

**THE RIGHT OF SELF-GOVERNMENT IN THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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## I. INTRODUCTION

In 1975, the United States and the people of the Northern Mariana Islands<sup>1</sup> entered into a Covenant of political union, which established a self-governing Commonwealth of the Northern Mariana Islands (CNMI) under the sovereignty of the United States.<sup>2</sup> From the end of World War II until that time, the United States had governed the Northern Marianas as a part of the Trust Territory of the Pacific Islands, under the auspices of the United Nations.<sup>3</sup> Prior to that, the Northern Marianas had been ruled successively by Spain (1695-1898), Germany (1898-1914), and Japan (1914-1944).<sup>4</sup> Thus, at the time the first Commonwealth government took office on January 9, 1978,<sup>5</sup> this represented the Northern Marianas people's first exercise of self-government in more than 280 years.

The Covenant established a political relationship unique in American history, and at least rare in the history of the world. A major power and a small island people have achieved a permanent and peaceful union, without the islands being either assimilated into the larger power, or ruled by it as a colony. The terms of the union, however, can be confusing. For example, the CNMI has "self-government,"<sup>6</sup> while the United States maintains "sovereignty."<sup>7</sup> But if "sovereignty" means the right to govern, as it does in

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<sup>1</sup> The Mariana Islands are a chain of about fifteen islands located in Micronesia in the tropical western Pacific. THE WORLD ALMANAC AND BOOK OF FACTS 2002 at 370 (2002) [hereinafter 2002 WORLD ALMANAC]. The Northern Mariana Islands refers to the entire chain except Guam, the largest, southernmost and most populous of the Marianas. *See id.* Most of the Northern Marianas population, including the indigenous Chamorros and Carolinians, lives on Rota, Tinian and Saipan, the southernmost of the Northern Marianas. *Id.*

<sup>2</sup> *See* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA (1975), *reprinted in* 48 U.S.C. § 1801 (approving the Covenant to Establish a Commonwealth) [hereinafter "COVENANT"]. The Covenant was signed on February 15, 1975. It was approved by the Mariana Islands District Legislature on February 20, 1975, and the Northern Marianas people in a plebiscite on June 17, 1975. The Covenant was approved by the United States through a joint resolution adopted by the House of Representatives on July 21, 1975, and the Senate on February 24, 1976, and signed by President Ford on March 24, 1976. *Id.*

<sup>3</sup> *See* TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS, *ratified by* Act of July 18, 1947, Pub. L. No. 204, ch. 271, 61 Stat. 397.

<sup>4</sup> *See generally* DON A. FARRELL, HISTORY OF THE NORTHERN MARIANA ISLANDS (1991). The Spanish Marianas had included Guam, but this was ceded to the United States at the end of the Spanish American War, while the rest of Spanish Micronesia, including the Northern Mariana Islands, was sold to Germany. *See id.* at 253.

<sup>5</sup> *Id.* at 631. Approval of the Covenant had been followed by an interim period, 1976-78, in which a local constitution was drafted and ratified, and a governor and legislature elected. *See generally id.* at 613-30 (describing interim period).

<sup>6</sup> COVENANT, *supra* note 2, § 103.

<sup>7</sup> *Id.* § 101.

some contexts, then has not the power of government been vested in two different places at once? Similarly, the United States has power to legislate for the CNMI, but in doing so cannot infringe on local self-government.<sup>8</sup> But does not any federal legislation for the CNMI infringe to some extent on self-government, since the Northern Marianas people have no representation in the federal government? Judicial decisions have sometimes acknowledged this confusion<sup>9</sup> and other times contributed to it.<sup>10</sup> Perhaps predictably, the overall federal tendency has been to ignore the unique circumstances of the CNMI, and lump it together with the traditional U.S. territories,<sup>11</sup> despite the fact that those territories do not have the same guarantees of self-government.<sup>12</sup> This has resulted in occasional friction and misunderstandings between the United States and the CNMI, but so far most of these have been worked out at the practical level without a head-on confrontation.

This article therefore addresses a question that has not yet needed to be conclusively determined, but which nonetheless lurks in the background of every dispute and difference of opinion between the United States and the CNMI—in the event of an irreconcilable conflict arising between the Northern Marianas people and the United States government regarding an internal matter of the CNMI, who must prevail? Or put another way, does the United States government have the legal power to impose its will on the Northern Marianas people with respect to their internal affairs? This article

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<sup>8</sup> *Id.* § 105. *See also, e.g.*, United States *ex rel.* Richards v. De Leon Guerrero, 4 F.3d 749, 755 (9th Cir. 1993) (finding that federal audit did not “impermissibly intrude[] on the internal affairs of the Commonwealth”); A&E Pac. Constr. Co. v. Saipan Stevedore Co., 888 F.2d 68, 71 (9th Cir. 1989) (measuring applicability of federal law by its consistency with local self-government).

<sup>9</sup> *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450, 1459 n.18 (9th Cir. 1990) (“[T]he precise status of the Commonwealth is far from clear.”).

<sup>10</sup> *Compare, e.g., Richards*, 4 F.3d at 754 (“[I]t is solely by the Covenant that we measure the limits of Congress’ legislative power.”), *with Saipan Stevedore Co. v. Dir., Office of Workers’ Comp. Programs*, 133 F.3d 717 (9th Cir. 1998) (measuring the limits of Congress’ legislative power in at least five different ways, only one of which is the Covenant).

<sup>11</sup> *See, e.g.*, Exec. Order No. 12,572, 51 Fed. Reg. 40,401 (Nov. 3, 1986) (placing relations between the United States and the Commonwealth “under the general administrative supervision of the Secretary of the Interior,” who also handles territorial matters).

<sup>12</sup> *See, e.g., Northern Mariana Islands v. Atalig*, 723 F.2d 682, 691 n.28 (9th Cir. 1984) (“As a commonwealth, the NMI will enjoy a right to self-government guaranteed by the mutual consent provisions of the Covenant. No similar guarantees have been made to Puerto Rico or any other territory.”); *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371 n.1 (9th Cir. 1988), *aff’d*, 495 U.S. 182 (1990) (“Guam’s relation to the United States is entirely different [from the Commonwealth’s]. Guam has no separate sovereign status; unlike [the CNMI], it ‘is subject to the plenary power of Congress and has no inherent right to govern itself.’”).

concludes that the Northern Marianas people, not the United States government, have final authority over their internal affairs, and that any federal law impacting such affairs can therefore apply to them only to the extent of their continuing consent to such law. If the Northern Marianas people, through their elected representatives, ever act to suspend the application of any federal law impacting their internal affairs—or any such provision of the federal constitution, other than those essential to the maintenance of a free government—then that law must immediately cease to have any legitimate or binding force in the CNMI. This conclusion flows inevitably from either of two lines of analysis – the construction of the Covenant itself, and the constitutional power of the United States to enter into the Covenant. These will be set out in Parts I and II respectively. Part III will consider and refute some expected objections to this thesis.

## II. CONSTRUCTION OF THE COVENANT

The nature of the United States-CNMI relationship is set out in Article I of the Covenant, which creates the CNMI, establishes the laws of the CNMI, guarantees local self-government over internal affairs, grants the U.S. authority over foreign affairs and defense, and allows modification of fundamental provisions of the Covenant only by consent of the United States and the CNMI:

§ 101: The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the “Commonwealth of the Northern Mariana Islands,” in political union with and under the sovereignty of the United States of America.

§ 102: The relations between the Northern Mariana Islands and the United States shall be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

§ 103: The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

§ 104: The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

§ 105: The United States may enact legislation in accordance with its constitutional processes which will be applicable in

the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.<sup>13</sup>

Other relevant sections of the Covenant provide that certain parts of the U.S. Constitution, including the first nine amendments and the due process and equal protection clauses of the fourteenth, will apply to the CNMI “as if [it] were one of the several States,”<sup>14</sup> with certain exceptions relating to jury trial,<sup>15</sup> land alienation,<sup>16</sup> and legislative apportionment.<sup>17</sup> Finally, the Covenant provides that existing federal laws which are applicable to Guam and to the states will also apply to the CNMI “as they are applicable to the several states,”<sup>18</sup> with the exceptions of immigration, “coastwise laws,” and minimum wage laws.<sup>19</sup>

This section attempts to answer the question of ultimate political authority in a way that reconciles and gives meaningful effect to each provision cited above. Where this can be done in more than one way, this analysis chooses the manner which best accords with the overall purpose of the Covenant and the historic context in which the Covenant was entered into.<sup>20</sup> This analysis also bears in mind throughout the principle enunciated

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<sup>13</sup> COVENANT, *supra* note 2, §§ 101-105.

<sup>14</sup> *Id.* § 501.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 805.

<sup>17</sup> *Id.* § 203.

<sup>18</sup> *Id.* § 502.

<sup>19</sup> *Id.* § 503.

<sup>20</sup> This rule of construction, while always useful, is particularly appropriate for a document like the Covenant—or like a constitution, which the Covenant more closely resembles than any other single type of document. Constitutions, like the Covenant, speak in broad terms of fundamental principles and are intended to be permanent and supreme, and their construction should reflect this:

For in setting up an enduring framework of government [the Framers of the United States Constitution] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the

when the United States House of Representatives gave its final approval to the Covenant. Rep. Phillip Burton, Chairman of the House Subcommittee on Territorial and Insular Affairs, and the most active and prominent congressional supporter of the Covenant,<sup>21</sup> with the express intent of ensuring “that the [US] legislative intent not be ambiguous,” stated:

Our committee’s and my own intent is that all possible ambiguities should be resolved in favor of and to the benefit of the people and Government of the Northern Mariana Islands.<sup>22</sup>

#### A. *Self-Government*

This analysis begins with the term at the heart of the entire issue—“self government,” a right guaranteed by Section 103 of the Covenant, and referred to in Sections 101 and 105 as well. The term “self-government,” as used in the Covenant, was not pulled out of thin air. Nor

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revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. If we remember that ‘it is a Constitution we are expounding,’ we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.

United States v. Classic, 313 U.S. 299, 316 (1941) (quoting *M’Culloch v. Maryland*, 17 U.S. (18 Wheat) 316, 407 (1819)).

Application of this same rule of purpose-based construction also follows from the fact that the Covenant derives its force from approval by two different legislative bodies as well as the general public. *See supra* note 2. This makes a more subjective intent-based construction problematic. *Cf. Maxwell v. Dow*, 176 U.S. 581, 602 (1900) (“A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.”).

<sup>21</sup> *See* HOWARD P. WILLENS & DEANNE C. SIEMER, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANA ISLANDS AND THE UNITED STATES 296-99 (2002) (describing how Burton “delivered” the House in passage of the Joint Resolution approving the Covenant in the House). *See also id.*, at 305-06 (describing Burton’s testimony before the Senate Interior Committee).

<sup>22</sup> 122 CONG. REC. 7272 (1976) (statement of Rep. Burton). This is also the rule for the construction of Indian treaties, which, like the Covenant, are negotiated agreements between the United States and people toward whom the United States stood in a trust relation. *See, e.g., Swim v. Bergland*, 696 F.2d 712, 719 (9th Cir. 1983) (“It is a well settled rule of construction in Indian law that any ambiguity in treaty language must be resolved in favor of the Indians.”); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866) (“[E]nlarged rules of construction are adopted in reference to Indian treaties . . . The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty.”).

did it derive, directly or indirectly, from the same term as used in any other context in domestic American law. Instead, the self-government to which the Covenant refers is explicitly the “self-government” of the Trusteeship Agreement, which is in turn the “self-government” of the United Nations Charter.<sup>23</sup> This derivation is clear and explicit on the face of the Covenant itself.<sup>24</sup> It is equally explicit in the U.S. Public Law approving the Covenant,<sup>25</sup> the resolution of the U.N. Trusteeship Council recommending termination of the trusteeship over the Northern Marianas,<sup>26</sup> and the proclamations of both President Reagan and the U.N. Security Council declaring the trusteeship terminated.<sup>27</sup> This context controls the meaning of the term “self-government” as used in the Covenant.<sup>28</sup>

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<sup>23</sup> See TRUSTEESHIP AGREEMENT, *supra* note 3, at Article 6 (obliging the United States to “promote the development of the inhabitants . . . toward self-government or independence” in accordance with Article 76(b) of the Charter). See also U.N. CHARTER art. 76 (stating that one objective of the trusteeship system is to “promote . . . the trust territories, and their progressive development towards self-government or independence”) and art. 73 (declaring that signatories accept “sacred trust” to “develop self-government” in all territories under their administration which “have not yet attained a full measure of self-government”), available at <http://www.un.org/aboutun/charter/index.html> (last visited May 30, 2003).

<sup>24</sup> COVENANT, *supra* note 2, pmb1.

Whereas, the Charter of the United Nations and the Trusteeship Agreement . . . guarantee to the people of the Northern Mariana Islands the right freely to express their wishes for self-government or independence . . . Now, therefore, the Marianas Political Status Commission . . . and the Personal Representative of the President of the United States have entered into this Covenant . . . .

*Id.*

<sup>25</sup> Pub. L. No. 94-241, reprinted in 48 U.S.C. § 1801.

Whereas the United States in accordance with the trusteeship agreement and the Charter of the United Nations, has assumed the obligation to promote the development of the peoples of the trust territory toward self-government or independence . . . Now be it Resolved . . . That the Covenant . . . is hereby approved.

*Id.*

<sup>26</sup> See T.C. Res. 2183, U.N. TCOR, 53d Sess., Supp. No. 3, at 14-15, U.N. Doc. T/1901 (1986) (noting the obligation of administering authorities of trust territories “to assist their peoples in the progressive development of their free political institutions and towards self-government,” and concluding from the establishment of the Commonwealth that the people of the Northern Marianas “have established constitutions and democratic political institutions providing the instruments of self-government,” and that the United States has therefore “satisfactorily discharged its obligations under the terms of the Trusteeship Agreement”).

<sup>27</sup> See Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 3, 1986) (determining that with the establishment of self-government, “the United States has fulfilled its obligations under the Trusteeship Agreement with respect to the Commonwealth of the Northern Mariana Islands”); S.C. Res. 683, U.N. SCOR, 45th Sess., 2972d mtg. at 29, U.N. Doc. S/INF/46 (1990) (noting the duty to develop the trust territory toward self-government

What then does “self-government” mean in the U.N. Charter and Trusteeship Agreement? The General Assembly has left a substantial record on this point. The meaning of “self-government” is set out at length in a series of resolutions.<sup>29</sup> Each of these resolutions builds upon previous resolutions<sup>30</sup> and together they culminate in the principle that a territory may attain self-government in any of three ways: (1) “emergence as a sovereign independent state,” (2) “free association with an independent state,” and (3) “integration with an independent state.”<sup>31</sup> Significantly, these do not represent three different levels of greater or lesser self-government, but rather different ways in which “a full measure of self-government” can be exercised.<sup>32</sup>

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or independence, and determining “in light of the entry into force of the new status agreement[] for the . . . Northern Mariana Islands, that the objectives of the Trusteeship Agreement have been fully attained”).

<sup>28</sup> In other words, just as provisions of the U.S. Constitution “are framed in the language of the English common law, and are to be read in light of its history,” *Smith v. Alabama*, 124 U.S. 465, 478 (1888), so are the provisions of the Covenant framed in the language of the U.N. Charter, and must be read in light of *its* history.

<sup>29</sup> G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29-30, U.N. Doc. A/4684 (1960) [hereinafter G.A. Res. 1541]; G.A. Res. 742, U.N. GAOR, 8th Sess., Supp. No. 17, at 21-24, U.N. Doc. A/2630 (1953) [hereinafter G.A. Res. 742]; G.A. Res. 648, U.N. GAOR, 7th Sess., Supp. No. 20, at 33-35, U.N. Doc. A/2361 (1952) [hereinafter G.A. Res. 648]; G.A. Res. 567, U.N. GAOR, at 60-62 (1952) [hereinafter G.A. Res. 567].

<sup>30</sup> Resolution 1541 “bore in mind” Resolution 742, G.A. Res. 1541, *supra* note 29, at 29, which in turn “recalled” both Resolution 648 and Resolution 567. G.A. Res. 742, *supra* note 29, at 21. Resolution 648 “had regard to” Resolution 567. G.A. Res. 648, *supra* note 29, at 33. The first three resolutions set out detailed objective “factors” to consider in determining whether self-government exists. *See generally* G.A. Res. 742, 648, & 567, *supra* note 29. Resolution 1541 sets out broader prescriptive “principles” of what conditions *should* exist. G.A. Res. 1541, *supra* note 29, at 29-30. Reading the resolutions together, we would thus look to the factors in determining whether the principles have been achieved.

