "Dillon's Rule," under which municipalities could exercise only those powers that were expressly granted to them by the state.[68] When introducing reforms in the 1870s, Congress drew upon these broader currents in legal thought, adapting the reconceptualization of the legal status of local governments to the situation in the District and reassuming federal control over local matters. Finally, during the twentieth century, when the District again attained a measure of home rule, the shift to greater political autonomy once again mirrored developments in the relations between state and local governments. Many states in the mid-twentieth century and thereafter sought to invigorate municipal home rule. They accomplished this in part by repudiating Dillon's Rule--for example, the Illinois Constitution of 1970 authorized local governments to tax, regulate, and otherwise deal with matters of local concern, unless specifically prohibited by statute--and these developments provided a model for those seeking to alter the political status of the District.[69]

A less fortunate example of the transfer of ideas involves the treatment of Native American tribes, residents of the District of Columbia, and populations within newly acquired territories in the late nineteenth and early twentieth centuries.[70] Beginning in the 1870s, a new racial element infected discussions in the United States about the character of the American people--one commentator described this racial element as “the militant assertion of an overarching American racial identity.”[71] Political figures and scholars characterized America as an Anglo-Saxon country, whose long-standing residents—in contrast to both Native Americans and recent immigrants from southern and eastern Europe—had a genius for constitutional government. This perspective legitimized American imperialism and racial subordination. It is reflected in the South in the end of Reconstruction, the “restoration” of white supremacy, and the purging of African-Americans from the voter rolls.[72] It is reflected in the North in efforts to restrict the franchise through literacy tests, longer waiting periods before naturalization, and stringent voting registration requirements. Finally, it is reflected in efforts to restrict immigration based on race and ethnicity, so as to preserve the essential character of the American populace.

This set of ideas influenced both the congressional exercise of discretion regarding non-state component units and the rulings of the Supreme Court upholding the congressional policies that resulted. The withdrawal of popular rule from a District of Columbia in which African-American voters played a crucial role is consistent with this perspective. So too is the extension of congressional control over Native American tribes in the late nineteenth century, when such tribes are characterized as “weak” and “helpless,” requiring white rule.[73] Finally, this set of

ideas informs the congressional refusal to treat newly acquired territories as equal to territories on the North American mainland and to grant equal rights to their inhabitants. Thus, Justice White in *Downes v. Bidwell* speaks of "citizens of the United States discover[ing] an unknown island, peopled with *an uncivilized race*."[74] In the same case, Justice Brown denies the equality of territorial inhabitants, noting their "differences of race, habits, laws, and customs . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race."[75]

Group Rights, Individual Rights, and Federal Asymmetry

The distinctive position of Indian tribes in the American constitutional universe reflects their anomalous character as rights-bearing collectivities in a system generally predicated on individual rights. This has added a further complication to the problem of asymmetry and has led to two responses on the part of the federal government. At times the federal government has sought to destroy the underpinnings of Indian group rights by striving to diminish or eliminate group identity, replacing tribal identity with an identity as Americans. During the late nineteenth and early twentieth centuries, this took the form of a campaign to assimilate Indians into the general population, to treat them as simply a collection of individuals sharing a common ancestry.[76] The Dawes Act, transforming communal property ownership into individual allotments, provides one example. The concerted effort to de-tribalize Indian children by banning Indian languages, Indian dress, and Indian ceremonies in schools represents another. A third would be the federal government's extension of American citizenship to assimilated Indians in an effort to wean Indians from their tribal allegiances. During the twentieth century, the now-discarded policy of termination was potentially the most severe threat to continuing tribal identity. Alternatively, the federal government has ignored tribes altogether and extended rights to Indians as individuals in a way that undermined tribal self-government. Thus, the Dawes Act gave property rights to individual Indians but did so by eliminating tribal ownership and control over property. The extension of American citizenship to all Indians in 1924 gave individuals new rights (at least in theory) but did so by imposing a new, non-tribal identity on Indians. Finally, the Indian Civil Rights Act of 1968 extended many of the protections of the Bill of Rights to Indians but did so by imposing new requirements on tribal governments that limited their opportunity to devise their own approaches to balancing communal concerns and individual rights claims.

