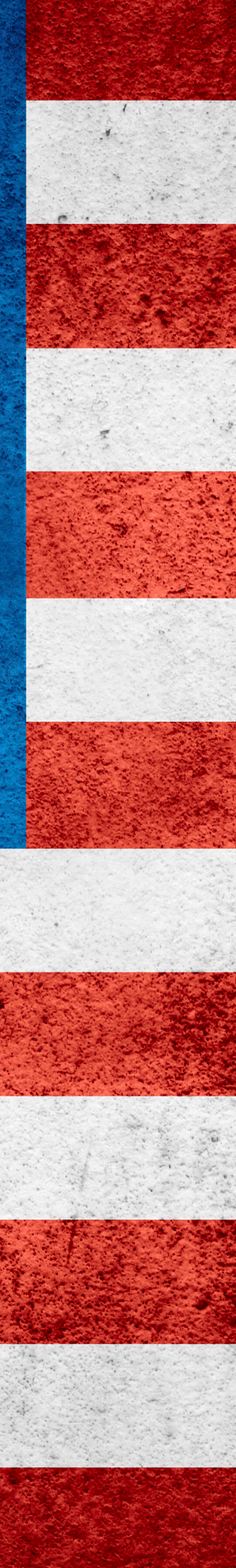




Manifest Destiny:

A Comparison of the Constitutional Status of Indian Tribes and U.S. Overseas Territories

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Comparing and contrasting the status of U.S. Overseas Territories and Indian tribes bring about profound legal questions. The subject is currently particularly ripe for discussion. On Jan. 15, 2015, the U.S. House of Representatives Natural Resources Committee reorganized Indian, Insular, and Alaska Native Affairs into a single subcommittee,¹ demonstrating some recognition of a relationship between these issues. As we will explore below, the same legal, cultural, and political ideas have fed and perpetuated both areas of law—namely Manifest Destiny and theories of inferiority of people in each of these political groups.

From a practical standpoint, members of the U.S. Supreme Court have increasingly been seeing fruitful connections between these areas of law as demonstrated by cross-citation and recent oral arguments. For example, in December, the constitutional status of Indian tribes was a matter of frequent discussion during oral arguments in the case of *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496, which focuses on the jurisdiction of a tribal court over a torts case.² At the time of that oral argument, the Court had also recently granted certiorari and scheduled argument in *Puerto Rico v. Valle*, No. 15-108, involving Puerto Rico's political status for purposes of the double jeopardy clause of the U.S. Constitution. The Supreme Court actually has a notable history of citing territorial cases in Indian law cases.³ Scholars have observed that the Supreme Court has shown increasing skepticism about the merits of allowing any extraconstitutional governmental authority within the American policy.⁴ Practitioners within both fields of law would be wise to consider how to use both areas of law to their advantage.

This article will examine several constitutional questions, providing a summary of the current state of American law for both areas of law. Much more could be and hopefully will be written by others on each of these themes in the future.

Topic 1: Underpinnings in the Constitutional Text **TERRITORIES**

The primary constitutional text used in cases involving the status of United States overseas territories is Article IV, § 3, clause 2. Often called the territorial clause or the property clause, it provides, "The Congress shall have

Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The exact boundaries of this congressional power have been a matter of dispute over the years, but it is certainly at its strongest in federal territories that are not within a state jurisdiction. In the case of overseas territories, federal courts have recognized the authority as complete and plenary.⁵ Of course, conflicts of laws between federal law and laws of territories may occur. The Constitution resolves these conflicts through the supremacy clause in Article VI, which provides that federal law is given primacy: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Congress exercised power over newly acquired territories for many years through the Northwest Ordinance of 1789, which established territories for expansion, territorial government, and guidelines for transition to statehood.⁶ Finally, between 1901 and 1922, the U.S. Supreme Court decided a series of cases known as the insular cases, adopting a doctrine of territorial incorporation under which incorporated territories would have the benefit of the Constitution and were destined for statehood, while unincorporated territories only had the guarantees of "fundamental" personal rights.⁷ The Court warned that in annexing overseas territories, "grave questions will arise from differences of race, habits, laws and customs of the people."⁸ The doctrine of plenary power and the insular cases framework are increasingly criticized

by federal courts as government without consent of the governed and as founded on racial and ethnic prejudices.⁹