<sup>31</sup> G.A. Res. 1541, *supra* note 29, at 29 (Principle VI). In Resolution 567, the General Assembly distinguished between two types of self-government: (1) independence or other separate system of self-government; and (2) free association—whether in a federal or unitary relationship—of a territory on equal status with other component parts of the metropolitan or other country. G.A. Res. 567, *supra* note 29, at 61-62. In Resolutions 648 and 742, the General Assembly revised its two-type analysis into three: (1) independence; (2) other separate systems of self-government; and (3) free association of a territory with other component parts of the metropolitan or other country. G.A. Res. 648, *supra* note 29, at 34-33; G.A. Res. 742, *supra* note 29, at 22-23. And in Resolution 1541, the General Assembly re-cast the three-part analysis into: (1) independence; (2) free association; and (3) integration. G.A. Res. 1541, *supra* note 29, at 29-30. It becomes apparent when comparing the resolutions that the terminology was adjusted over the years, so that Resolution 1541’s option of “free association” is in substance the same as what the earlier resolutions termed a “separate system of self-government,” and that Resolution 1541’s option of “integration” is what the earlier resolutions called “free association.”

<sup>32</sup> G.A. Res. 1541, *supra* note 29, at 29 (Principle VI). Thus, the assumption that the CNMI, simply by virtue of its close and permanent relationship with the United States, must necessarily have less self-government than a free associated state or an independent

Self-government in a “free associated” state is measured principally in terms of non-interference in internal affairs by the associated sovereign power. The people of the associated state should be free from “control or interference by the government of another State in respect of the internal government,”<sup>33</sup> and should enjoy “effective participation . . . in the government of the territory.”<sup>34</sup> Self-government in an “integrated” state, meanwhile, is measured chiefly in terms of political equality:

Integration with an independent state should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and equal rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.<sup>35</sup>

The people of an integrated state should enjoy “[r]epresentation without discrimination in the central legislative organs on the same basis as other inhabitants and regions, . . . equal rights and status [with] inhabitants and local bodies of . . . other parts of the country, . . . an identical degree of self-

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republic, *see, e.g.*, United States *ex rel.* Richards v. De Leon Guerrero, Misc. No. 92-001, slip op. at 64 (D. N. Mar. I., July 24, 1992), is fundamentally wrong. It is not the degree of self-government, but only the political structure within which it is exercised, that differentiates the three.

This is illustrated by the fact that none of the documents associated with the termination of the trusteeship differentiates in any way between the degree of self-government to be enjoyed by the CNMI under the Covenant, and that of the free associated states elsewhere in Micronesia. All are described without distinction as “self-governing.” *See* T.C. Res. 2183, *supra* note 26, at 14 (noting that the “peoples of the Federated States of Micronesia, Marshall Islands, the Northern Mariana Islands and Palau have established constitutions and democratic political institutions providing the instruments of self-government”); Proclamation No. 5564, *supra* note 27 (stating that the Commonwealth, Marshall Islands, and Federated States of Micronesia “are self-governing”); S.C. Res. 683, *supra* note 27, at 29 (determining “in the light of the entry into force of the new status agreements for the Federated States of Micronesia, the Marshall Islands and the Northern Mariana Islands, that the objectives of the Trusteeship Agreement have been fully attained”).

<sup>33</sup> G.A. Res. 742 *supra* note 29, at 22; G.A. Res. 648 *supra* note 29, at 34; and G.A. Res. 567, *supra* note 29, at 61.

<sup>34</sup> G.A. Res. 742 *supra* note 29, at 23; G.A. Res. 648 *supra* note 29, at 35; and G.A. Res. 567, *supra* note 29, at 61.

<sup>35</sup> G.A. Res. 1541, *supra* note 29, at 30 (Principle VIII).

government, [and] . . . [l]ocal self-government of the same scope and under the same conditions as enjoyed by other parts of the country.”<sup>36</sup>

The CNMI arrangement does not fit neatly into either of these categories. The CNMI is not fully “integrated” into the United States because it has no representation in Congress, the United States’ “central legislative organ.” Nor does “free association” fit very well, because of the permanence of the United States-CNMI union.<sup>37</sup> The U.N. categories, however, are to be read as flexible and not exclusive:

[T]he General Assembly lists under two separate headings . . . the factors to be taken into account, stressing that the list cannot be regarded as exhaustive or definitive, and that a single factor or particular combination of factors cannot be regarded as decisive in every case. Whether the peoples of a territory should be regarded as having reached a stage of self-government where there is no longer any obligation to transmit information should be solved in the light of the conditions enumerated under either of the two headings, taking into account the circumstances of each particular case, which will need to be studied separately.<sup>38</sup>

It may therefore be said that the “self-government” of the CNMI, as guaranteed in the Covenant, is intended to be a system in which the spirit, if not every letter, of the principles and factors noted above, is satisfied—ie., a system in which, if any factor is missing, it is compensated for in another way, such that the arrangement, taken as a whole, provides the people of the CNMI with no less autonomy and equality, no less a “full measure of self-government,” than they would enjoy if every factor were present.

The primary purpose of the Trusteeship was to develop this type of self-government, and the primary purpose of the Covenant, as the successful culmination of the Trusteeship with respect to the Northern Marianas, was

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<sup>36</sup> G.A. Res. 742 *supra* note 29, at 23; G.A. Res. 648 *supra* note 29, at 35. *See also* G.A. Res. 567, *supra* note 29, at 62.

<sup>37</sup> *See* COVENANT, *supra* note 2, § 105 (requiring mutual consent of the United States and the Commonwealth to dissolve political union). A “free association,” as the name implies, is supposed to be unilaterally terminable. *See* G.A. Res. 1541, *supra* note 29, at 29 (Principle VII). *See generally* Peter Bergsman, *The Marianas, the United States, and the United Nations: The Uncertain Status of the New American Commonwealth*, 6 CAL. W. INT’L L.J. 382, 406-07 (1976) (deeming the Covenant inconsistent with Resolution 1541 for this reason).

<sup>38</sup> G.A. Res. 567, *supra* note 29, at 61. Again in Resolutions 648 and 742, the General Assembly described these factors as a “guide,” noting that “each concrete case should be considered in light of the particular circumstances of that case.” G.A. Res. 648, *supra* note 29, at 33-34; G.A. Res. 742, *supra* note 29, at 22. And like the factors, “these principles [of Resolution 1541] should be applied in light of the facts and circumstances of each case[.]” G.A. Res. 1541, *supra* note 29, at 29.

to establish it.<sup>39</sup> A construction of the Covenant, therefore, that would leave the Northern Marianas people with such a “full measure of self-government” in the U.N. sense is therefore strongly to be favored over a construction that would not—i.e., a construction under which the U.S. government, not the Northern Marianas people, has ultimate control over the internal affairs of the CNMI, or under which the Northern Marianas people have a less substantial voice in their internal matters than the American people have in theirs. This principle of construction must be kept in mind when considering some of the other features of the Covenant relationship and their impact, if any, on the question of where ultimate political power is vested.

### B. *Sovereignty*

Section 101 of the Covenant, which provides for United States “sovereignty,” is not the obstacle to true self-government in the Northern Marianas that it is sometimes assumed to be. It is of course true that, at the broadest possible level, “sovereignty” has been defined, as “supreme, absolute, uncontrollable power, the absolute right to govern.”<sup>40</sup> In the context of the CNMI, this definition would be problematic because it conflicts with the Covenant’s guarantee of self-government as properly read in light of the U.N. resolutions on self-government—indeed with *any*

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<sup>39</sup> See, e.g., *Temengil v. Trust Terr. of the Pac. Islands*, 881 F.2d 647, 649 (9th Cir. 1989) (“The paramount duty of the United States was to steward Micronesia to self government.”); *Gale v. Andrus*, 643 F.2d 826, 830 (D.C. Cir. 1980) (“The task of the United States under the Trusteeship Agreement at issue is primarily to nurture the Trust Territory toward self-government.”).

The United States and the Northern Marianas adopted and relied on the United Nations’ understanding of the term when entering into the Covenant:

What we have before us is a covenant that does provide for self-government, and the kind of self-government that will meet the standards and definitions of self-government by the United Nations. . . . The agreement which we entered into with the United Nations says clearly that we have an obligation to offer them either self-government or independence, and self-government includes association with a sovereign power.

Hearing Before the Committee on Interior and Insular Affairs, U.S. Senate, 94th Cong., 1st Sess., on S.J. 107, Joint Resolution to Approve the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, and For Other Purposes (July 24, 1975) [hereinafter *Covenant Hearing*] at 237 (statement of Ambassador F. Haydn Williams, chief US Covenant negotiator). See also, e.g., Roger S. Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?* 21 HARV. INT’L L. J. 1, 75 n.398 (1981) (noting U.S. position that Commonwealth Covenant was “perfectly compatible with Resolution 1541”).

<sup>40</sup> BLACK’S LAW DICTIONARY 1396 (6th ed. 1990) (defining “sovereignty”). This definition derives from Blackstone’s Commentaries, where it described the powers of the British Parliament. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 462 (1793) (Wilson, J.).

meaningful definition of self-government.<sup>41</sup> It has long and widely been recognized, however, that absolute power to rule is not the only, or even the ordinary, meaning of the term,<sup>42</sup> and that other meanings of “sovereignty” exist that are fully capable of accommodating a “self-government” conformable to the U.N.’s definitions.<sup>43</sup>

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<sup>41</sup> See generally U.N. Resolutions cited *supra* note 29.

<sup>42</sup> Indeed, “sovereignty” is a famously flexible term. See, e.g., *United States v. Spelar*, 338 U.S. 217, 224 (1949) (Frankfurter, J., concurring) (“The very concept of ‘sovereignty’ is in a state of more or less solution these days.”); *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1541 (9th Cir. 1994) (“[T]he concept of sovereignty is a pliable one for purposes of resolving domestic jurisdictional disputes.”).

Louis Henkin, perhaps the pre-eminent modern writer on international law, has famously written:

Sovereignty is a bad word, not only because it has served terrible national mythologies; in international relations, and even in international law, it is often a catchword, a substitute for thinking and precision. It means many things, some essential, some insignificant; some agreed, some controversial; some that are not warranted and should not be accepted. . . . For legal purposes at least, we might do well to relegate the term to the shelf of history as a relic from an earlier era.

LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* (1989), *quoted in* *INTERNATIONAL LAW: CASES AND MATERIALS* 15-16 (Henkin et al. eds., 1993). See also, e.g., Louis Henkin, *That “S” Word: Sovereignty and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 1 (1999) (“The meaning of “sovereignty” is confused and its uses are various, some of them unworthy, some even destructive of human values.”); Naomi Hirayasu, *The Process of Self-Determination and Micronesia’s Future Political Status Under International Law*, 9 *U. HAW. L. REV.* 487, 526 (1987) (“Commentators agree that sovereignty is an elusive and relative concept.”).

Courts have used various qualifying formulations of “sovereignty.” See, e.g., *McComish v. Commissioner*, 580 F.2d 1323, 1330 (9th Cir. 1978) (“It is this “quasi-sovereign” status of the Trust Territory that leads to our determination. . . .”); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 n.20 (1979) (The Washington Supreme Court . . . has repeatedly held that the peculiar semisovereign . . . status of Indians justifies special treatment . . . .”); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character.”); *Cobb v. United States*, 191 F.2d 604, 608 (9th Cir. 1951) (distinguishing between “de facto” and “de jure” sovereignty as applied to Okinawa); *Morgan Guar. Trust Co. v. Republic of Palau*, 639 F. Supp. 706, 714, 715 (S.D.N.Y. 1986) (“With the adoption of its Constitution and Compact, Palau has reactivated a sovereignty which had been dormant.”); *Sablan Constr. Co. v. Trust Terr. of the Pac. Islands*, 526 F. Supp. 135, 140 (D. N. Mar. I. 1981) (“At most the Trust Territory has . . . ‘qualified sovereignty.’”); and *United States v. Ushi Shiroma*, 123 F. Supp. 145, 149 (D.Haw. 1954) (“[T]he United States felt that the best formula would be to permit Japan to retain *residual sovereignty*, while making it possible for [Okinawa] to be brought into the U.N. trusteeship system . . . .”). These cases demonstrate that the term “sovereignty,” taken naked and out of context, does not clearly mean anything at all. In order to determine its meaning, the context in which it appears must be considered.

<sup>43</sup> Indeed, this must be so, since only one of the three options of Resolution 1541—independence—unequivocally requires separate sovereignties. See *supra* Section II(A).

One such meaning of sovereignty is “international independence.”<sup>44</sup> The most obvious example of the difference between “international independence” and the “absolute right to govern” is found in the structure of the United States itself. To say that the entire territory from the Atlantic to the Pacific between Canada and Mexico is “under the sovereignty of the United States” does not mean that the United States has unlimited legislative power over all that territory—ie. over the states. It means only that the states do not have separate international personalities, but instead are subsumed within a larger political entity, the United States, which acts as their common international voice. In other words, the assertion that the states are “under the sovereignty of the United States” carries no inherent assumptions regarding the internal workings and relative distribution of legislative power within that political unit. In fact, the United States does *not* have unlimited legislative power over the states, but rather has carefully circumscribed and delegated powers which it lacks lawful authority to exceed—yet the United States is nonetheless “sovereign” on the international stage.<sup>45</sup>

Reading the “sovereignty” of the Covenant in this international sense leaves room for a full measure of self-government, and thus furthers, rather than defeats, the purpose of the Covenant. Moreover, this reading of “sovereignty” is supported by history. U.S. sovereignty in the CNMI was important to the establishment of the political union not because of any authority it would grant the United States over internal matters of island governance. Rather, it was important because of the security, in terms of “strategic denial” of the area to other powers, and its assured continuing availability for U.S. military purposes, that the permanence of sovereignty, as opposed to unilaterally terminable “free association” would provide.<sup>46</sup>

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<sup>44</sup> See BLACK’S LAW DICTIONARY 1396 (6th ed. 1990) (further defining “sovereignty” as “the *international independence* of a state, combined with the right and power of regulating its internal affairs without *foreign* dictation”) (emphasis added).

<sup>45</sup> Cf. R.B.S., Comment, *Inventive Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA. L. REV. 1041, 1055 (1974) (distinguishing between international personality (“sovereignty”) and internal legislative power (“authority”), such that a “nation may retain full ‘sovereignty’ over several areas while exercising unequal levels of ‘authority.’”).

<sup>46</sup> See, e.g., HOWARD P. WILLENS & DEANNE C. SIEMER, NATIONAL SECURITY AND SELF-DETERMINATION: UNITED STATES POLICY IN MICRONESIA 1961-1972 (2000) at 137 (“American policy makers believed that the only way the nation’s security interests could be met in the Pacific was to extend U.S. sovereignty to the Trust Territory[.]”); DONALD F. MCHENRY, MICRONESIA: TRUST BETRAYED (1975) at 136 (“[T]he more permanent the set-up, the better United States military interests would be protected.”); FARRELL, *supra* note 4, at 603 (“The principal interest of the United States in the Marianas . . . is not so much use of the islands ourselves as the denial of them to others.”) (quoting Sen. Ernest Hollings (1976)); *Id.* (“The ability to deny the Northern Marianas to the military of other nations, coupled with the right to operate and base U.S. forces in the area, is important to the maintenance of [a credible defense] posture[.]”) (quoting Deputy Defense Secretary Robert Ellsworth (1976)).

Thus, outward, internationally-focused “sovereignty” is the correct construction of the term.

The final nail on the coffin for any attempt to base boundless federal authority in the CNMI on “sovereignty” is the fact that *even if* “sovereignty” is taken to mean “uncontrollable power” or “absolute right to govern,” such power and right cannot, under American political theory, rest in “the United States” as a government. That power lies only with the people, who created the government and are inherently empowered to alter or abolish it.<sup>47</sup> In other words, therefore, the placement of the Northern Marianas people under the sovereignty of “the United States” really means that they are under the sovereignty of *the people* of the United States, a body of persons which includes themselves,<sup>48</sup> and which body, before uniting as one, established by joint action a system by which the entire body would be bound thereafter. That system is the Covenant, which guarantees the CNMI local self-government, as defined above.<sup>49</sup> Viewed in this light, the CNMI’s self-government and U.S. sovereignty are not only consistent, they are virtually the same thing.

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<sup>47</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (Wilson, J.) (“To the Constitution of the United States the term SOVEREIGN, is totally unknown,” except as applied to the people); *Chisholm*, 2 U.S. at 461 (denouncing “arbitrary doctrines and pretensions concerning the Supreme, absolute, and incontrollable, power of Government,” see *supra* note 34 and accompanying text, as a usurpation by despotic governments). See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 228 (1992).

The course of intellectual, as well as political and military, events had brought into question the entire concept of a unitary, concentrated, and absolute governmental sovereignty. It had been challenged, implicitly or explicitly, by all those who had sought constitutional grounds for limiting Parliament’s power in America. In its place had come the sense, premised upon the assumption that the ultimate sovereignty -- ultimate yet still real and effective -- rested with the people, that it was not only conceivable but in certain circumstances salutary to divide the attributes of governmental sovereignty among different levels of institutions.

*Id.*

<sup>48</sup> See COVENANT, *supra* note 2, §§ 301, 303 (conferring American citizenship on the Northern Marianas people). See also *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856) (“[E]very citizen is one of this people [of the United States], and a constituent member of this sovereignty.”).