One suspects that this tension between the American emphasis on individual rights and the tribes' insistence on their collective identity and collective rights will be a continuing source of conflict. But the problem is not limited to relations with Indian tribes. Other component units have also emphasized group identity and ethnicity in ways that clash with the individualistic ethos of the United States. Within the American states, this issue has been most pronounced in Hawaii, where Article XII of the state constitution focuses on "Hawaiian Affairs" and the distinctive concerns of "native Hawaiians."[77] In *Rice v. Cayetano* (2000), the Supreme Court reaffirmed the Constitution's emphasis on individual rights, striking down a Hawaiian law that restricted the right to vote in certain elections to those of Hawaiian ancestry. Speaking for the Court in *Rice*, Justice Kennedy declared that "it demeans a person's dignity and worth to be

judged by ancestry instead of by his or her own merit and essential qualities" and that "using racial classifications is corruptive of the whole legal order democratic elections seek to preserve."[78] Yet most of America's offshore territories have distinct cultures and ethnic or racial identities that they wish to preserve, and they have adopted ethnic and racial classifications as a means to that end.[79] For example, laws in American Samoa prohibit the sale of land to any person how is less than "one-half native blood," and the Constitution of the Northern Mariana Islands restricts permanent and long term interests in real property to "persons of Northern Marianas descent."[80] The choice appears to be between striking down such statutes as unconstitutional or denying the full applicability of the Constitution to non-state component units. Neither alternative seems particularly attractive.

Conclusion

American federalism is more complex—and more interesting—than a simple focus on federal-state relations would suggest. The framers of the U.S. Constitution had to respond to a series of problems that could not be solved within the traditional framework of state and nation, and they crafted distinctive federal relationships to deal with those problems. The imperialist expansion of the United States in the late nineteenth and early twentieth centuries posed new issues not contemplated by the Constitution's framers—or, perhaps better, issues that political officials of the era did not wish to resolve by employing the existing constitutional guidelines for the governance of territories. The overall result of these factors has been a variety of federal relationships in America beyond that of the federal and state governments, albeit relationships in which the federal government has plenary power. The politics of asymmetrical federalism in the United States has thus largely focused on efforts to persuade the federal government to grant greater autonomy to non-state component units. These efforts have met with varying success in the past, and it is to be expected that the relations between the federal government and the District of Columbia, Native American nations, and the "unincorporated" territories will continue to fluctuate in response to shifts in political ideas and in political power.

NOTES

[1] See the discussion in G. Alan Tarr, *Understanding State Constitutions* (Princeton, NJ: Princeton University Press, 1998), pp. 42-43.

[2] *Coyle* v. *Smith*, 221 U.S. 559, 568 (1911). The Court further held that "when a new state is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original states, and such powers may not be constitutionally impaired, diminished, or shorn away by any conditions, compacts, or stipulations embraced in the act by which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission." (221 U.S. 559, 573)

[3] Many commentators on American federalism have done so. For example, a recent textbook on American federalism—G. Ross Stephens and Nelson Wikstrom, *American Intergovernmental*

Relations: A Fragmented Federal Polity (New York: Oxford University Press, 2006)—altogether ignores the District of Columbia, Indian tribes, and non-state territories under the jurisdiction of the United States.

[4] In line with common practice, this paper uses interchangeably the terms "Native American" and "Indian" and the terms "nation" and "tribe."

[5] See, e.g., E. Robert Statham, Jr., *Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations* (Lanham, MD: Lexington Books, 2002).

[6] See, e.g., *United States* v. *Morrison*, 529 U.S. 598 (2000); *Alden* v. *Maine*, 527 U.S. 706 (1999); *Printz* v. *United States*, 521 U.S. 898 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); and *Lopez* v. *United States*, 514 U.S. 549 (1995).

[7] This has been undermined somewhat by constitutional amendments (the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth) establishing a federal floor for voting requirements.

[8] For an account of this "incorporation" of the Bill of Rights, see Ralph A. Rossum and G. Alan Tarr, *American Constitutional Law: Cases and Interpretation*, 6th ed. (Belmont, CA: Wadsworth, 2003), vol. 2, pp. 54-59.

[9] The primary source for discussion of the legal/constitutional status of capital cities remains Donald C. Rowat, ed., *The Government of Federal Capitals* (Toronto: University of Toronto Press, 1973).