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Indian tribes were also dealt with in the Northwest Ordinance—Indian land and property were not to be taken without their consent, and Indian rights and liberty were not to be disturbed under Article III of the Northwest Ordinance's Articles of Compact. However, Indian law jurisprudence has focused on the Indian commerce clause¹⁰ and the President's authority in the treaty clause¹¹ rather than the territorial clause to hold that the authority of Congress over Indian affairs is both plenary and exclusive of state law.¹² More specifically, the commerce clause recognizes Indian tribes as sovereigns along with foreign nations and the states and empowers Congress to regulate commerce with Indian tribes.¹³ Finally, the supremacy clause includes federal Indian treaties as the supreme law of the land.¹⁴ While the texts might seem cryptically short, Indian affairs concerns encompassing issues such as war with Indian tribes, treaty-making, land title transactions, and trade were all a significant justification for the creation of a national government to begin with.¹⁵ The resulting modern doctrine of plenary power over Indians without their consent is not without controversy or debate within the field of Indian law.¹⁶ For those new to the field, it is probably worth noting that Indian tribes as governments were not signatories to the Constitution and are not bound by it in the same way as state governments.¹⁷

Topic 2: U.S. Citizenship TERRITORIES

Residents of U.S. overseas territories are generally U.S. citizens. Originally, citizenship was conferred by federal statutes.¹⁸ However, since 1940, the Nationality Act has recognized, with the exception of American Samoa, that persons born in these territories are natural-born citizens.¹⁹

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Initially members of Indian tribes were not considered U.S. citizens by birth.²⁰ Over time, various federal statutes and treaties provided specific citizenship avenues frequently premised on the goal of assimilation. Finally, in 1924, Congress passed 8 U.S.C. § 1401(b) making U.S. citizens of all native-born Indians. Thus Indians are now dual citizens of their tribe and the United States and enjoy all the constitutional protections that other individual citizens enjoy. In addition, since 1868, individual Indians have been citizens of any state where they reside under the 14th Amendment to the U.S. Constitution.²¹

Topic 3: Presidential Vote TERRITORIES

Residents of the territories generally cannot vote in elections for the U.S. President, regardless of their citizenship. However, in the Commonwealth of Northern Mariana Islands, U.S. citizens who previously voted in a state or in the District of Columbia can vote under the Uniformed and Overseas Citizens Absentee Voting Act.²² This result has been criticized judicially for decades, because it creates a second-rate class within the United States as well as constitutes a throwback to Colonial times with no representation in the British government.²³

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As discussed above, members of Indian tribes are citizens of the any state they reside in under the 14th Amendment. As such, they may generally vote in presidential elections as state residents.

Topic 4: Congressional Representation With Vote TERRITORIES

U.S. citizens in the territories do not have the benefit of voting representation in the U.S. Congress. Again, those in the Commonwealth of Northern Mariana Islands who previously voted in a state can vote under the Uniformed Overseas Citizens Absentee Voting Act.²⁴

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Indian tribes do not have their own direct voting representation in the U.S. Congress, although one treaty did promise a delegate in the U.S. House of Representatives.²⁵ However, individual members have voting representation through their state citizenship, with the notable exception of residents of the District of Columbia.

Topic 5: Constitutions TERRITORIES

Some of the territories have congressionally approved constitutions. In some cases, Congress passed Organic Acts or other statutes authorizing a territory to draft a constitution.²⁶ Judges and scholars have diverging views as to whether once Congress approves a territorial constitution, as is the case with Puerto Rico and Northern Mariana Islands, Congress then retains plenary authority to unilaterally repeal or amend said constitution or continue to legislate as to purely local matters governed by the territory's constitution.²⁷

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No federal law requires or prohibits an Indian tribe from having a written constitution. Many tribes of course had traditional narratives prescribing their political organization, history, and values. Written constitutions became more common among tribes after Congress passed the Indian Reorganization Act in 1934, which encouraged adoption of tribal constitutions subject to the approval by the secretary of the Interior.²⁸ In 2004, Congress clarified that Indian tribes also retain the inherent power to adopt governing documents outside of the provisions of the Indian Reorganization Act (IRA).²⁹ Today, there are tribes with no written constitutions, tribes with IRA constitutions, and tribes with a wide variety non-IRA constitutions.