<sup>49</sup> Significantly, the sovereignty of the United States attached, and the Northern Mariana people became a part of that sovereignty by becoming citizens, at precisely the same time – November 4, 1986. See COVENANT *supra* note 2, § 1003 (making effective date of § 101 the same as that of §§ 301 and 303). Thus, the Northern Marianas people’s preexisting sovereignty was never lost or relinquished, but rather *merged*. See *id.* pmbl. (stating that approval of the Covenant by the Northern Marianas people “constitut[es] on their part a sovereign act of self-determination”).

### C. Federal Legislative Authority

More formidable challenges are posed, however, by some other sections of the Covenant. Section 105 allows the U.S. Congress, in which the Northern Marianas are not represented, to enact new legislation that is effective in the islands. Sections 501 and 502 make certain previously existing provisions of the federal Constitution and laws effective in the CNMI. Finally, Section 102 makes those applicable federal laws part of the “supreme law” of the CNMI. In order for the Covenant to be true both to its purpose and to its own text, the political relationship it creates must be consistent with the existence of such legislative power, but at the same time must preserve for the Northern Marianas people a measure of self-government equal to that of the states.

Many commentators are too willing to simply give up at this point and declare that the Northern Mariana Islands are not self-governing, despite the plain language of the Covenant that they are.<sup>50</sup> This view, however, gives too little credit to the United States and the Covenant negotiators, basically accepting that a kind of hoax or semantic game has been played on the CNMI and the United Nations, and that the label of “self-government” on the CNMI is no more than a sham. Rather than assume a hoax, however, the better legal construction is to start from the presumption that self-government is what it purports to be—a reality—and see if this presumption can be reconciled with the United States’ power to legislate for the Northern Marianas.<sup>51</sup>

#### 1. Limitation to Foreign Affairs and Defense

One way to reconcile self-government with the federal power of legislation in the Northern Marianas would be by restricting federal legislative power to defense and foreign affairs only, leaving all other matters as the sole province of the local government. Although the text and

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<sup>50</sup> See, e.g., Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 504 (1992) (“Congress can pass laws binding on them without their consent. They are not therefore truly self-governing.”); Clark, *supra* note 39, at 75-78, 84 (maintaining that the Commonwealth “falls short” of self-government). Cf. Hirayasu, *supra* note 42, at 516-17 (arguing that CNMI has “arguably” attained status of free association or integration, but reaching this conclusion without perceiving or pursuing the implications of federal legislative authority).

<sup>51</sup> See *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956) (“Public Law 600, pursuant to which the people of Puerto Rico drafted and promulgated a constitution, purported to be *enlarging*, rather than *restricting*, the measure of local self-government in Puerto Rico. . . . We find no reason to impute to the Congress the perpetration of such a monumental hoax.”) (emphasis added). See also *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (“[I]t would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government” for the court to assume that Congress would violate a treaty in legislation purporting to implement such treaty).

legislative history of the Covenant provide some support for such an approach,<sup>52</sup> the Ninth Circuit rejected it in *United States ex rel. Richards v. De Leon Guerrero*.<sup>53</sup> In *Richards*, the issue was whether the Governor of the CNMI could be required to disclose tax returns, confidential by local law, to the federal Inspector General in the course of an audit of the CNMI government authorized by federal law. The CNMI maintained that federal authority extended only to foreign affairs and defense, while the United States asserted a theory of “institutional self-government,” meaning that only the “naked existence” of local governmental institutions was secured by the Covenant, instead of any substantive protection of their legislation against plenary congressional authority.<sup>54</sup>

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<sup>52</sup> Compare COVENANT, *supra* note 2, § 103 (“The people of the Northern Mariana Islands will . . . govern themselves with respect to internal affairs[.]”), *with id.* § 104 (“The United States will have complete responsibility for . . . foreign affairs and defense affecting the Northern Mariana Islands.”). The parallel structure implies a dichotomy. This implication is even clearer in the Chamorro version of the Covenant, where “internal affairs” and “foreign affairs” are rendered respectively as matters “gi halom Marianas”—inside the Marianas—and “gi hiyong Marianas”—outside the Marianas. See also Covenant Hearing, *supra* note 39, at 45 (“We now have a covenant that gives almost total self-government to the Marianas with the exception of defense and foreign policy.”) (statement of Sen. Johnston).

<sup>53</sup> *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749 (9th Cir. 1993).

<sup>54</sup> See *id.* at 754 (noting Inspector General’s argument that “Congress has plenary legislative authority over the CNMI”). *Richards* was the culmination of a controversy that had been brewing for several years over these issues. See generally Lizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Island Entities: The Path To Self-Government In the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT’L L.J. 257, 280-82 (1990) (summarizing significant events and litigation efforts in conflict between advocates of Commonwealth self-government and plenary U.S. power); Van Dyke, *supra* note 50 at 481-86 (detailing the parties’ positions leading into *Richards*); Hirayasu, *supra* note 42, at 499, n.38 (noting the United States’ and the Commonwealth’s “differing views on the nature of the relationship,” with good examples of 1986 correspondence expressing the views of both sides).

For some contemporary examples of the pro-self-government approach, see CNMI House Resolution 5-14 (*Self-Determination Realized*) (1986) and Final Report of the Northern Mariana Islands Commission on Federal Laws to the Congress of the United States (1987), reprinted in 1 N.Mar.I. Appendix 1G (1991). See also *Sablan v. Superior Court*, 2 N.M.I. 165, 184 (1991) (Hillblom, J., dissenting) (“The District Court assumed that the U.S. Congress and the Executive could override the will of the people of the [Commonwealth] on any and all matters with the exception of the *naked existence* of the positions of government.”) (emphasis added); *Sablan v. Iginoef*, 1 N.M.I. 551, 568 (1990) (Hillblom, J., concurring) (concluding that “any matter not involving foreign affairs and defense is a matter of self-government reserved to the inhabitants of the CNMI”); and *Borja v. Goodman*, 1 N.M.I. 225, 245 (1990) (Hillblom, J., concurring) (reasoning that “[a] plain reading of the Covenant reveals one basic theme, the reservation of ‘self-government’ in the people of the Northern Mariana Islands”).

The definitive statement of the contrary view is the federal District Court’s opinion in *Richards*, which adopted the “institutional” view of self-government, and a territorial view of the US-CNMI relationship. See *United States ex rel. Richards v. De Leon Guerrero*, Misc. No. 92-001 (D. N. Mar. I., July 24, 1992).

The court rejected both views. The Court declined the CNMI's invitation to "carv[e] out an area of 'local affairs' immune from federal legislation," but at the same time required, in order for a federal law to apply in the CNMI, that "the federal interest to be served by the legislation at issue" must outbalance "the degree of intrusion into the internal affairs of the Commonwealth." Applying this balancing test, the court found a "substantial" and "significant" federal interest in the disclosure of the tax records, and minimal interference with local affairs. It therefore ordered the records disclosed.<sup>55</sup>

## 2. Balancing Test

A "balancing test" of this type, under which federal legislation that is overly intrusive into local affairs is *per se* invalid, is another possible way to reconcile local self-government and federal legislative power.<sup>56</sup> Certainly some imaginable types of legislation would be so facially violative of the whole principle of self-government as to be void from the outset under a test such as that enunciated in *Richards*.<sup>57</sup> The *Richards* test should also be

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<sup>55</sup> See *Richards*, 4 F.3d at 755. Although a federal victory on the facts, the case was actually a larger step forward for the Commonwealth in terms of the principles it enunciated and applied. It confirmed the primacy of the Covenant in U.S.-Commonwealth relations (particularly as against the Territorial Clause), established that consistency with self-government is a necessary condition to the application of a federal law in the Commonwealth, and demonstrated that such terms as "self-government" and "internal affairs" are not mere shibboleths or "political questions," but are capable of sensible construction and application in cases as they arise – all of which were points the United States had disputed. Thus, although it did not entirely satisfy anyone, or resolve all of the lingering questions about the U.S.-Commonwealth relationship, the *Richards* decision took the steam out of the immediate dispute, and at least appeared to point the direction for the future in a constructive way.

<sup>56</sup> This is what might be called "dormant" or "defensive" self-government. See, e.g., Brian Z. Tamanaha, *Post-1997 Hong Kong: A Comparative Study of the Meaning of "High Degree of Autonomy,"* 20 CAL. W. INT'L L.J. 41, 44 (1989) ("[S]elf-government means more than just affirmative control over internal affairs. There is also a protective aspect to this term which assures non-interference by the principal entity within the sphere of self-government.").

<sup>57</sup> See, e.g., Northern Mariana Islands Covenant Implementation Act, S. 507, 107th Cong. § 1(b)(1) (1st Sess. 2001) (seeking to impose federal control over immigration into the Commonwealth). This bill purports to recognize the Covenant's guarantee of self-government. *Id.* § 1(b)(1)(B). However, it displays an utterly fatuous understanding of the term, consisting of the United States "considering the views of [local] officials in the implementation of Federal law by Federal agencies." *Id.* The actual decisions would be made in every case in the U.S. Attorney General's "sole discretion." *Id.* § 6(a). All duly enacted CNMI laws on the subject would be "supersede[d] and replace[d]." *Id.* § 6(g). See also United States-Commonwealth of the Northern Marianas Human Dignity Act, H.R. 2661, 107th Cong., 1st Sess. (2001) (proposing similar immigration takeover, but without even purported recognition of self-government).

It is beyond the scope of this Article to comment on the accuracy of what the sponsors of these bills perceive to be the Commonwealth's problems, or the likely efficacy

sufficient to protect the CNMI from certain other laws that plainly meddle in matters of strictly local concern with little or no federal justification—more or less in the same way that the Tenth Amendment protects the states.<sup>58</sup> A balancing test can also be useful in determining, in mixed-bag situations, just what constitute “internal affairs” subject to the right of self-government in the first place.<sup>59</sup>

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of how they propose to solve them. Regardless of the bills’ debatable merits, however, their indisputable effect would be complete loss of local control over the entry and duration of stay of an alien population which, at present, is more than half that of the entire CNMI, but consists mostly of hitherto temporary workers. See 1996 COMMONWEALTH OF NORTHERN MARIANA ISLANDS STATISTICAL YEARBOOK 2-3 (Nov. 1997). This could cause enormous social disruption in a small island community, while serving no federal interest more concrete than amorphous and unspecified “national values underlying Federal immigration policy.” *Id.* § 1(b)(2)(E). Thus, these proposed bills would likely fail any test fairly balancing extent of interference against asserted interest.

<sup>58</sup> This is not to suggest that the scope of protection from federal interference under the *Richards* test is no broader than that afforded by the Tenth Amendment—which, though recently resurgent (*see, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995))—has with some justice been called “more theoretical than real.” Marybeth Herald, *Does the Constitution Follow the Flag Into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 766 (1995).

The scope of the *Richards* test remains to be worked out in practice. If the system of local suspension of federal law described *infra* is accepted, then the *Richards* test perhaps need be only more or less as broad as the Tenth Amendment, as self-government is otherwise secured. If local suspension of federal law is not accepted, however, and the entire burden of securing self-government thus falls on the shoulders of the *Richards* test, then the test must be much stronger. It must, at the very least, require that legislation substantially impacting local affairs be narrowly tailored to meet a compelling federal interest. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (strict scrutiny of laws affecting “discrete and insular minorities”—the Northern Marianas being “insular” in the truest sense of the word); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (applying strict scrutiny to laws restricting the right to vote—i.e., to have a voice in the laws under which one must live). *Cf. Van Dyke*, *supra* note 50 at 515 (advocating a system in which an “overriding national necessity to have a uniform law on the subject” would be required for a federal law to apply against the wishes of the islanders). Interestingly, an earlier draft of Covenant §105 explicitly included such a “compelling national interest” requirement in the case of laws that could not be applied to the states. *See* Draft of May 2, 1974, §207(a) (copy on file with author). *See generally* WILLENS & SIEMER, *supra* note 21, at 175.

<sup>59</sup> This would seem to be the question that the *Richards* court was really answering: whether an audit relating to the use of federal funds in the Commonwealth really affected “internal,” as opposed to intergovernmental, matters at all. This type of question also arises with respect to an issue like immigration, which, because of the Commonwealth’s large alien population, *see supra* note 57, is deeply interwoven with internal affairs, but at the same time, has potential defense and foreign policy implications.

For example, the United States could probably lawfully prevent the Commonwealth from granting entry to known terrorists, or citizens of a nation with which the United States is at war. It would not follow, however, that the United States could also prevent the entry of anyone from a nation that the United States regards as posing a higher than average risk of visa overstays or criminal activity, such as drugs or prostitution. Still less could the United States prohibit the entry of any aliens, or classes of aliens, simply because it held the subjective view that there are too many people in the Commonwealth.

The *Richards* balancing test alone, however, is insufficient to ensure a “full measure” of self-government. It does not take into account the situation presented by a federal law which does not, on its face, infringe on self-government, but which in its application becomes undesirable to the people of the Northern Marianas. Many possible laws become intrusive only when the opinion of the people is against them. For example, a raise in the minimum wage,<sup>60</sup> a restriction on imports,<sup>61</sup> the imposition of the death penalty for certain offenses,<sup>62</sup> or either the restriction or allowance of abortion<sup>63</sup> might be welcomed in the Northern Mariana Islands, or might be opposed. That opinion, rather than anything inherent in the legislation, is what really determines the nature and measure of the legislation’s interference with internal government.<sup>64</sup>

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<sup>60</sup> See, e.g., Fair Minimum Wage Act of 2001, S. 964, 107th Cong., 1st Sess. § 3 (2001) (proposing to raise minimum wage in CNMI (currently \$3.05/hr) by 50 cents every 6 months over a 3.5-year span). This has generally been opposed in the Commonwealth as economically unfeasible. See, e.g., Benhur C. Saladores, *Teno Renews Plea on Minimum Wage*, SAIPAN TRIBUNE, Oct. 16, 2000. On the other hand, it was the local District Legislature that first attempted to enact a minimum wage in the NMI, but this was vetoed by the U.S. Trust Territory administration. See *Questions About the Plebiscite, the Covenant and Commonwealth*, reprinted in *Covenant Hearing*, supra note 39, at 186. Either way, federal and local opinion on the subject seems rarely to coincide.

<sup>61</sup> In 1998, the U.S. Attorney in the Northern Marianas began enforcing a federal law allowing only cars meeting certain safety standards to be imported or sold. See *US Attorney Files Case in US court: ‘Get 19 Vehicle Imports Out,’* MARIANAS VARIETY, Apr. 28, 1998, at 6. That seems to have accorded with the views of the NMI people, since, at about the same time, the CNMI legislature enacted its own statute providing the same thing. See *New Law Bans Import of Non-US Standard Vehicles*, MARIANAS VARIETY, May 1, 1998, at 1.

However, had the factual circumstances been different, local opinion might also have been different. It might have been the case that a large number of the automobiles used in the CNMI were imported used cars, originally built for the Japanese domestic market, which would not meet U.S. standards because of such differences, as right-side steering. Such cars are widely used on some other islands of Micronesia. If that were also the case in the CNMI, the imposition of the federal law could well have conflicted with local opinion, and thus interfered with internal self-government.

<sup>62</sup> Compare N. MAR. I. CONST. art. I, § 4(i), <http://cnmilaw.org/htmlpage/npg04a.htm> (prohibiting capital punishment), with *United States v. Acosta-Martinez*, 252 F.3d 13, 15-16 (1st Cir. 2001) (enforcing federal death penalty in Puerto Rico, despite island’s constitutional prohibition against capital punishment).

<sup>63</sup> See N. MAR. I. CONST. art. I sec. 12, <http://cnmilaw.org/htmlpage/npg04a.htm>. (“The abortion of the unborn child during the mother’s pregnancy is prohibited in the Commonwealth of the Northern Mariana Islands, except as provided by law.”). No current Commonwealth statute either authorizes or penalizes abortion, and the phrase “as provided by law” has not been construed.

<sup>64</sup> In other words, the flip side of Tamanaha’s comment, *quoted in supra* note 56, is equally true: Self-government means more than just “non-interference by the principal entity within the sphere of self-government.” It also means “affirmative control over internal affairs.”