[10] Ibid., p. 342.

[11] Whether this is the correct interpretation is a matter of dispute. Royce Hansen and Bernard H. Ross have argued that the language was designed merely to "create a district free from control by any individual state" and not to give Congress control over the local government of the District or to disenfranchise District residents. See Hansen and Ross, "Washington," in Rowat, *Government of Federal Capitals*, p. 79. Similarly, in Federalist No. 43, James Madison assumed that "a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed" to the residents of the District.

[12] Our account of changes in the governance of the District of Columbia in this and succeeding paragraphs relies on Charles Wesley Harris, *Congress and the Governance of the Nation's Capital: The Conflict of Federal and Local Interests* (Washington, D.C.: Georgetown University Press, 1995), especially chapters 1 and 3; and Alan Lesoff, *The Nation and Its City: Politics, "Corruption," and Progress in Washington, D.C., 1861-1902* (Baltimore: Johns Hopkins University Press, 1994).

[13] Congress did allow voting for the District's school board in 1967.

[14] For a presentation of the case against the amendment, see Judith Best, *National Representation for the District of Columbia* (Frederick, MD: University Press of America, 1984).

[15] As one commentator has noted, the disenfranchisement of District residents was arguably consensual "to the extent that future residents of the District had chosen for economic reasons to move to the new city rather than retain their political rights in the states." See Gerald L. Neuman, "Constitutionalism and Individual Rights in the Territories," in Christina Duffy Barnett and Burke Marshall, eds., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Durham, NC: Duke University Press, 2001), p. 186.

[16] The "doctrine of discovery" is a key element in understanding the European and American perspective on the rights of Indian tribes. Particularly helpful discussions are found in Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), and S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).

[17] See Vine Deloria, Jr., and David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin: University of Texas Press, 1999), chapter 3, for a survey of pertinent constitutional provisions.

[18] See David E. Wilkins, "Tribal-State Affairs: American States as 'Disclaiming' Sovereigns," *Publius: The Journal of Federalism* 28 (Fall 1998): 55-81.

[19] Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987). p. 112.

[20] This famous characterization of the tribes is drawn from Chief Justice John Marshall's opinion in *Cherokee Nation* v. *Georgia*, 30 U.S. (6 Pet.) 1, 17 (1831).

[21] *Worcester* v. *Georgia*, 31 U.S. (7 Pet.) 515, 560 (1832), (emphasis added).

[22] See Henry E. Fritz, *The Movement for Indian Assimilation, 1860-1890* (Philadelphia: University of Pennsylvania Press, 1963); Francis P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman: University of Oklahoma Press, 1976); and Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (New York: Cambridge University Press, 1984).

[23] *United States* v. *Kagama*, 118 U.S. 375 (1886); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

[24] 118 U.S. 375, 383-384.

[25] On the Indian Reorganization Act and its effects, see Graham D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45*

(Lincoln: University of Nebraska Press, 1980); on termination policy, see Larry W. Burt, *Tribalism in Crisis: Federal Indian Policy, 1953-1961* (Albuquerque: University of New Mexico Press, 1982); and on the transformation of Indian policy during the Nixon administration, see George Pierre Castile, *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960-1975* (Tucson: University of Arizona Press, 1998). Useful overviews include: Russell L. Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980), Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988); and Emma R. Gross, *Contemporary Federal Policy Toward American Indians* (Westport, CT: Greenwood Press, 1989).

[26] Thus, the Northwest Ordinance of 1787 spelled out the initial policy: The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress...."

[27] *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810). Justice William Johnson offered considerably more support for tribal rights in his concurring opinion: “the uniform practice of acknowledging [the tribes'] right to soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right to soil." (10 U.S. at 146-47)

[28] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574.

[29] For analyses of the Dawes Act and its consequences, see Delos S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Norman: University of Oklahoma Press, 1973); Loring B. Priest, *Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865-1887* (New Brunswick, NJ: Rutgers University Press, 1942); and Ronald L. Trosper, "Mind Sets and Economic Development on Indian Reservations," in Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do?* (Los Angeles: University of California Indian Studies Center, 1992). Not every scholar has viewed the transfer of ownership from tribes to individuals as a negative development; see, for example, Terry L. Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians* (San Francisco: Pacific Research Institute for Public Policy, 1995).