Topic 6: Courts TERRITORIES

There are territorial U.S. district courts in all the territories, with the exception of American Samoa. Puerto Rico is the only territory with an Article III federal court. Puerto Rico's Article III court was established by federal statute in 1966.³⁰ All territories, with the exception of American Samoa, have a parallel system of local courts, in which appeals from their supreme courts can be taken to the U.S. Supreme Court, just as is the case with state supreme courts.

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Currently, most courts have determined that tribal governments have access to local Article III courts under subject-matter jurisdiction rules but not under diversity jurisdiction. Indian tribes have had limited access to Article III federal courts since 1831, when the Supreme

Court had opined that Indian tribes, being domestic, could not bring suit under Article III as foreign nations.³¹ In addition, unincorporated Indian tribes are often not considered a citizen of a state for purposes of diversity jurisdiction.³² However, individual tribal members have similar access to federal courts as other individual citizens.

Indian tribes are also generally free to adopt and implement tribal court systems with certain limitations imposed by federal law, such as the judicially created prohibition on criminal jurisdiction over non-Indians³³ and a federal statutory limitation on criminal sentences greater than one year generally or three years under certain conditions.³⁴ Jurisdiction of these tribal courts is commonly challenged by

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nonmembers in both the civil and criminal contexts.³⁵ Although the usual constitutional criminal rights do not apply to tribal governments, including tribal courts, Congress enacted the civil rights it felt were appropriate to Indian Country through the Indian Civil Rights Act of 1968,³⁶ and many tribes have their own civil rights laws.³⁷ Some Indian treaties have detailed agreements on both federal and tribal courts and tribal jurisdiction.³⁸

Topic 7: Shared Historical Background of Discrimination

As demonstrated by the quotes below, both of these areas of law have been profoundly shaped by the notions of American superiority and other prejudices of the past during the period of expansion in the United States. These quotes are not exhaustive but merely instructive of such a sentiment.

TERRITORIES

“[I]t would be unwise to give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico ... the benefits of the Constitution.” —Simeon E. Baldwin, Yale Law professor and co-founder of the American Bar Association³⁹

“The Filipinos, who [are] Asiatics, Malays, negroes and of mixed blood have nothing in common with us and centuries cannot assimilate them. ... They can never be clothed with the rights of American citizenship nor their territory be admitted as a State of the American Union.” —U.S. Rep. Thomas Spight of Mississippi⁴⁰

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“[T]he character and religion of its [Indian] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.” —Chief Justice John Marshall, U.S. Supreme Court

Conclusion

This area of comparison is ripe for more in-depth exploration. It is clear that the application of the 14th Amendment to members of Indian tribes making them state citizens had a profound impact on their legal privileges in contrast to territorial residents. The constitutional and early American struggles to justify dispossession of Indian lands and domination of Indian tribes, as ratified by the Supreme Court in the so called Marshall Trilogy,⁴² must have helped propel the nation toward the overseas imperialism in the late 19th and early 20th centuries. If the U.S. Supreme Court does indeed move toward a rethinking of its framework of the insular cases and a rethinking of broad tribal court jurisdiction and other tribal sovereign rights, it may continue to be confronted with how to harmonize its reasoning in the two fields. With both territorial and Indian law cases on the Supreme Court’s docket this year, the consideration of the relationship of these two areas of law in modern times may be coming sooner rather than later. ☉

Endnotes

¹House Committee on Natural Resources, *House Natural Resources Committee Chairman Rob Bishop Announces Republican Members for 114th Congress, New Subcommittee on Oversight and Investigations*, United States House Committee on Natural Resources (Jan. 13, 2015), naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=398007.

²Transcript available at www.supremecourt.gov/oral_arguments/argument_transcripts/13-1496_j4ek.pdf.