### 3. Local Repeal

Federal legislative power over the CNMI may also be reconciled with self-government by construing “self-government” to include an implicit right in the Northern Marianas people to repeal (as to the Northern Marianas only) a federal law that would otherwise bind them. One author calls this practice “territorial nullification” and recommends it as a workable system, noting that it was used with success in Alaska.<sup>65</sup> A similar system is apparently also in effect with respect to the authority of the British Parliament over the Isle of Man:

Parliament has been able to legislate for the Isle of Man since before [1765.] The legislation may deal with any subject, and need not be expressed in a special manner and form, although the intention of Parliament to legislate for the Isle of Man should be clear. The legislation may repeal Acts of Tynwald [the Manx Legislature], *but is subject to repeal by such Acts.*<sup>66</sup>

Other similar systems, where self-governing islands opt into, rather than out of, new national laws and may repeal old ones, are also in effect in the Cook Islands and Niue, which, together with the CNMI, are the only post-1960 U.N.-approved examples of self-government short of independence.<sup>67</sup> Construing the Covenant to include a right of local repeal

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<sup>65</sup> Van Dyke, *supra* note 50, at 501-02 (“Another option is to give the legislature of the insular political community the power to nullify or amend some of the federal laws that otherwise would apply. This approach was used in Alaska beginning in 1912.”). *See also* R.B.S., *supra* note 45, at 1049-50 (noting the same fact about Alaska). The relevant Alaska laws are set out in full in Van Dyke’s article, and provide that all laws in force in Alaska prior to August 24, 1912, “shall continue in full force and effect until altered, amended or repealed by Congress *or by the Legislature [of the Territory of Alaska].*” Act of August 24, 1912, 37 Stat. 512 § 23 (1912) (codified at 48 U.S.C. § 23 (1946)) (quoted in Van Dyke, *supra* note 50 at 502) (emphasis added). The next section limited that authority somewhat by exempting certain enumerated federal laws from territorial repeal. *Id.* at § 24.

<sup>66</sup> Peter W. Edge, *David, Goliath, and Supremacy: The Isle of Man and the Sovereignty of the United Kingdom Parliament*, 24 *ANGLO-AMERICAN L. REV.* 1, 22 (1995) (emphasis added). *See also id.* at 16-17 (citing examples of British laws repealed by Tynwald).

<sup>67</sup> In the Cook Islands, prior-enacted New Zealand law “shall continue in force,” but “may be repealed, in relation to the Cook Islands, by Act of the Parliament of the Cook Islands.” *COOK ISLANDS CONST. AMENDMENT (NO. 9) ACT 1980-81*, art. 22(1), *reprinted in* *CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES* 74, 76 (Philip Raworth ed., 2001) [hereinafter *CONSTITUTIONS*]. New acts of the New Zealand Parliament shall not extend to the Cook Islands, “[e]xcept as provided by Act of the Parliament of the Cook Islands.” *COOK ISLANDS CONST.* art. 46, *reprinted in* *CONSTITUTIONS*.

In Niue, the constitution provides that no act of the New Zealand Parliament shall extend to Niue unless “it has been requested and consented to by resolution of the Niue Assembly,” in which case it “shall have the same force and effect as if it were an Act of the

would fill in the gap left by the *Richards* balancing test, and allow the Northern Marianas people a voice in *all* laws affecting their lives, not just nullify those that facially and inherently intrude on self-government.

A right of outright local repeal, however, may be difficult to reconcile with Section 102 of the Covenant, making applicable federal laws part of the supreme law of the CNMI. The bestowal of “supremacy” on federal laws would seem to preclude the notion that they can be repealed by local laws. Indeed, if the customary interpretation of the federal Constitution’s supremacy clause is followed, the opposite would be true.<sup>68</sup> It is by no means clear, however, that that interpretation is intended or should be followed, especially since following it would create a plain conflict with the concept of “self-government” found in the U.N. Charter, which we know to be intended, and which, as part of the Covenant, is itself supreme.<sup>69</sup> If this question needed to be answered, it would appear to be

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Niue Assembly.” NIUE CONST. art. 36 (1974), *reprinted in* CONSTITUTIONS, at 26. *See also* An Act to make provision for self-government by the people of Niue, and to provide a constitution for Niue (New Zealand) (Aug. 29, 1974) (providing, similarly to the CNMI Covenant, that Niue shall be self-governing; British nationality and New Zealand citizenship shall be maintained; and external affairs and defense shall be the responsibility of the Queen). *See generally* Clark, *supra* note 39, at 54-60 (discussing the relationships of the Cook Islands and Niue with New Zealand).

<sup>68</sup> By contrast, even this type of “supremacy” can easily accommodate a *Richards*-type balancing test, even a strict one with a compelling-interest requirement, or even a strict exclusion of federal authority from anything but foreign affairs and defense. This is because Section 102 makes only “applicable” federal laws supreme in the CNMI, just as the federal Constitution’s supremacy clause makes only laws “made in pursuance” of the constitution supreme in the states. *See* U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . any thing in the constitution or laws of any state to the contrary notwithstanding.”); *Alden v. Maine*, 527 U.S. 706, 731 (1999) (“[T]he Supremacy Clause enshrines as ‘the supreme Law of the Land’ only those Federal Acts that accord with the constitutional design.”). Just as only constitutional laws, according with due process, equal protection, etc., are supreme in the states, only laws consistent with the Covenant, including its guarantee of self-government, are supreme in the Commonwealth.

<sup>69</sup> *See* COVENANT, *supra* note 2, § 102 (establishing as supreme law of CNMI not U.S. law alone, but rather “this Covenant,” together with applicable U.S. law). *See supra* Part I.A for U.N.-based construction of self-government. The necessity of a different interpretation of “supreme law” is also suggested by the different political structure. Indeed, because the Northern Marianas are not represented in the federal government, it is *per se* impossible for “supreme law” to mean the same thing in the Commonwealth as it means in the states – i.e., that laws enacted by the people through their federal representatives prevail over those enacted by the people through their state representatives. If the meaning of “supreme law” is not adjusted by allowing greater force to local legislation, then its meaning is necessarily distorted in the other direction by transforming it into law supreme *over the people*, as no law is over the people of the states. Yet, Section 501 makes constitutional provisions applicable to the Commonwealth as if it “were one of the several States,” while Section 502 applies federal laws “as they are applicable to the states,” and of course the laws and constitution are applicable to the states *subject to repeal by the people*. *See* COVENANT, *supra* note 2, §§ 501, 502.

one of those ambiguities that must be resolved “in favor of the people and government of the Northern Mariana Islands.”<sup>70</sup>— It need not be answered, however, because there is one last way in which federal legislative authority and local self-government can be reconciled.

#### 4. Suspension of Federal Law

It is to acknowledge the power of the Marianas people, as an exercise of the right of self-government, to *suspend the application* to the Marianas of any federal law. The law could retain its status as part of the supreme law, but it would be held in abeyance and be legally unenforceable until such time as the United States and the Northern Marianas reached a mutually satisfactory agreement as to its application.<sup>71</sup> The United States could accommodate the Northern Marianas by modifying the law or rescinding its application, or it could try to persuade the Northern Marianas people (whether by force of reason, by making concessions elsewhere, or by exerting economic pressure, to the extent otherwise lawful) to accept the law

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In further support of this view, a “notwithstanding” clause like that of the federal supremacy clause is conspicuously absent from Section 102. Such a clause was found in the earlier draft noted above, *see supra* note 58 (“anything in the Constitution or laws of the Commonwealth to the contrary notwithstanding”), but was later removed. The removal of both the “notwithstanding” clause and the “compelling national interest” requirement, whether or not deliberately linked, taken together can be seen as effecting a shift in the mechanism for protecting local self-government from a restriction on Congress to an empowerment of the local government, i.e., from defensive to active self-government. Thus, “supreme” and “applicable” in Section 102 would effectively cancel each other out, and the end result would be something not unlike the mutual repeal system of the Isle of Man. *See Edge, David, Goliath, and Supremacy, supra* note 66 and accompanying text.

Other evidence in support of a right to repeal at least pre-existing federal laws includes the fact that Section 502, which makes such laws applicable, is not a “fundamental” section subject to Section 105’s mutual consent provision, and thus it may unilaterally be altered by the Commonwealth. Also, “[t]he purpose of section 502(a)(2) was to ‘provide a workable body of law’ when the new Mariana Islands government became operative in 1978.” *Northern Mariana Islands v. United States*, 279 F.3d 1070, 1073 n.3 (9th Cir. 2002) (quoting S. REP. NO. 94-433, at 76 (1975)). This purpose does not require the Northern Marianas people to be unable ever to amend that body of law.

<sup>70</sup> *See supra* note 22 and accompanying text.

<sup>71</sup> The framework for such discussions is already in place. *See COVENANT, supra* note 2, § 902 (providing for regular consultation between the two governments on matters affecting their relationship). Just consultation without a right of suspension, however, is insufficient, because the United States could simply impose a law and refuse to agree, or even consult, with the Commonwealth about it. Indeed, in a recent round of 902 consultations, the U.S. administration was willing to talk only about how to implement a federal wage and immigration takeover, not whether there should be any such takeover in the first place. *See* Aldwin R. Fajardo, *Stayman: US Action Still ‘Non-Negotiable,’* MARIANAS VARIETY, Jan. 14, 1998, at 1; Zaldy Dandan, *Teno Says 902 Panel to Press Local Control,* MARIANAS VARIETY, Feb. 9, 1998, at 1. Indeed, the U.S. administration submitted draft takeover legislation to Congress before the talks were even held. *See* Zaldy Dandan, *Teno Says 902 Talks Should Have Preceded US Takeover Legislation,* MARIANAS VARIETY, Mar. 5, 1998, at 3.

as it is. The United States could not, however, unilaterally impose any law on the Northern Marianas people against their will.

This power of suspension is the absolute minimum necessary for the overall scheme of the Covenant to provide a true full measure of self-government in accordance with its purpose, and for the Northern Marianas people to stand, as they must, on an equal footing with their fellow citizens in the states in terms of power to govern themselves. Nothing in the Covenant explicitly establishes such a right of suspension, but nor does anything deny it, and because it is the only way left in which local self-government, federal legislative power, and the supremacy of applicable federal law—all of which the Covenant does explicitly establish—can clearly coexist, the right is there by necessary implication.<sup>72</sup>

### III. THE CONSTITUTIONAL POWER OF THE UNITED STATES TO ENTER INTO THE COVENANT

The previous section demonstrates, from the construction of the Covenant itself, that the people of the Northern Marianas have at least the power to suspend the application of objectionable federal laws to themselves and their islands. The same conclusion is reached if we approach the issue from the other direction, and analyze not the Covenant itself, but rather the United States' constitutional power to enter into and approve it. This section will demonstrate that the Covenant protects the Northern Marianas from the unilateral imposition of federal authority, and establishes at least a right to suspend federal law, by showing that it would have been unconstitutional for the United States to enter into the Covenant if it does not provide this protection.<sup>73</sup>

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<sup>72</sup> The Covenant granted the President a similar right to suspend laws inconsistent with the Trusteeship while it remained in effect. COVENANT, *supra* note 2, § 1004. This demonstrates that the concept of suspension can coexist with that of “supreme law,” as the term is used in the Covenant. This power was exercised on three occasions, which might usefully serve as models for any future act of suspension by the CNMI government. *See* Proclamation No. 4568, 43 Fed. Reg. 19,999 (May 9, 1978) (suspending U.S. laws restricting jury service to U.S. citizens as inconsistent with the Trusteeship obligation to promote political development and protect rights, because vast majority of inhabitants of the Northern Marianas were not yet citizens of the United States); Proclamation No. 4726, 45 Fed. Reg. 12,369 (Feb. 21, 1980) (suspending U.S. laws restricting fishing in territorial waters by foreign-built ships, as inconsistent with the Trusteeship obligation to promote economic advancement and self-sufficiency); Proclamation No. 4938, 47 Fed. Reg. 19,307 (May 3, 1982) (suspending U.S. laws restricting communications licenses to U.S. citizens, as inconsistent with the Trusteeship obligation to guarantee free speech and press).

<sup>73</sup> Ultimately, of course, this constitutional analysis is part of the construction of the Covenant itself, because the Covenant must be construed so that its approval was a constitutional act, if any such construction is possible. *Cf. NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

The cardinal principle of statutory construction is to save and not destroy. We have repeatedly held that as between two possible interpretations of a

### A. The Treaty Power

In analyzing this issue, we must first ask pursuant to what constitutional power the United States acted when it entered into the Covenant. It has sometimes been assumed that the United States acted under the Territorial Clause.<sup>74</sup> In fact, however, that would have been impossible, because in 1975-76, when the United States entered into and approved the Covenant, the Northern Marianas were, and would be for another ten years, part of the Trust Territory of the Pacific Islands, which undisputedly was not a territory of the United States, and thus not within the scope of the Territorial Clause.<sup>75</sup> It is apparent, tracing our way backward from the Covenant itself and the documents associated with its enactment,<sup>76</sup> that it was entered into and approved as the fulfillment of the terms of two treaties—the Trusteeship Agreement and the United Nations Charter—that placed the Northern Marianas under the administration of the United States

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statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which would save the act. Even to avoid a serious doubt the rule is the same.

*Id.*

<sup>74</sup> See, e.g., *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990) (framing the question as: “[D]id Congress exceed its powers under Article IV, section 3 [the Territorial Clause] by insulating section 805 [of the Covenant] from the reach of the equal protection clause?”). The Territorial Clause 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[.]” U.S. CONST. art. IV, § 3, cl. 2.

<sup>75</sup> See, e.g., *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1540 (9th Cir. 1994) (“We have never considered the Trust Territory as simply a United States territory or insular possession.”); *In re Rothstein*, 884 F.2d 490, 492 (9th Cir. 1989) (“The Trust Territory of the Pacific Islands is not a territory nor an insular possession of the United States, but was only held under a trusteeship agreement with the Security Council of the United Nations.”); *Holmes v. Dir. of Revenue & Taxation*, 827 F.2d 1243, 1245 (9th Cir. 1987) (“[T]he CNMI was not a possession of the United States—it was a United Nations Trust administered by the United States.”); *Saipan v. United States Dep’t of Interior*, 502 F.2d 90, 95 (9th Cir. 1974) (“[T]he Trust Territory is not a territory or possession of the United States.”); *Brunell v. United States*, 77 F. Supp. 68, 70 (S.D.N.Y. 1948) (upholding U.S. position that “Saipan has not been and is not a part of the United States, nor a territory or possession of the United States.”); *Juda v. United States*, 6 Cl. Ct. 441, 457 (1984) (“The Trust Territory is not a territory of the United States, either incorporated or unincorporated.”). Thus, whatever one’s view as to the application of the Territorial Clause to the Northern Marianas after the termination of the Trusteeship there in 1986, it could not have applied before that date. Moreover, even the most expansive constructions of the Territorial Clause do not find in it a power to acquire territory, as opposed to govern in once acquired. See generally cases cited *infra* notes 155-158. Thus, even if the Covenant established a territorial relationship—which it did not, see *infra* Section III(B)—the actual act of establishing it must be pursuant to some other power.

<sup>76</sup> See *supra* notes 24-27 and accompanying text.

and obliged the United States to develop self-government there.<sup>77</sup> This means two things—first, that the approval of the Covenant, like the Covenant itself, must be construed *in pari materia* with the treaties it is designed to effectuate;<sup>78</sup> and second, that the constitutional source of the power to enter into the Covenant was the power to take such actions as are necessary and proper to effectuate the terms of a valid treaty—and that the constitutionality of the entry into the Covenant should therefore be measured by the standard applied to actions taken pursuant to treaties.<sup>79</sup>

The power of the United States to act under a treaty is extremely broad. This power includes the power of both Congress and the President to take actions not authorized by any other provision of the Constitution,<sup>80</sup> and is coextensive with the powers of all nations under international law:

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<sup>77</sup> See *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 73 (1955) (describing U.N. Charter as “an exercise of the treaty-making power under the Constitution”); *Temengil v. Trust Terr. of the Pac. Islands*, 881 F.2d 647, 652 (9th Cir. 1989) (“The Trusteeship Agreement is a treaty[.]”).

<sup>78</sup> *Chew Heong v. United States*, 112 U.S. 536, 549 (1884). A statute enacted pursuant to a treaty, and purporting to effectuate the treaty, must be read *in pari materia* with the treaty:

For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.

*Id.* See also, e.g., *United States v. Gue Lim*, 176 U.S. 459, 465 (1900) (refusing to infer that Congress would, “while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty”).

<sup>79</sup> At least two cases have already held that the treaty power provided the constitutional basis for U.S. action in the Trust Territory, which includes its entry into the Covenant. See *Juda v. United States*, 6 Cl. Ct. 441, 456 (1984):

[T]he United States administration of the Trust Territory is based upon the President’s treaty power conferred in Article II, section 2, clause 2 of the Constitution. The United States has not administered the Trust Territory under the authority conferred in Article IV, section 3, concerning regulation by Congress of territories or other property belonging to the United States.

See also *Sablan v. Tenorio*, 4 N.M.I. 351, 361 n.43 (1996) (“[T]he U.S. Government’s authority to negotiate and become party to the Covenant may properly be said to have derived from the treaty power . . . and the Necessary and Proper Clause,” not from the Territorial Clause) (citation omitted).

<sup>80</sup> See *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (upholding congressional legislation effectuating the terms of the Migratory Bird Treaty pursuant to the “Necessary and Proper Clause,” Art. I, § 3, cl. 18, even though the legislation was not authorized by any other specifically delegated congressional power); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 211 (1999) (Rehnquist, C.J., dissenting) (“[T]reaties, every bit as much as statutes, are sources of law and may also authorize Executive actions.”).