[30] "The United States shall guarantee to every State in this Union a Republican Form of Government" (U.S. Constitution, Article IV, section 4).

[31] Wilkinson, *American Indians, Time and the Law*. p. 8.

[32] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

[33] *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831).

[34] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). This ruling has been subjected to scathing

critique; see, for example, David E. Wilkins, "The U.S. Supreme Court's Explication of `Federal Plenary Power:' An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914," in John R. Wunder, ed., *Native American Sovereignty* (New York: Garland, 1996).

[35] Pertinent cases include: *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968); *Morton* v. *Mancari*, 417 U.S. 535 (1974); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); and *United States* v. *Dion*, 476 U.S. 734 (1986). For a useful analysis of this issue, see Wilkinson, *American Indians, Time, and the Law*, pp. 46-52.

[36] Robert B. Porter, "Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies," *Columbia Human Rights Law Review* 28 (1997): 238.

[37] 109 U.S. 556 (1883).

[38] The discussion draws upon Gavin Clarkson, "Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis" (unpublished paper, Harvard Business School, 2001).

[39] 18 U.S.C. sec. 1153. The Act was upheld in *United States* v. *Kagama*, 109 U.S. 556 (1886).

[40] 18 U.S.C. sec. 1162. For discussion of the threat to tribal autonomy posed by Public Law 280, see Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (Los Angeles: American Indian Studies Center, 1998).

[41] 25 U.S.C. sec. 1326. Since adoption of this legislation, no Indian nation has consented to state assumption of jurisdiction. See Carole Goldberg, "Public Law 280 and the Problem of `Lawlessness' in California Indian Country," in Johnson, *Contemporary Native American Political Issues*, p. 198.

[42] 25 U.S.C. sec. 1301 et seq. For an attempt to unravel the intricacies of the criminal jurisdiction of tribal courts, see Robert N. Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze," *Arizona Law Review* 18 1976): 503-583.

[43] 435 U.S. 191 (1978).

[44] For present purposes, we ignore the antebellum concerns for balancing the number of free and slave states.

[45] The analysis in this paragraph relies on Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* (New Haven: Yale University Press, 2004), chapter 4.

[46] *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 42 (1890); *National Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880).

[47] *Thompson* v. *Utah*, 170 U.S. 343, 348 (1898).

[48] The source of this accurate statement of principle is, ironically, *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 383 (1857, 446-47. The Court's claim that the principle requires recognition of a property right in persons in the territories is erroneous, however.

[49] *Downes* v. *Bidwell*, 182 U.S. 244, 341-42 (1901). The analysis in this section owes much to Barnett and Marshall, *Foreign in a Domestic Sense*; Lawson and Seidman, *The Constitution of Empire;* and Statham, *Colonial Constitutionalism.*

[50] This account draws on Pedro A. Malavet, *America's Colony: The Political and Cultural Conflict between the United States and Puerto Rico* (New York: New York University Press, 2004), chapter 2.

[51] Treaty of Paris between the United States and the Kingdom of Spain, U.S. Statutes at Large 30 (1899), art. IX, at 1759.

[52] *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

[53] 182 U.S. 244, 372.

[54] This innovation sparked a sharp dissent from Justice Harlan, who insisted that "the idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces--the people inhabiting them to enjoy only such rights as Congress chooses to accord them--is wholly inconsistent with the spirit and genius as well as the words of the Constitution." (182 U.S. 244, 380)

[55] *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), and *Harris* v. *Rosario*, 446 U.S. 652 (1980).

[56] Roberto P. Aponte Toro, "A Tale of Distorting Mirrors: One Hundred Years of Puerto Rico's Sovereignty Imbroglio," in Burnett and Marshall, *Foreign in a Domestic Sense,* p. 255.

[57] *Igartua de la Rosa* v. *United States*, 107 F.Supp.2d 140 (D. Puerto Rico 2000); *Igartua de la Rosa* v. *United States,* 229 F.3rd 80 (1st Cir. 2000).

[58] Data on and discussion of the plebiscites are found in Nancy Morris, *Puerto Rico: Culture, Politics, and Identity* (Westport, CT: Praeger, 1995), chapter 3.