³*E.g.*, *United States v. Lara*, 541 U.S. 193, 203, 214, 225, 229 (2004); *United States v. Wheeler*, 435 U.S. 313, 315, 319, 319 n.9, 11, 321, 321 n.16 (1978). See also Alex Tallchief Skibine, *Symposium: Tribal Sovereignty and United States v. Lara*; *United States v. Lara*, *Indian Tribes, and Dialectic of Incorporation*, 40 TULSA L. REV. 47 (Fall, 2004).

⁴See, e.g., Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 659 (April 2013).

⁵See, e.g., *United States v. Husband*, 453 F.2d 1054 (5th Cir. 1971). On the topic of plenary power in both territorial and Indian law contexts, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (Nov. 2002).

⁶Act of Aug. 7, 1789, 1 Stat. 50.

⁷See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawai’i v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904).

⁸*Downes v. Bidwell*, 182 U.S. 244, 282 (1901).

⁹*E.g.*, *United States v. Amaro-Santiago*, 998 F. Supp. 2d 1 (D.P.R. 2014); *Igartua v. United States*, 626 F.3d 592, 612-13 (1st Cir. 2010) (Torruella, J. concurring in part; dissenting in part) (citation omitted).

¹⁰U.S. Const. art. I, § 8, cl. 3.

¹¹U.S. Const. art. II, § 2, cl. 2.

¹²*United States v. Lara*, 541 U.S. 193, 200 (2004).

¹³U.S. Const. art. I, § 8, cl. 3.

¹⁴U.S. Const. art. IV, cl. 2.

¹⁵Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (Feb. 2014).

¹⁶*Worcester v. Georgia*, 31 U.S. 515, 559 (1832); see, e.g., Robert

N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (Spring 2002).

¹⁷*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978);

Talton v. Mayes, 163 U.S. 376 (1896); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[1] (2012).

¹⁸*E.g.*, 8 U.S.C. § 1406 regarding citizenship in the U.S. Virgin Islands.

¹⁹Act of Oct. 14, 1940, Pub. L. No. 76-853, 54 Stat. 1137.

²⁰*Elk v. Wilkins*, 112 U.S. 94 (1884).

²¹U.S. Const. amend. XIV, § 1.

²²52 U.S.C. §§ 20301-20311.

²³*See, e.g. Sanchez v. United States*, 376 F. Supp. 239, 242 (D.P.R. 1974).

²⁴52 U.S.C. §§ 20301-20311.

²⁵Treaty of New Echota, art. 7, Dec. 29, 1835, 7 Stat. 478. [Treaty of New Echota, art. 7].

²⁶*See, e.g.*, Puerto Rico Federal Regulations Act of July 3, 1950, 64 Stat. V. 319.

²⁷*See, e.g., United States v. Mercado Flores*, 2015 WL 4132355, at * 4-5 (D.P.R. July 8, 2015).

²⁸*See* Act of June 18, 1934, Pub. L. No. 73-383, 48 Stat. 984.

²⁹25 U.S.C. § 476(h).

³⁰Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764.

³¹*Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

³²*Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 710 (2003).

³³*See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

³⁴25 U.S.C. § 1302(a)(7)(B), (b).

³⁵For more on the criminal context, *see* Zachary S. Price, 113 COLUM. L. REV. 657 (April 2013).

³⁶Act of April 11, 1968, 90 Pub. L. No. 90-284, 82 Stat. 73.

³⁷The National Indian Law Library maintains a Tribal Law Gateway, available at www.narf.org/nill/triballaw.

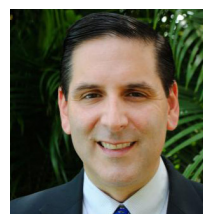
³⁸*See, e.g.*, Treaty With the Cherokee, art. 7, July 19, 1866, 14 Stat. 799.

³⁹Simeon E. Baldwin, *The Constitutional Question Incident to the Acquisition and Government by the United States of Island Territories*, 12 HARV. L. REV. 393, 401 (1899).

⁴⁰33 CONG. REC. 2105 (1900).

⁴¹*Johnson v. McIntosh*, 21 U.S. 543, 572 (1823).

⁴²*Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).



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