The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and that of the States. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.<sup>81</sup>

As we have seen from the U.N. resolutions discussed in Part I(A), it is possible under international law, and under the particular treaties involved, to establish self-government in a formerly non-self-governing territory by entering into a political union with it on terms that secure its autonomy.<sup>82</sup> *If* that is what the United States did with respect to the Northern Marianas, then the United States acted within the bounds of the treaty power in entering into the Covenant.

However, it would have been *outside* even the broad bounds of the treaty power for the United States to have assumed sovereignty over the Northern Marianas *without* affording its people a full measure of self-government conforming to the United Nations' definitions. The treaty power authority to enter into the Covenant was necessarily limited by its source, the U.N. Charter and the Trusteeship Agreement, and it included no power to do anything outside of or unrelated to those treaties, and certainly not anything directly contrary to them:

[T]he authority of the trustee is never any greater than that with which it was endowed by the trust agreement. The task of the United States under the Trusteeship Agreement at issue is primarily to nurture the Trust Territory toward self-government.<sup>83</sup>

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<sup>81</sup> *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (citation omitted). *See also, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“As a member of the family of nations, the right and power of the United States in that field [of international relations] are equal to the right and power of the other members of the international family.”); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“The treaty-making power . . . extend[s] to all proper subjects of negotiation between our government and other nations.”); *In re Ross*, 140 U.S. 453, 463 (1891) (“The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments . . . equally with any of the former or present governments of Europe. . . .”).

<sup>82</sup> *See supra* notes 29-38 and accompanying text.

<sup>83</sup> *Gale v. Andrus*, 643 F.2d 826, 830 (D.C. Cir. 1980). *See also* *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990) (“It appears that in approving the Covenant . . . the federal government was potentially constrained by . . . the Trusteeship Agreement[.]”); *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1997) (stating that a statute enacted pursuant to a treaty must bear a rational relationship to the treaty to be constitutional under the necessary and proper clause).

The establishment of a permanent non-self-governing regime in the Northern Marianas would have been in direct derogation of the United States' obligations under the treaties and would thus have been unconstitutional under the treaty power. Since, as demonstrated below, it would have been unconstitutional under any other power, it would have been void from the outset.

### B. *Inherent Sovereign Powers and Their Limitations*

It might be argued that the United States entered into the Covenant pursuant not to the treaty power, but rather as an exercise of its inherent powers as a sovereign state. This finds no support in the Covenant or its related documents—all of which, as noted in the previous section, indicate an explicit intent to fulfill the terms of the treaty—but the possibility must still be considered, in order to determine whether any construction of the Covenant as establishing anything less than a fully self-governing Commonwealth is constitutionally possible under any theory.

This section demonstrates that *even if* the United States entered into the Covenant pursuant to inherent sovereign powers—indeed even if (assuming the impossible *arguendo*)<sup>84</sup> it did so pursuant to the Territorial Clause—the establishment of a permanent non-self-governing regime in the Northern Marianas would still lie beyond the Constitution for two reasons. First, it would be contrary to the law of nations, and second, it would violate a right which is fundamental to all free government. These are the limitations imposed by the Insular Cases, which measured the limits of inherent and territorial powers.<sup>85</sup>

#### 1. The Insular Cases

The Insular Cases held that the United States, being a nation, inherently has the powers that international law grants to all nations, including the power to acquire territory, but that the Constitution does not apply in full of its own force to acquired territory until such time as the territory is “incorporated” into, or made an integral part of, the United States by an action of Congress.<sup>86</sup> After incorporation, the Constitution applies in

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<sup>84</sup> See *supra* note 75 and accompanying text.

<sup>85</sup> Although other cases dealing with related issues are sometimes included under the rubric “Insular Cases,” for present purposes the term is used in reference to the following cases, which address the issue of extending the Constitution to the territories: *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). A general survey of the cases can be found in JAMES E. KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* (1982).

<sup>86</sup> Underlying all of the Insular Cases was a conflict between Justices Brown and White as to whether Congress could extend the Constitution to a territory only explicitly

full and irrevocably, and the territory is destined for statehood. Pre-incorporation, the territory is held as a defeasible possession, and the Constitution does not restrict federal powers with respect to the territory except in two instances.<sup>87</sup> These exceptions are: (1) those constitutional provisions which flatly prohibit Congress from enacting certain types of laws,<sup>88</sup> and (2) those explicit or implicit provisions that safeguard rights

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(Brown's view), or whether Congress could also do so implicitly, by legislation that evinces a congressional intent to deal with the territory as an integral part of the United States rather than as a mere possession (White's view).

White's view is generally perceived to have prevailed. See KERR, *supra* note 85, at 109. Brown, however, emerged as the real victor in *Balzac v. Porto Rico*. In *Balzac*, decided after both Justices White and Brown were off the bench, the Court claimed to adopt White's view. *Balzac*, 258 U.S. at 305. Actually, however, it used the existence of White's theory to achieve Brown's result. The Court held that the earlier Insular Cases had made Congress fully aware of the significance of territorial incorporation, and that the Court would therefore no longer presume that Congress had effected an incorporation without its explicitly saying so. *Id.* at 306.

In opposition to both White and Brown was Justice Harlan, who maintained that the Constitution applied in full and of its own force to all territories of the United States from the time of their acquisition, without any necessity of further "incorporation" or other act of Congress, either explicit or implicit. See *Downes*, 182 U.S. at 347, 389-91 (Harlan, J., dissenting); *Mankichi*, 190 U.S. at 227, 244 (Harlan, J., dissenting). In *Downes* and *Mankichi*, Harlan's view was shared by a plurality of the full court. In *Dorr*, however, Justices Peckham, Brewer and Fuller bowed to the authority of *Mankichi* and concurred in the judgment strictly on stare decisis grounds. See *Dorr*, 195 U.S. at 153 (Peckham, J., concurring). Harlan himself continued to vigorously maintain his views throughout his tenure on the bench. See *Dorr*, 195 U.S. at 154-58 (Harlan, J., dissenting); *Rasmussen*, 197 U.S. at 528-31 (Harlan, J., concurring).

<sup>87</sup> The idea of "incorporation" is ultimately rooted in the intertwining of three basic political concepts: (1) that the United States is a nation, which internally consists of a combination of states and territories; (2) that the Constitution is the law of this nation; and (3) that this nation functions in the world as a single sovereignty, with the same powers recognized by the law of nations as appertaining to any sovereign nation, including the power to acquire, hold and dispose of territory. This last concept draws a plain distinction between the nation itself and its possessions, and thus, given the first concept that some territories are part of the nation ("incorporated" territories), between those territories which are part of the nation and those which are its possessions ("unincorporated" territories). Applying all three concepts in combination to the question of the extent of the application of the Constitution to the territories leads to the following conclusion: Because the Constitution is the law of the nation, all of its provisions are fully applicable of their own force—*ex proprio vigore*—to the territories which are part of the nation (incorporated territories); but for the same reason, that same Constitution is *not* applicable of its own force to territories which are not part of the nation (unincorporated territories), but rather are its possessions.

<sup>88</sup> See, e.g., U.S. CONST. art. I, § 9 (prohibiting ex post facto laws, bills of attainder, etc.). See *Downes*, 182 U.S. at 277 (Brown, J.) 292, 294-96 (White, J.). See generally *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450-51 (1856) (articulating an earlier version of this view). This exception has not been directly at issue in any of the Insular Cases or their progeny.

fundamental to all free government.<sup>89</sup> These provisions bind Congress generally, without regard to the type of locality toward which it is legislating,<sup>90</sup> and thus limit its action not only in the “incorporated” territory of the United States, or even its “unincorporated” territory, but anywhere in the world its jurisdiction reaches.<sup>91</sup>

## 2. The Law of Nations

The law of nations is not set out in the Insular Cases as an explicit limit on inherent powers, but the logic of the Cases necessarily imposes this limit as well. Justice White in *Downes* made it clear that the power to acquire and govern territory existed in the United States *because* it existed in all sovereign nations under international law as it then stood:

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<sup>89</sup> See *Downes*, 182 U.S. at 282-83 (Brown, J.), 290-91 (White, J.). See also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890) (articulating an earlier version of this view). In *Downes*, Justice Brown cited *Scott* as an application of this principle as well, albeit a flawed one. The *Scott* court, he wrote, was essentially correct in holding that Congress could not deny to persons in the territories the right to hold or keep property which they brought there, as such a denial would be “an exercise of arbitrary power inconsistent with the underlying principles of a free government.” *Downes*, 182 U.S. at 274-275. *Scott* erred, however, in failing to “make a distinction between property in general and a wholly exceptional class of property”—namely slaves. *Id.* at 275. In other words, while the right to hold property in general is fundamental to all free government, the particular right to hold a man *as* property is not. This kind of distinction between the general and the particular is central to the “free government” test. It has appeared most often in the context of criminal procedure. See, e.g., *Dorr*, 195 U.S. at 145-48 (distinguishing between a general right to a fair trial and the particular right to a jury). However, the distinction was again applied to property rights in *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1990) (holding that, due to scarcity and special value of land in the Northern Marianas, non-islanders’ equal access to long-term interests in real estate is not fundamental to all free government).

<sup>90</sup> Both Justices White and Brown, despite their differences over “incorporation,” recognized these exceptions to unrestricted federal powers, which formed the actual basis of decisions in all the Insular Cases and their progeny. For that reason, as well as the White-Brown fusion later accomplished in *Balzac*, see *supra* note 86, the furious philosophical disputes between White and Brown which animate and dominate all of the early Insular Cases are ultimately irrelevant to the Cases’ real legal significance.

<sup>91</sup> See, e.g., *Dorr*, 195 U.S. at 148 (“fundamental right[s go] wherever the jurisdiction of the United States extends”). The rule of the Insular Cases is also relevant to a treaty-power analysis because it is ultimately indistinguishable from the measure of the constitutionality of acts taken under the treaty power—namely, international law, and the explicit and implicit constraints of the constitution. See *generally supra* note 81 and accompanying text. The substantive identity of the two standards is illustrated by the fact that *In re Ross*, 140 U.S. 453 (1891) (holding that a jury trial was not constitutionally required in U.S. consular courts in Japan, established pursuant to the treaty power) foreshadowed the Insular Cases’ discussion of the jury issue, and is often lumped with the Insular Cases in subsequent discussions. See *Downes*, 182 U.S. at 293-94 (White, J.) (discussing *In re Ross*). See also, e.g., *United States v. Verdugo Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1, 50 (1957) (Frankfurter, J., concurring) (discussing *In re Ross* and the Insular Cases).

It may not be doubted that *by the general principles of the law of nations* every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that, as a general rule, wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power, in the absence of stipulations upon the subject.<sup>92</sup>

In support, White cited to virtually all of the then-recognized authorities on the law of nations, quoting at length from Halleck as follows:

The sovereignty of a state may be lost in various ways. It may be vanquished by a foreign power, and become incorporated into the conquering state *as a province* or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a state will entirely cease.

. . .

[I]f [a conqueror] incorporates [new territory] with his former states, giving to them the rights, privileges and immunities of his own subjects, he does for them all that is due from a humane and equitable conqueror to his vanquished foes. But if the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection.<sup>93</sup>

The application of this same syllogism today, however, leads to a different result from that which obtained in 1901. The United States is still a nation and is still, by virtue of being such, empowered to do all that nations may do, *but nations may no longer acquire colonies*. On that point, the law of nations has changed radically since the time of the Insular Cases.<sup>94</sup>

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<sup>92</sup> *Downes*, 182 U.S. at 300 (emphasis added).

<sup>93</sup> *Id.* at 301-02 (quoting HALLECK, INTERNATIONAL LAW, ch. 3, § 23 & ch. 33, § 3) (internal quotation marks omitted).

<sup>94</sup> Indeed, even then, the acquiring power's right to absolute rule could be qualified by "stipulations upon the subject" or "agreement to the contrary." *See supra* accompanying text to note 92. *See also Downes*, 182 U.S. at 306 ("The general principle of the law of nations . . . is that acquired territory, *in the absence of agreement to the contrary*, will bear such relation to the acquiring government as may be by it determined.") (emphasis added). This qualification would seem to include the requirement imposed by the Trusteeship Agreement to develop self-government.

The Insular Cases were decided at a time that can clearly be seen in retrospect as the historic high tide of global imperialism. However, the frenzy of colonial acquisition that characterized the second half of the nineteenth century slowed significantly in the first two decades of the twentieth.<sup>95</sup> World War I then marked the first major step in the opposite direction. The German, Austro-Hungarian, and Ottoman empires were broken up as a consequence of the war, resulting in the independence of numerous nations. Even the former holdings of these empires, including the Northern Mariana Islands, which continued to be administered by foreign countries, were nevertheless no longer true colonies, but mandates under the supervision of the League of Nations.<sup>96</sup> After a kind of imperial twilight between the wars,<sup>97</sup> decolonization gained decisive momentum after World War II, as the principles of self-determination and self-government were incorporated into the Charter of the United Nations.<sup>98</sup> These principles were first put into practice with the independence of, *inter alia*, the Philippines (1946), India (1947), and Indonesia (1949). Decolonization then accelerated through the succeeding decades, with the greatest burst in 1960, until, by 1984, the once-immense British, French, Dutch and Portuguese empires had almost completely disintegrated.<sup>99</sup> Even the Russian Empire,

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<sup>95</sup> Beginning in mid-century, with the celebrated “great game” for control of Central Asia, the pace of acquisition accelerated to the point that, in the 1880’s, twenty-one nations, as presently construed, were acquired by foreign powers, followed by twenty-five more in the 1890’s. This placed most of Asia and virtually all of Africa and the Pacific under colonial rule. *See generally* 2002 WORLD ALMANAC, *supra* note 1, at 767-866 (Nations of the World). By contrast, only fifteen more present-day nations were acquired by foreign powers between 1900 and 1918. *See id.*

<sup>96</sup> *See generally* MARK R. PEATTIE, NAN’YŪ: THE RISE AND FALL OF THE JAPANESE IN MICRONESIA, 1885-1945 at 53-57 (1988) (establishment of Japanese mandate over former German islands in Micronesia).

<sup>97</sup> Some countries—notably Italy and Japan—continued to try to build or extend colonial empires during this time. *See* 2002 WORLD ALMANAC, *supra* note 1, at 783 (Japan seizes Manchuria in 1931), 794 (Italy invades Ethiopia in 1936). However, they were swimming against the tide, and their empires would be short-lived.

<sup>98</sup> *See* U.N. CHARTER art. 73. In addition to the Charter, these principles were articulated in the 1948 Universal Declaration of Human Rights, G.A. Res. 217, which provided that, “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives,” *id.* art. 21, and that:

Everyone is entitled to all the rights and freedoms set forth in this declaration . . . . [N]o distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

*Id.* art. 2.

<sup>99</sup> *See generally* 2002 WORLD ALMANAC, *supra* note 1, at 767-866 (Nations of the World). 1960 saw the independence of no less than eighteen nations, most of them in Africa: Cameroon, the Central African Republic, Chad, Congo (French), Congo (Belgian),

taken on a longer historic detour by the 1917 Revolution and the establishment of the Soviet Union, finally collapsed in 1991.

In addition to being a watershed year for colonial independence, 1960 also marked the adoption by the U.N. General Assembly of resolutions regarding the rights of colonial peoples. Resolution 1541, as noted above, established principles for the achievement of self-government.<sup>100</sup> Even stronger was another resolution adopted the previous day, No. 1514, which “[s]olemnly proclaim[ed] the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations,” as follows:

Immediate steps shall be taken, in trust and non-self-governing territories or all other territories which have not yet attained independence, to transfer all power to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any restriction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.<sup>101</sup>

1960 thus can fairly be regarded as the year by which the standard of international law regarding the maintenance of colonies had become, both in theory and practice, precisely the opposite of what it had been in 1901.<sup>102</sup>

Since 1960, and arguably since 1945 or even 1918, it is unquestionable that the acquisition or establishment of new permanent non-

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Cyprus, Dahomey (later Benin), Gabon, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Nigeria, Senegal, Somalia, Togo, and Upper Volta (later Burkina Faso). *Id.*

<sup>100</sup> See *supra* text accompanying notes 29-38.

<sup>101</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (1960), 1960 U.N.Y.B. 49-50. Lest any doubt remain, the right of all peoples to self-determination was reiterated in 1966 in the International Covenant on Civil and Political Rights, G.A. Res. 2200, and the International Covenant on Economic and Social Rights, G.A. Res. 2200, 1966 U.N.Y.B. 423, and again in the 1970 Programme of Action:

[T]he further continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the principles of international law.

G.A. Res. 2621, 1970 U.N.Y.B. 706-07. See also Declaration of Principles, G.A. Res. 2628 (1970) (stating similar principles); Clark, *supra* note 39, at 64 (discussing these international law developments).