[59] On the enhanced commonwealth argument, see Christina Duffy Burnett and Burke Marshall, "Between the Foreign and Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented," in Burnett and Marshall, *Foreign in a Domestic Sense*, pp. 19-21. For a trenchant constitutional critique, see Richard Thornburgh, "Puerto Rican Separatism and United States

Federalism," in the same volume. A few commentators have insisted that the compact adopted in 1952 was a partial transfer of sovereignty that ended Congress's absolute sovereignty over the island and is irrevocable. This, however, is very much a minority view.

[60] Discussion of these territories and their status draws on Statham, *Colonial Constitutionalism*, and on Stanley K. Laughlin, Jr., *The Law of the United States Territories and Affiliated Jurisdictions* (Danvers, MA: Lawyers Cooperative Publishing, 1995).

[61] Statham, *Colonial Constitutionalism*, p. 93.

[62] Ibid., p. 97.

[63] Quoted in Laughlin, *Law of the United States Territories and Affiliated Jurisdictions*, p. 431.

[64] See Peter Pernthaler, "Asymmetric Federalism as a Comprehensive Framework of Regional Autonomy," in Forum of Federations, *Handbook of Federal Countries 2002* (Montreal: McGill-Queen's University Press, 2002).

[65] The case for a limited judicial role in protecting the division of power between nation and state is enunciated in Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980). For judicial endorsement of this perspective, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

[66] Indians seem a prime example of a "discrete and insular minority" deserving of enhanced judicial protection. See the famous Footnote 4 of *United States* v. *Carolene Products Company*, 304 U.S. 144 (1938). There is some evidence, at least on a rhetorical level, that courts have recognized that responsibility of heightened scrutiny--see, for example, *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942).

[67] See Michael E. Libonati, "Intergovernmental Relations in State Constitutional Law: A Historical Overview," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 107-16. More generally, see Tarr, *Understanding State Constitutions*, pp. 19-20.

[68] *Clinton v. Cedar Rapids and Missouri River Railroad*, 24 Iowa 455, 476; see generally John Forest Dillon, *A Treatise on the Law of Municipal Corporations*, 5th ed., 5 vols. (Boston: Little, Brown, 1913). A useful overview of the transformations in the understanding of local government is Gerald E. Frug, "The City as a Legal Concept," *Harvard Law Review* 93 (April 1980): 1059-1154.

[69] Illinois Constitution, Article 7.

[70] The discussion in this paragraph relies upon Rogers M. Smith, *Civic Ideals: Conflicting*

Visions of Citizenship in U.S. History (New Haven, CT: Yale University Press, 1997); Robert H. Wiebe, *Self-rule: A Cultural History of American Democracy* (Chicago: University of Chicago Press, 1995); and Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

[71] Mark S. Weiner, "Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War," in Burnett and Marshall, *Foreign in a Domestic Sense*, p. 59.

[72] See Michael Perman, *The Road to Redemption: Southern Politics, 1869-1879* (Chapel Hill: University of North Carolina Press, 1984); Perman, *Struggle for Mastery: Disenfranchisement in 1888-1908* (Chapel Hill: University of North Carolina Press, 2001); and J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1890-1910* (New Haven, CT: Yale University Press, 1974).

[73] *United States v. Kagama*, 118 U.S. 375, 384 (1886).

[74] *Downes v. Bidwell*, 182 U.S. 244, 312 (1901) (emphasis added).

[75] Ibid. at 282-83. Justice Brown is, perhaps not coincidentally, the author of the Court's infamous opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which endorsed the concept of racial separation ("separate but equal").

[76] This campaign to assimilate Indians paralleled efforts to "Americanize" European immigrants to the United States, who were also depicted as groups of individuals with a common ancestry. For obvious reasons, the term "Americanize" could not be used with regard to Indians, so it was replaced by "civilize."

[77] For discussion of this Article, see Anne Feder Lee, *The Hawaii State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), pp. 170-180.

[78] *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

[79] See the useful discussion in Jose Julian Alvarez Gonzalez, "Law, Language, and Statehood: The Role of English in the Great State of Puerto Rico," in Burnett and Marshall, *Foreign in a Domestic Sense*, and Statham, *Colonial Constitutionalism*, pp. 88-91.

[80] Laughlin, *Law of the United States Territories*, pp. 320, 454.