<sup>102</sup> See generally COLONIALISM AND THE UNITED NATIONS at 5 (A.G. Mezerik, ed. 1964) (“The decisive Assembly for anti-colonialism was that of 1960.”); LYNN BERAT, WALVIS BAY: DECOLONIZATION AND INTERNATIONAL LAW at 143 (1990) (“Promulgated at the beginning of the era in which colonial empires were dismantled, the resolution [1514], which has been called the Magna Carta of decolonization, reflects a shift in the way the international community viewed self-determination.”).

self-governing colonies by anyone anywhere is fundamentally inconsistent with international law, and is not regarded as among the legitimate powers of sovereign nations.<sup>103</sup> In the language of Halleck, it remains lawful for one state to incorporate another “as one of its component parts,” but no longer “as a province.”<sup>104</sup> An acquiring power may still give the people of an acquired territory “the rights, privileges, and immunities of his own subjects,” but may no longer “govern them with a tighter rein” or “keep them under subjection,” regardless of their “impetuosity” or the “degree of their indocility.”<sup>105</sup> The United States remained, at the time it entered into and approved the Covenant (1975-76), empowered by the nature of its Constitution to do what all sovereign nations can do under international law, but that no longer included the acquisition of, and exercise of untrammelled rule over, a colonial possession.<sup>106</sup>

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<sup>103</sup> See, e.g., Hirayasu, *supra* note 42, at 512-13 (describing international norm regarding self-determination and decolonization); BERAT, *supra* note 102, at 143-46 (stating that Res. 1514 was “an authoritative interpretation of the charter,” and that, through widespread repetition and acceptance, the principle of self-determination has become “a rule of customary international law”); *Id.* at 146-50 (arguing that the principle of self-determination has achieved the level of *jus cogens*); Van Dyke, *supra* note 50, at 515 (“[T]he international community now prohibits the maintenance of colonies.”).

<sup>104</sup> See *supra* note 93 and accompanying text.

<sup>105</sup> See *id.*

<sup>106</sup> See generally *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (“[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”); *The Paquete Habana*, 175 U.S. 677, 694 (1900) (“[W]hat originally may have rested on custom or comity [can] grow, by the general assent of civilized nations, into a settled rule of international law.”).

The question of whether the United States can constitutionally violate the law of nations in any circumstances does not arise here. There is authority that the United States can do so, in cases where it acts pursuant to some enumerated constitutional power. See, e.g., Louis A. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 879 (“[I]f we grant equal status to international law and United States statutes in our jurisprudence, it should follow that a constitutional act of Congress supersedes prior conflicting international law.”) (emphasis added); *id.* at 883 (stating that even the most “extreme position supports the conclusion that the President can disregard international law only when he acts within the scope of his constitutional authority”). Cf. the famously ambiguous passage from *The Paquete Habana*: “where there is no treaty and no controlling executive act or judicial decision, resort must be had to the custom and usages of civilized nations[.]” 175 U.S. at 700.

Here, however, we are addressing a situation where the act taken—the acquisition of territory—has no enumerated constitutional basis, and is constitutional solely because of the United States’ status as a sovereign nation created by the Constitution. See *supra* note 92 and accompanying text. Such powers and incidents of sovereignty themselves being concepts which have no existence apart from the law of nations, that same law cannot be disregarded in measuring the scope of those powers.

### 3. Rights Fundamental to All Free Government

In addition to the law of nations, the United States is also bound in the exercise of inherent powers, even outside its incorporated territory, by rights fundamental to all free government, which, the Insular Cases held, are implicit in the Constitution.<sup>107</sup> These rights are variously characterized in the Cases as “natural rights,” “fundamental right[s],” “such [] immunities as are indispensable to a free government,” “fundamental limitations in favor of personal rights,” “principles which are the basis of all free government which cannot be with impunity transcended,” and “restrictions of so fundamental a nature that they cannot be transgressed.”<sup>108</sup> The rule of the

<sup>107</sup> The *Downes* Court was circumspect about whether it was actually stating a constitutional rule to this effect, or simply philosophizing. See *Downes v. Bidwell*, 182 U.S. at 282 (1901) (Brown, J.) (“We suggest, without intending to decide . . . .”); *id.* at 291 (White, J.) (“[I]t does not follow that there may not be” such a rule.). This coyness disappeared in *Mankichi*, however, where the non-fundamental character of jury trial was explicitly stated as the ground for decision. *Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903). The rule, moreover, was described and/or applied as such in *Downes*’ most direct source, *Latter-Day Saints*, 136 U.S. 1, and in all the cases, both before and after *Downes*, cited in the following two footnotes. See *infra notes* 108 & 109.

<sup>108</sup> *Dorr v. United States*, 195 U.S. 138, 146 (1904) (quoting *Latter-Day Saints*, 136 U.S. at 44); *Downes*, 182 U.S. at 282-83 (Brown, J.); *id.* at 291 (White, J.).

At the time of the Insular Cases, this was the same standard applied to the states as the measure of the fourteenth amendment due process clause. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932) (“certain immutable principles of justice, which inhere in the very idea of a free government, which no member of the Union may disregard”) (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964) (“a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such a government”); *Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226, 237 (1897) (“limitations on [governmental] power, which grow out of the essential nature of all free governments”); *Hurtado v. California*, 110 U.S. 516, 521 (1884) (“the general principles of public liberty and private right, which lie at the foundation of all free government”). It was also applied as the measure of the privileges and immunities clause of Article IV, Section 2. See, e.g., *Corfield v. Coryell*, 6 F.Cas. 546, 551 (C.C.Pa. 1823) (“those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments”) (cited on this point in multiple cases, including *Twining*).

This standard was gradually supplanted in its “due process” role by a stricter standard of rights specifically fundamental to the Anglo-American tradition. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (noting this shift in perspective); *Malloy v. Hogan*, 378 U.S. 1, 6-8, (1964) (overruling *Twining* as inconsistent with the American system of criminal procedure); *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (mixing international view with “our polity,” “our institutions,” “our people”). Some cases have attempted to read this shift backward into the Insular Cases. See, e.g., *United States v. Tiede*, 86 F.R.D. 227, 252-53 (1979) (finding right to jury trial “fundamental” in American Sector of Berlin); *Montalvo v. Colon*, 377 F. Supp. 1332, 1342 (D.P.R. 1974) (finding right to abortion “fundamental” in Puerto Rico). However, *Atalig* clarifies that the standards are distinct, with the old international “all free government” standard still in effect outside the states as the measure of inherent and territorial powers. *Northern Mariana Islands v. Atalig*, 723 F.2d 682, 689-90 (9th Cir. 1984).

Insular Cases, already applied three times in evaluating the constitutionality of the United States' approval of the Covenant,<sup>109</sup> is that the United States is inherently prohibited from violating these rights. Just as the Constitution explicitly prohibits Congress from passing any ex post facto law, effective anywhere, under any circumstances, it also implicitly prohibits Congress from otherwise infringing rights fundamental to free government, anywhere, at any time.

*The right of the people to make and alter the laws that govern them is fundamental to all free government*, and the recognition and protection of this right is therefore constitutionally mandatory on the United States in all places subject to its jurisdiction.

In *Twining v. New Jersey*, the Supreme Court stressed the fundamental character of this right:

[I]t must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have

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<sup>109</sup> *Atalig*, 723 F.2d at 685 (upholding agreement to COVENANT, *supra* note 2, § 501(a): “[N]either trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law.”); *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992) (upholding agreement to COVENANT § 805(a): “[T]he Government of the Northern Mariana Islands . . . may . . . regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent.”); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139 (D.N.M.I. 1999), *aff’d sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000) (upholding agreement to COVENANT § 203(c): “The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature.”). It should be noted that these cases applied the “free government” rule *by analogy* to the Insular Cases, and should therefore not be read as holding that the CNMI is an “unincorporated territory.” See *Atalig*, 723 F.2d at 691 n.28. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (reasoning by similar analogy to Insular Cases). The analogy is appropriate, however, because the Insular rule is equally applicable to actions taken under the treaty power. See *supra* note 91.

For discussions of these cases, and/or the Covenant provisions they upheld, see James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 DENV. J. INT’L L. & POL’Y 35 (1980); Marybeth Herald, *Does the Constitution Follow the Flag Into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707 (1995); Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779 (1992); and Howard P. Willens and Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation In a Pacific Setting*, 65 GEO. L.J. 1373 (1977). The latter two articles approve of the Covenant’s major exemptions from the U.S. Constitution, while the former two criticize them.

restrained themselves by constitutional limits specifically established . . . .<sup>110</sup>

Indeed, this is stated as a caution against courts declaring too many *other* rights to be fundamental, thus placing them beyond the reach of the people's lawmaking power.

The same conclusion is abundantly clear from a review of the writings of the founders of the American republic and framers of the Constitution who, more thoroughly and vigorously than anyone else in history, devoted themselves to the analysis of precisely this kind of question, and who are, moreover, best positioned to tell us what rights are so fundamental to free government as to be inherent in the system they created. The First Continental Congress summed up the Founders' views when it resolved that:

the foundation of English liberty, *and of all free government*, is a right in the people to participate in their legislative council . . . .<sup>111</sup>

Alexander Hamilton, in a tract intended to vindicate the Congress, elaborated:

It is not the supreme power being placed in one, instead of many, that discriminates an arbitrary from a free government. When any people are ruled by laws, in framing which, they have no part, that are to bind them, to all intents and purposes, without, in the same manner, binding the legislators themselves, they are in the strictest sense slaves, and the government, with respect to them, is despotic. *Great-Britain is itself a free country; but it is only so because its inhabitants have a share in the legislature: If they were once divested of that, they would cease to be free.* So that, if its jurisdiction be extended over other countries that have no actual share in its legislature, it becomes arbitrary to them; because they are destitute of those checks and controuls which constitute that moral security which is the very essence of civil liberty.<sup>112</sup>

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<sup>110</sup> Twining, 211 U.S. at 106. See also, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

<sup>111</sup> DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), reprinted in DOCUMENTS OF AMERICAN HISTORY 82, 83 (Henry S. Commager ed. 1944) [hereinafter DOCUMENTS] (emphasis added).

<sup>112</sup> Alexander Hamilton, *The Farmer Refuted: or, a More Impartial and Comprehensive View of the Dispute Between Great-Britain and the Colonies* (Feb. 23,

John Adams agreed, writing:

[T]he Right to be governed by Laws made by Persons in whose Election they had a Voice [is a] most essential Right, which discriminates Freemen from Vassals.<sup>113</sup>

Adams also pointed out that the historic practice of free governments was to allow colonial autonomy, citing the examples of Greece and republican Rome:

The Greeks planted colonies, and neither demanded nor pretended any authority over them, but they became distinct independent commonwealths.

...  
The senate and people of Rome did not interfere commonly in making laws for their colonies, but left them to be ruled by their governors and senates.<sup>114</sup>

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1775), *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON, 1768-1778, at 81, 100 (Harold C. Syrett ed., 1961) (emphasis added).

The issues raised here by Hamilton are also explored at length by James Wilson—later a signatory to both the Declaration of Independence and the Constitution, and an original Justice of the U.S. Supreme Court—who perhaps best explained *why* representative government is fundamental to freedom. Wilson’s thesis was that, because those empowered to make law will always do so in such a way as to advance the interests of themselves and those to whom they are answerable, it is necessary to the liberty, security and happiness of any people that those who make their laws be affected themselves by the laws they make, and answerable to the people who are affected by them. *See* James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), *reprinted in* 2 THE WORKS OF JAMES WILSON at 721, 726-27 (Robert Green McCloskey ed. 1967).

<sup>113</sup> John Adams, Answer of the House, *reprinted in* THE BRIEFS OF THE AMERICAN REVOLUTION 53, 63 (John Philip Reid ed., 1981). This was a part of a running public debate in early 1773 between Thomas Hutchinson, royal governor of Massachusetts, and the provincial legislature as to whether Parliament had complete legislative authority over the colonies. Adams wrote for the House of Representatives and James Bowdoin for the Council.

<sup>114</sup> John Adams, *Novanglus Letter No. 7* (Mar. 6, 1775), *reprinted in* 2 PAPERS OF JOHN ADAMS, at 307, 311-12 (Robert J. Taylor et al. eds., 1977). This was part of another running public debate over parliamentary powers, this time between Adams, writing as “Novanglus,” and Daniel Leonard, writing as “Massachusettensis,” in January-April 1775 in the *Boston Gazette*.

The kind of practical comparison with world standards that Adams engages in here continues to be part of the “free government” standard. In *Rayphand*, for example, the court wrote, “Several countries that are considered to have ‘free government’ have a bicameral legislature in which one house is malapportioned. Amongst these is the United States.” *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1140 (D. N. Mar. I. 1999). Although the court did not mention any other countries by name, the Commonwealth in its briefs had cited the examples of Australia, Canada, Argentina, Brazil, Mexico, South Africa and

By way of contrast, Adams cited the Ottoman Empire, which to Englishmen of the day represented the very epitome of despotism:

Absolute monarchies, as that of the Turks, neither plants its people at home nor abroad, otherwise than as tenants for life or at will; wherefore its national and provincial government is all one.<sup>115</sup>

And John Dickinson<sup>116</sup> said the same:

The freedom of a people consists in being governed by laws, in which no alteration can be made, without their consent.<sup>117</sup>

Dickinson cited the example of Spain to illustrate that free government is coextensive with the substantive power of representative government:

Spain was once *free*. Their Cortes resembled our parliament. No *money* could be raised on the subject, *without their consent*. One of their Kings having received a grant from them, to maintain a war against the Moors, desired, that if the sum which they had given, should not be sufficient, he might be allowed, *for that emergency only*, to raise more money *without assembling the Cortes*. The request was violently opposed by the best and wisest men in the assembly. It was, however, complied with by the votes of a majority; and this

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Switzerland, in all of which countries one house of a bicameral legislature provides numerically equal representation to all political units. See CNMI Defendants' Joint Motion to Affirm at 18-19 (copy on file with author).

<sup>115</sup> Adams, *Novanglus*, *supra* note 114, at 313. Today as well, the degree of free government in any place—such as Northern Ireland, Palestine, Chechnya or Tibet—is most typically measured by the degree of autonomy exercised by the people through their local government, as against the amount of interference by the dominant sovereign power. Most similar to the CNMI in terms of its peaceful relations with the associated power, but great disparity of size and population, and correspondingly great risk of political domination, is Hong Kong. See Tamanaha, *supra* note 56 (noting Hong Kong's similarity to CNMI, and recommending Covenant-like arrangement to secure its liberty).

<sup>116</sup> John Dickinson was a delegate to the Continental Congress and a signatory to the Constitution. His *Letters from a Farmer in Pennsylvania* (1768), excerpted in TRACTS OF THE AMERICAN REVOLUTION 1763-1776, at 127 (Merrill Jensen ed., 1967), were an important and influential early discussion of the rights of the colonies. Parenthetically, the "farmer" whom Hamilton "refuted" was not Dickinson but Samuel Seabury, a Tory who wrote under the pen name A Westchester Farmer. See Hamilton, *supra* note 112, at 81 n.1.

<sup>117</sup> John Dickinson, *An Essay on the Constitutional Power of Great-Britain Over the Colonies in America* (1774), reprinted in THE POLITICAL WRITINGS OF JOHN DICKINSON at 329, 403 (1801).

single concession was a PRECEDENT for other concessions of the like kind, until at last the crown obtained a general power of raising money, in case of necessity. From that period the Cortes ceased to be *useful*,—the *people* ceased to be *free*.<sup>118</sup>

These principles, moreover, have not been left to gather dust in the history books. The principle that “[a]ll political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit” is incorporated into at least thirteen current state constitutions.<sup>119</sup> That of Maryland states, most clearly of all, “[T]he right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government[.]”<sup>120</sup>

#### 4. The Congruence of the Free Government Standard and the Law of Nations

Modern international law and the free government standard are, on this point, identical. The anti-colonial free-government principle upon which the United States was founded was, at the time, a deviation from the ordinary law and practice of nations,<sup>121</sup> but by the late twentieth century, the

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<sup>118</sup> Dickinson, *Farmer's Letters*, No. 9, *supra* note 116, at 155-56. Dickinson had no use for what has come to be called “institutional” self-government, see *supra* note 54 and accompanying text, writing as follows about local legislatures which may meet, but have no meaningful power:

Some few of them may meet of their own accord, by virtue of their charters. But what will they have to do, when they are met? To what shadows will they be reduced? The men, whose deliberations heretofore had an influence on every matter relating to the *liberty* and *happiness* of themselves and their constituents, and whose authority in domestic affairs at least, might well be compared to that of Roman senators, will *now* find their deliberations of no more consequence, than those of *constables*. They may *perhaps* be allowed to make laws for the *yoking of hogs*, or the *pounding of stray cattle*.

Dickinson, *Farmer's Letters*, No. 9, *supra* note 116, at 155.

<sup>119</sup> CONN. CONST. art. 1 § 2. Substantially the same language, with local variations, appears in the constitutions of Ala., art. 1, § 1; Ind., art. 1, § 1; Kan., § 2; Ky., § 4; Me., art. 1, § 2; Or., art. 1, § 1; Pa., art. 1, § 2; S.D., art. 6, § 26; Tenn., art. 1, § 1; Tex., art. 1, § 2; Utah, art. 1, § 2; and Wyo., art. 1, § 1.

<sup>120</sup> MD. CONST., Decl. of Rights art. 7.

<sup>121</sup> For this very reason, Adams rejected any reliance on the then-prevailing rules of international law that a colony must be governed by the laws of its mother country. He stated that “the practice of free governments alone can be quoted with propriety, to show the sense of nations. . . . Absolute monarchies, whatever their practice may be, are nothing to us.” Adams, *Novanglus*, *supra* note 114, at 313. Thus, the free government standard, while not so strict as the “Anglo-American” due process standard, see *supra* note 108, is stricter than the modern international law standard of *jus cogens*, which includes only those principles agreed to as fundamental by *all* the world’s governments, “free” and otherwise. See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (stating

rest of the world had come around to the view that the United States had pioneered. Indeed, the principle of U.N. Resolution 742, that self-government can be achieved by association with another state “if this is done freely and on the basis of absolute equality,”<sup>122</sup> does no more than catch up, two centuries later, with Hamilton’s requirement that there be “an *exact equality of constitutional rights* among all his Majesty’s subjects, in the several parts of the empire.”<sup>123</sup> As applied to the United States through the rule of the Insular Cases, therefore, *both* international law *and* the free government standard require, as a condition of constitutionality, that the Northern Marianas people have the right, no less than the people of the states, to live only under laws they have the power to change.

#### a. Independence Contrasted

Full independence is not necessary under either standard. Just as forms of self-government short of independence are recognized by the U.N., the founders of the United States also did not regard independence as a necessary prerequisite to free government. All of them originally accepted the sovereignty of the King of Great Britain, and saw no conflict in Britain and the colonies each maintaining its own separate sphere of legislative power, all the while under that same sovereignty—just as England and Scotland had done after the accession of James I to the English throne in 1603, which united them under a single king, but before the 1707 Act of Union, which united their legislatures.<sup>124</sup> They even acknowledged an

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that *jus cogens* are “derived from values taken to be fundamental by the international community”); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 941-42 (D.C. Cir. 1988) (citing torture, summary execution, genocide, slavery, murder, and prolonged arbitrary detention as violations of *jus cogens*). Further, while the “free government” that the Insular Cases’ standard refers to is not precisely congruent with the American system, it is still “freedom” as perceived from the perspective of American political philosophy, since it refers to the freedom inherent in the U.S. Constitution.

<sup>122</sup> G.A. Res. 742, *supra* note 29, at 195.

<sup>123</sup> Hamilton, *supra* note 112, at 163.

<sup>124</sup> See e.g., Adams, *Answer of the House*, *supra* note 113, at 71-72:

Your Excellency adds, “For although there may be but one Head, the King, yet the two Legislative Bodies will make two Governments as distinct as the Kingdoms of England and Scotland before the Union.” Very true, may it please your Excellency; and if they interfere not with each other, what hinders but that being united in one Head and common Sovereign, they may live happily in that Connection, and mutually support and protect each other?

Thomas Jefferson, likewise, though maintaining that “the British Parliament has no right to exercise authority over us,” nonetheless acknowledged the King’s common sovereignty as “the central link connecting the several parts of the empire[.]” Thomas Jefferson, *A Summary View of the Rights of British America* (1774), in BASIC WRITINGS OF THOMAS JEFFERSON (Philip S. Foner ed., 1944) at 5, 8, 16. See also, e.g., Wilson, *supra* note 112, at 745 n.r (“[A]ll the different members of the British Empire are distinct states, independent of each other, but connected together under the same sovereign in right of the same

authority of Parliament over matters external to the local government of the colonies, such as trade and overall management of the empire.<sup>125</sup> Their stance became revolutionary only when the king endorsed parliamentary supremacy over the colonies' internal government, thus refusing self-government to his subjects in the colonies, while those at home continued to enjoy this right.<sup>126</sup> Indeed, even the tory Joseph Galloway, who argued in the Continental Congress against independence and sided with Britain when revolution came,<sup>127</sup> recognized that the maintenance of a free society in the colonies required giving colonists the deciding voice in the legislation governing them, in a manner very much like what the Covenant, as construed in Section I above, provides for the CNMI:

If the British state . . . means to retain the colonies in a due obedience on her government, it will be wisdom in her to restore to her American subjects, the enjoyment of *the right of assenting to, and dissenting from, such bills as shall be proposed to regulate their conduct*. Laws thus made will ever be obeyed; because by their assent, they become their own acts. It will place them *in the same condition as their brethren in Britain*, and remove all cause of complaint; or, if they should conceive any regulations inconvenient, or unjust, they will petition, not rebel. Without this it is easy to perceive that the union and harmony, which is peculiarly essential to a free society, whose members are resident in regions so very remote from each other, cannot long subsist.<sup>128</sup>

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crown.”); Hamilton, *supra* note 112, at 91 (“So that, to disclaim, the authority of a British Parliament over us, does by no means imply the dereliction of our allegiance to British Monarchs.”).

<sup>125</sup> See, e.g., Dickinson, *An Essay*, *supra* note 117, at 386 (distinguishing power over foreign relations, which “leaves the colonies free,” and general legislative power, which does not). See generally JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION at 179 (1943) (“Down to the eve of the Declaration of Independence, the petitions and declarations emanating from the Continental Congress and the colonial assemblies agreed in giving Parliament control of colonial trade and general supervision over the empire.”).

<sup>126</sup> The concept of a link with Britain only through the King necessitated the Declaration of Independence’s specific break with the crown. Only then was independence possible, because under the American view, Parliament had no authority over the colonies even before independence. See BRIEFS, *supra* note 113, at 71-72 & n.42.

<sup>127</sup> Dickinson also opposed independence and refused to sign the Declaration, but fought on the American side once it was declared. MILLER, *supra* note 125, at 497.

<sup>128</sup> Joseph Galloway, *A Candid Examination of the Mutual Claims of Great Britain and the Colonies: With a Plan of Accommodation on Constitutional Principles* (1780), reprinted in TRACTS OF THE AMERICAN REVOLUTION 1763-1776, at 350, 383 (Merrill Jensen ed., 1967) (emphasis added). Galloway proposed the creation of the “Grand Council,” a pan-colonial elected American legislature. *Id.* at 391-92. Under Galloway’s plan, legislation affecting the colonies could originate in either the Grand Council or the British Parliament, but the consent of both would be required for the law to become

Likewise, any demand for self-government in the Marianas, in the form of local suspension of federal law or otherwise, is not a rejection of United States citizenship, or of United States sovereignty, or even of United States control over foreign affairs, defense, and such external matters. On the contrary, it is an *assertion* of that citizenship, and a demand for no more than the ordinary right it confers on those who bear it in the states—the right to be governed by laws made by representatives in whose election they have a voice:

Permit us to be as free as yourselves, and we shall ever esteem a union with you to be our greatest glory, and our greatest happiness.<sup>129</sup>

#### b. Statehood Contrasted

Just as full “integration” is only one recognized mode of self-government, the founders of the United States did not regard it as necessary to be represented in Parliament on the same basis as Englishmen. They agreed that, if they were so represented, then Parliament’s authority over them would be valid without the need for a separate self-government of their own, but this was generally regarded as impossible, due to the exigencies of time, distance, and population.<sup>130</sup> Likewise, although one congressman, two senators, and three electoral votes—i.e., statehood—would make all the talk

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effective. *Id.* at 393. Galloway’s plan was narrowly rejected by the Continental Congress, which, by the time he proposed it, was irretrievably committed to independence. *See generally* MILLER, *supra* note 125, at 382-83. *See also supra* Part I.

<sup>129</sup> John Jay, *Address to the People of Great Britain* (1774), reprinted in THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 17, 19 (Henry P. Johnston ed., 1890) (writing on behalf of the Continental Congress).

<sup>130</sup> *See, e.g.,* Adams, *Answer of the House*, *supra* note 113, at 62 (“It was easily and plainly foreseen that the Right of Representation in the English Parliament could not be exercised by the People of this Colony. It would be impracticable, if consistent with the English Constitution”). Adams as Novanglus stated the problem in further detail:

England have [sic] six millions of people we will say: America has three. England has five hundred members in the house of commons we will say: America must have two hundred and fifty. Is it possible she should maintain them there, or could they at such a distance know the state, the sense or exigencies of their constituents? Ireland too must be incorporated, and send another hundred or two of members. The territory in the East-Indies and West India islands must send members.

Adams, *Novanglus*, *supra* note 114, at 310. Adams noted that such a system was necessary to be consistent with the English constitution and at the same time vest all legislative power in a single body. *Id.* at 309-10. In the event such a system were to be attempted, he foresaw America, with its increasing population, eventually coming to dominate the whole. *Id.* at 310.

of separate self-government in the Northern Marianas moot,<sup>131</sup> there are considerable obstacles to accomplishing this. Time and distance may not be the barriers they once were, but they remain substantial,<sup>132</sup> as does the population problem, albeit in a different way: the old colonies were too large to be represented in Parliament, but the CNMI may be too small to be a state. The total Northern Marianas population is only about 69,000, and the permanent resident population about half that, either figure far smaller than any state. Even if Guam (population c. 155,000) were added, forming the largest possible state out of the Marianas, it would still total only about half the population of Wyoming, the least populous state.

This would not categorically rule out statehood,<sup>133</sup> but statehood raises its own problems. The Marianas' interests may be different enough from other states,' yet their voting strength so diluted, that effective representation may be difficult even with statehood.<sup>134</sup> Also, special protections such as restrictions on land ownership and local control over immigration would no longer be available, meaning that Northern Marianas Chamorros and Carolinians could conceivably end up as a marginalized, alienated minority on their own land, just as have, in greater or lesser degrees, the native populations of Guam, Hawai'i, and the continental

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<sup>131</sup> The mere provision of a single non-voting delegate to Congress, as is currently the case with Guam, Puerto Rico, the Virgin Islands and American Samoa, would be entirely insufficient to address the problem.

<sup>132</sup> The Marianas are further west of Hawai'i than Hawai'i is of California. They share a time zone with the east coast of Australia, and are never open for business at the same time as New York or Washington, D.C.

<sup>133</sup> The Commonwealth's 69,000 is more than the 60,000 set out in the Northwest Ordinance as the threshold for admission of new states. *See* NORTHWEST ORDINANCE arts. 4-5 (July 13, 1787), *reprinted in* DOCUMENTS, *supra* note 111, at 128, 131-32. And in fact, eight states have been admitted to the Union with a population of 69,000 or lower. *See* 2002 WORLD ALMANAC at 376-77. And if Guam were to be included in the prospective state, then the total population of the Mariana Islands would be about 224,000. Thirty-four states, the majority of the total, have been admitted to the union with smaller populations. *See id.*

<sup>134</sup> For example, the French overseas territories, such as New Caledonia and French Polynesia, are represented in the French Parliament, but this has not resolved all their problems, and agitation for greater local autonomy continues there. Indeed, the situation in New Caledonia reached the point that in 1986 it was put back on the UN's list of non-self-governing territories after a 40-year absence. *See* U.N.G.A. Res. 41/41A, 41st Sess. (1986). On the other hand, Alaska seems to get along reasonably well as a state, despite its minimal representation, geographic remoteness, and various unique circumstances.

United States.<sup>135</sup> This would create intractable socio-political problems of the sort that the Northern Marianas has so far avoided.<sup>136</sup>

Statehood, therefore, may or may not be practicable. Whether it is desirable or not is ultimately up to the Northern Marianas people. But for so long as the Northern Mariana Islands, for whatever reason and for however long, is *not* a state, its people's right of self-government—which, both by international law and principles fundamental to free government, is no less than that of the people of the states—must be exercised in some form. Under the Covenant as written, it can only be exercised through a local government armed with, at a minimum, the power to suspend application of federal laws objectionable to the people.<sup>137</sup>

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<sup>135</sup> See generally R.B.S., *supra* note 45, at 1043 (“Statehood is also an unrealistic alternative. The population of the Marianas is too small to support statehood, and statehood would endanger the preservation of the islands’ culture by impairing their control of their land and internal affairs.”).

<sup>136</sup> International law recognizes two distinct rights of self-government – one territorial in nature (and the focus of this Article), the other pertaining to indigenous peoples. See generally Jon M. Van Dyke et al., *Self-Determination For Nonself-governing Peoples and for Indigenous Peoples*, 18 U. HAW. L. REV. 623 (1996). On Guam, neither right of self-government—that of the territory as a whole or that of its native Chamorro population—has yet been achieved. See generally Hannah M.T. Gutierrez, Comment, *Guam’s Future Political Status: An Argument for Free Association with U.S. Citizenship*, 4 ASIAN-PAC. L. & POL’Y J. 122 (2003), at <http://www.hawaii.edu/aplpj>; and Anthony T.J. Quan, Comment, “*Respeto I Taotao Tano*”: *The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 ASIAN-PAC. L. & POL’Y J. 56 (2002), at <http://www.hawaii.edu/aplpj>. In Hawai’i, territorial self-government was achieved at statehood, but self-government for the Native Hawaiians remains elusive. See generally Van Dyke et al., *Self-Determination*. In the CNMI, however, both rights of self-government exist intact—the territorial right explicitly under the Covenant, and the indigenous right de facto, since the population at the time self-government was first achieved was almost entirely indigenous. Indeed, no serious “native rights” movement exists in the Commonwealth, for the simple reason that none is necessary – the natives are already in charge. That would almost surely change with statehood.

<sup>137</sup> See Adams, *Novanglus*, *supra* note 114, at 324 (“That a representation in parliament is impracticable we all agree: but the consequence is, that we must have representation in our supreme legislatures here.”). See also, e.g., *Declaration and Resolves*, *supra* note 111, at 83:

[A]s the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.

The qualification “subject only to the negative of their sovereign” ought not be misconstrued. Under the American view, the king’s veto power existed for the sole purpose of preserving liberty. “[I]f he sought to destroy liberty, he ceased to be King.” MILLER, *supra* note 125, at 183. Recall also that the “sovereign” in the CNMI is the whole

## IV. CONTRARY ARGUMENTS CONSIDERED

A. *The Insular Cases*

This analysis may be criticized for turning the Insular Cases on their heads, by making cases that hold that the United States *can* acquire colonial possessions into cases holding that it cannot. It was, after all, not the Insular Cases majority, but Justice Harlan in dissent, who wrote:

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 to them,—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.<sup>138</sup>

This criticism would be valid were it not for a crucial caveat—that even under the majority’s view, the period of ultimate federal authority and suspended self-government is temporary, and exists for the sole purpose of preparing the territory for self-government.<sup>139</sup> All territorial generalizations,

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American people, including those of the Commonwealth itself. *See supra* note 47-49 and accompanying text.

<sup>138</sup> *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting). *See also* *Hawaii v. Mankichi*, 190 U.S. 197, 240 (1903) (Harlan, J., dissenting) (stating that a system where subject peoples are “controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish[,]” is “entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution”).

<sup>139</sup> *See e.g.*, *Downes*, 182 U.S. at 287 (Brown, J.) (“the blessings of a free government under the Constitution” may be withheld from a territory “for a time”); *Id.* at 293 (White, J.) (noting “the presumably ephemeral nature of a territorial government”); *Hawaii v. Mankichi*, 190 U.S. 197, 219 (1903) (White, J., concurring) (Hawaii acquired as an unincorporated territory, with its “permanent relation” to the United States to be determined later); *Dorr v. United States*, 195 U.S. 138, 148 (1904) (noting territories’ “condition of temporary pupilage”) (quoting Cooley, *Principles of Constitutional Law*, at 164). *See also* *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (characterizes Insular Cases as involving “the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions”) (emphasis added); *Ballentine v. United States*, 2001 WL 1242571 (D.V.I. 2001) (emphasizing the temporary character of the “unincorporated” territory status under the Insular Cases).

*See generally* *District of Columbia v. Carter*, 409 U.S. 418, 431-32 (1973) (“From the moment of their creation, the Territories were destined for admission as States into the Union, and as ‘a preliminary step toward that foreordained end—to tide over the period of ineligibility—Congress, from time to time, created territorial governments, the existence of which was necessarily limited to the period of pupilage.’”) (quoting *O’Donoghue v. United States*, 289 U.S. 516, 537 (1933)); *O’Donoghue v. United States*, 289 U.S. 516, 536-38 (1933) (noting the “transitory,” “purely provisional,” “impermanent” character of the territorial governments, which last only until the inevitable end of statehood is achieved); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894) (“And the Territories acquired by Congress . . .

such as Justice White's statement that Congress may "accord only such degree of representative government" to a territory that it wishes to accord,<sup>140</sup> are subject to this limitation. Traditionally, this period of "pupilage" or "tutelage" takes the form of a conventional territorial relationship, and "self-government" takes the form of statehood. In Micronesia, the "pupilage" took the form of the Trust Territory, and self-government that of a commonwealth relationship (for the Northern Marianas) and free association (for the Marshall Islands, Federated States of Micronesia, and Palau). The principle, however, is the same.<sup>141</sup> Because, in both cases, federal rule was temporary and dedicated to preparing the territory for *some* form of self-government, whether statehood, independence, or otherwise, such rule at least arguably did not conflict with fundamental principles of all free government.<sup>142</sup>

The Commonwealth of the Northern Mariana Islands, however, is not an inherently temporary incorporated territory or trust territory. It is

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are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects[.]""); *Boyd v. Nebraska*, 143 U.S. 135, 170 (1892) ("Congress ha[s] the power to deal with the people of the Territories in view of the future States to be formed from them[.]"); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) ("[T]his discretion in Congress is limited by the obvious purposes for which it was conferred . . . [to] prepare the people of the Territories to become States in the Union . . ."); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 447 (1856) (holding that the United States may acquire territory "not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission," and that such territory "is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority").

<sup>140</sup> *Downes*, 182 U.S. at 299.

<sup>141</sup> The generality of the principle is evident in a circuit court opinion which, more than a decade before the Insular Cases, stated their rule more succinctly. *See Nelson v. United States*, 30 F. 112, 115 (C.C.D.Or. 1887) (Congress "may exercise any legislative power not expressly forbidden to it by the constitution, and to this there may be the further limit that the same shall not be inconsistent with the general spirit and genius of that instrument, *nor contrary to the purpose for which territory may be acquired*. Subject to these limitations, the manner in which this power shall be exercised rests in the discretion of congress.") (emphasis added).

<sup>142</sup> *See Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820) (noting that the territories may be taxed without representation, despite the contrary revolutionary principle, *because* they are "in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained").

Governor Camacho of the CNMI offered an interesting variation on this theme when he described the Northern Marianas not only as a boy advancing to manhood but also as a sick man being restored to health. The trusteeship, he stated, had been "a period where the scars and fatigue of 400 years of colonialism were effectively removed and replaced by a kind of confidence, aggressiveness and sheer exuberance that is strange in a thoroughly defeated subject people. It is as if direct contract has been re-established with our pre-Magellan ancestors." Statement of Carlos S. Camacho to the U.N.T.C., May 15, 1978, *reprinted in* PROVISIONAL VERBATIM TRANSCRIPT, 45th Sess. at 42, U.N. Doc. T/PV. 1470 (1978).

permanent,<sup>143</sup> and permanence and non-self-governing status cannot constitutionally co-exist. In the past, they could co-exist as a matter of international law, but they cannot do so today. They never could co-exist consistent with principles fundamental to all free government.<sup>144</sup> The Insular Cases, though they no longer specifically require *statehood* as the ultimate status for a territory, did not disturb the rule of the earlier cases that the non-self-government of territories is temporary. On the contrary, they endorse this principle.<sup>145</sup> They specifically envision not only the ultimate granting of independence *or* statehood to a colonial possession,<sup>146</sup> but even

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<sup>143</sup> The permanence of the Covenant relationship can be seen in the fact that it cannot be changed in its fundamental provisions except by mutual agreement. COVENANT, *supra* note 2, § 105. Indeed, the very name “Covenant,” with its biblical echoes, *see, e.g., Genesis 9:12* (covenant “for perpetual generations”) (Douay & King James), was chosen specifically because it connotes that “the relationship between the United States and the Northern Mariana Islands will be a permanent one,” *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* (1975) at 1 [hereinafter *Covenant Analysis*], just as the name “Commonwealth” was chosen to connote an advancement into self-government. *See WEBSTER’S NEW WORLD DICTIONARY* (1962) (commonwealth: “a nation or state in which there is self-government”). *Cf.* Commonwealth of England (1649-1660) (former Kingdom); Commonwealths of the Philippines and Puerto Rico (former Territories).

<sup>144</sup> Justice Brown’s placement of “suffrage” among *non*-fundamental rights, *Downes v. Bidwell*, 182 U.S. 244, 283 (1901), is not to the contrary. His citation to a case upholding a state’s denial of the vote to women, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), reveals—even if we concede his point *arguendo*—that he was speaking of the right of individuals or classes of persons to vote, not the right of the whole population to participate in the government. *Cf. Corfield v. Coryell*, 6 F.Cas. 546, 552 (C.C.Pa. 1823) (enumerating among fundamental rights “the elective franchise, as regulated and established by the laws or constitution of the state in which it is exercised”).

Although free government may not require jury trials, *Dorr v. United States*, 195 U.S. 138, 144-49 (1904); *Maxwell v. Dow*, 176 U.S. 581, 594, 601 (1900); *Northern Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1994), indictment by grand jury, *Hawaii v. Mankichi*, 190 U.S. 197, 217-18 (1903); *Hurtado v. California*, 110 U.S. 516, 538 (1884), or the privilege against self-incrimination, *Twining v. New Jersey*, 211 U.S. 78, 114 (1908), it still requires a fair trial, with notice and a meaningful opportunity to be heard. *See Brown v. Mississippi*, 297 U.S. 278 (1936); *Powell v. Alabama*, 287 U.S. 45, 58-73 (1932). Similarly, free government requires a meaningful popular voice in legislation, though not necessarily perfect legislative apportionment, *Rayphand v. Sablan*, 95 F. Supp. 2d 1133 (D.N.M.I. 1999), or universal suffrage. *See generally supra* notes 108-109 and cases cited. Dickinson made this point when he acknowledged that property qualifications on the franchise in England rendered the English system imperfect, but observed, “There is, to a *nice* observer of nature, a *perceptible* difference between a *deformed* man and a DEAD man.” Dickinson, *An Essay*, *supra* note 117, at 341-42.

<sup>145</sup> *See supra* note 139.

<sup>146</sup> *See Downes*, 182 U.S. at 283 (Brown, J.) (assuming island territories will ultimately either “be introduced into the sisterhood of States or be permitted to form independent governments”); *Id.* at 308 (White, J.) (assuming conquered territory will eventually be “either released or retained because it was apt for incorporation into the United States”).

an in-between relationship similar to what today would be called “free association”:

Suppose Congress should determine that the millions of inhabitants of the Philippine islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guaranty of life and property and to protect against foreign encroachment.<sup>147</sup>

Thus, the current status of Guam, American Samoa, and the Virgin Islands is constitutional *only if* continued territorial rule there is temporary and is dedicated to establishing self-government.<sup>148</sup> Since the Northern Marianas

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<sup>147</sup> *Downes*, 182 U.S. at 318 (White, J.).

<sup>148</sup> This raises the question of how to determine whether actual progress toward self-government is being made or even attempted there, and, if not, what can be done about it. The Insular Cases would leave this to Congress, but the Court surely never dreamed that the United States would still be holding Puerto Rico and the other islands as unincorporated territories more than a century later. See *Downes*, 182 U.S. at 343-44 (White, J.) (conceding arguendo that it would be unconstitutional to “permanently hold territory which is not intended to be incorporated”). At the time *Downes* was decided, no territory had remained in “unincorporated” limbo for more than nine years (the Great Plains of upper Louisiana (1803-1812)), *Downes*, 182 U.S. at 304 (White, J.), and Hawai‘i had already been incorporated in the short interval between the time the *Mankichi* case arose and the time the Court decided it. See *Mankichi*, 190 U.S. at 220 (White, J., concurring). The court plainly assumed that the matter could safely be left to the discretion of Congress without any fundamental rights being infringed, but that no longer seems to be a safe assumption.

The resolution of this question is beyond the scope of this Article. To the extent there ever was a purely political question about the status of the CNMI, it received its political answer when the United States entered into first the Trusteeship Agreement and then the Covenant. It should be noted, however, that courts may at last be recognizing that it is time to revisit the “political question” aspect of the Insular Cases, as history has revealed the fundamental assumptions underlying it to be erroneous. In *Ballentine*, the district court invited supplemental briefing on the issue:

Does the Constitution authorize the United States to acquire and keep a territory *in perpetuity* as “unincorporated,” without any apparent intention to integrate or incorporate that territory and thereby keeping those United States citizens who inhabit the territory in a state of perpetual pupillage, dependence and inequality?

*Ballentine*, 2001 WL 1242571 at 52-53, 2001 U.S. Dist. LEXIS 16856, 52. See also *Igartua de la Rosa v. United States*, 229 F.3d 80, 88-89 (1st Cir. 2000) (Torruela, J., concurring) (writing that “[t]he present conundrum cannot be justified or perpetuated further under the subterfuge of labeling it a ‘political question,’” and calling for a reassessment similar to that of the “separate but equal” doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954)). In fact, the only proper political question would seem to be whether a territory should be incorporated, not whether it should have self-government. The latter question goes beyond politics into the realm of fundamental constitutional rights. See generally Part III.

has already attained its permanent status, that status must be self-governing *now* in order to be constitutional.<sup>149</sup>

The Insular Cases have received their share of criticism over the years. They have come to be seen as an embarrassing relic of manifest-destiny imperialism, reflecting, at best, a result-oriented post hoc justification of politically popular expansionism, and, at worst, a racist unwillingness to extend to non-white peoples the basic civil liberties enjoyed by white Americans.<sup>150</sup> This conventional view of the Cases must be reassessed. By allowing the conclusion that statehood—what would be called, in U.N. terms, the “integration” model of self-government—is not the only form of self-government that may be established, the Insular Cases allow for more flexibility than a requirement of ultimate statehood would permit. Indeed, by allowing for such special provisions as restrictions on land alienation and immigration, and equal apportionment of the Senate, the Insular Cases made the very existence of the United States-CNMI union possible,<sup>151</sup> accommodating both Justice Harlan’s concerns about the wishes

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<sup>149</sup> History leaves no room for any suggestion that the arrangement is non-permanent, thus permissibly non-self-governing. This would leave the CNMI in a new temporary state of “pupilage,” despite the fact that its establishment was explicitly an advancement *out of* the temporary state of pupilage which was the trust territory (not to mention the centuries of colonial rule preceding it) and *into* self-government. In other words, to view the Commonwealth as a non-permanent, non-self-governing regime is to conclude that the Covenant and its negotiations, as well as the Trusteeship, were moot acts, which left the Northern Marianas people in basically the same place where they had been in 1962, 1947, even 1885 -- with advisory local officials, an all-powerful administering authority, and an inchoate right in the people to achieve self-government at some point in the indefinite future. It is to conclude, in short, that it must all be done all over again. See Van Dyke et al., *supra* note 136, at 631 (“[I]f the choice adopted is not one of the three options endorsed by the U.N. General Assembly in Resolution 1541, the people of these islands remain in a nonself-governing status and *continue to have a right to self-determination so that they can become self-governing.*” (emphasis added)).

<sup>150</sup> See, e.g., *Ballentine*, 2001 WL 1242571 (“a thoroughly ossified set of cases marked by the intrinsically racist imperialism of a previous era of United States colonial expansionism”); ROBERT F. ROGERS, *DESTINY’S LANDFALL: A HISTORY OF GUAM* (1995) at 125 (“The reasoning of the majority was unabashedly Victorian in its racism[.]”). They were nearly overruled in *Reid v. Covert*, 354 U.S. 1, 14 (1957), where the plurality called their rule a “dangerous doctrine” that should not be extended. More recently, however, the vitality of the Insular Cases has been reaffirmed, see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268, 277 (1990), as has their “free government” test, see *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1138 n.11 (D.N.M.I. 1999).

<sup>151</sup> See *Rayphand*, 95 F. Supp. 2d at 1136 n.7; *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1992) (noting necessity of constitutional exemptions regarding legislative apportionment and land ownership to establishment of US-CNMI political union). It is one of the ironies of history that, while the intent of the Insular Cases was to provide flexibility for future imperial expansion, see, e.g., *Downes v. Bidwell*, 182 U.S. 244, 286 (1901) (Brown, J.) (“A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire.”), their effect in the CNMI has been to provide flexibility in the establishment of an autonomous island government.

of the people,<sup>152</sup> and the Insular majority's concern about what (albeit sometimes phrased in terms of "territory peopled by savages") might better be called multi-culturalism.<sup>153</sup> At the same time, the requirement of adherence to the necessities of free government keeps innovation within the bounds of internationally shared democratic principles of personal and political rights.

### B. *The Territorial Clause*

This article's analysis may also be criticized as inconsistent with the Territorial Clause. Under that clause as it has come to be interpreted, the people of a territory have no representation in Congress and cannot vote for President,<sup>154</sup> and Congress' authority over them is not limited to specific enumerated powers, but is general and plenary.<sup>155</sup> Congress can allow for

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<sup>152</sup> See, e.g., *Hawaii v. Mankichi*, 190 U.S. 197, 240 (1903) (Harlan, J., dissenting) (stating that a system where subject peoples are "controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish[.]" is "entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution").

<sup>153</sup> See *Hurtado v. California*, 110 U.S. 516, 530-31 (1884). *Hurtado* provides an earlier, perhaps better, statement of the rationale behind the "free government" rule, which can hardly be called racist:

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations, and of many tongues. And, while we take just pride in the principles and institutions of common law, we are not to forget that, in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and every age[.]

*Id.* See also *Wabob*, 958 F.2d at 1460 ("In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures.")

<sup>154</sup> Courts have recently reaffirmed that residents of territories have no constitutional right to vote for president. See *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001); *Igartua de la Rosa v. United States (II)*, 229 F.3d 80, 83-84 (1st Cir. 2000); and *Igartua de la Rosa v. United States (I)*, 32 F.3d 8, 9 (1st Cir. 1994).

<sup>155</sup> See, e.g., *United States v. McMillan*, 165 U.S. 504, 510-11 (1897) ("Congress . . . may itself directly legislate for any territory, or may extend the laws of the United States over it, in any particular that Congress may think fit."); *Talbott v. Bd. of Comm'rs of Silver Bow County*, 139 U.S. 438, 441 (1891) (describing a territory as "wholly dependent upon Congress, and subject to its absolute supervision and control"); *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885) ("[I]n ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress[.]"); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (stating that the people of Florida "do not [ ] participate in political power; they do not share in the government, [until] Florida shall become a state"); *Sere v. Pitot*, 10 U.S. (6

the establishment of a representative territorial assembly,<sup>156</sup> but it retains the power to nullify any of the assembly's acts of which it disapproves, and make its own laws for the territory should the assembly fail to act as Congress sees fit:

Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the Territories.<sup>157</sup>

Indeed, Congress retains the power to abolish the territorial assembly itself.<sup>158</sup> If the Territorial Clause applied to the Northern Marianas—at least if it applied without any limitation—it would indeed create substantial problems for this article's thesis. However, the clause does not apply, or, if it applies, it is strictly limited by the Covenant and the Constitution.

### 1. No Territorial Clause

The Clause has no application in or to the Northern Marianas for at least the following reasons. First, it is not among the sections of the Constitution extended to the CNMI by the Covenant,<sup>159</sup> and for that reason alone should be regarded as inapplicable.<sup>160</sup> Indeed, its omission from the

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Cranch) 332, 337 (1810) (“[W]e find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans.”).

<sup>156</sup> *Simms v. Simms*, 175 U.S. 162, 168 (1899) (“Congress has . . . full legislative power . . . and may, at its discretion, intrust that power to the legislative assembly of a Territory.”).

<sup>157</sup> *First Nat'l Bank of Brunswick v. County of Yankton*, 101 U.S. 129, 133 (1879). *See also, e.g., Asiatic Petroleum Co. v. Insular Collector of Customs*, 297 U.S. 666, 670-71 (1936) (“The erection of a local legislature in a territory or a possession and the grant of legislative power do not deprive Congress of the reserved power to legislate for the territory or possession, or abrogate existing congressional legislation in force therein.”); *Sakamoto v. Duty Free Shoppers, Inc.*, 764 F.2d 1285, 1286 (9th Cir. 1985) (“Plenary control by Congress over the Guamanian government is illustrated by the provision that Congress may annul any act of Guam's Legislature.”); *Guam v. Okada*, 694 F.2d 565, 568 (9th Cir. 1982) (“Congress has the power to legislate directly for Guam, or to establish a government for Guam subject to congressional control.”).

<sup>158</sup> *See, e.g., United States v. Kagama*, 118 U.S. 375, 379-80 (1886) (“The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified or repealed at any time by Congress.”).

<sup>159</sup> *See COVENANT, supra* note 2, § 501 (omitting Territorial Clause from list of constitutional provisions applicable in the Northern Marianas).

<sup>160</sup> *Cf. Fleming v. Dep't of Pub. Safety*, 837 F.2d 401, 406 (9th Cir. 1988) (“We believe that had the drafters intended to make the eleventh amendment applicable in the

Covenant has been noted by the Ninth Circuit in the specific context of allaying local concerns about federal overreaching.<sup>161</sup> Second, we have already seen that the Territorial Clause did not and could not apply to the Northern Marianas prior to the termination of the Trusteeship in 1986,<sup>162</sup> yet nothing happened in 1986 which would cause it to have applied since then. The only changes at the termination of the Trusteeship were the extension of U.S. sovereignty and attainment of U.S. citizenship, and the example of the states shows that these may exist without any application of the Territorial Clause. Third, we have already seen that the treaty power, in conjunction with the necessary and proper clause, was the constitutional source of the United States' power to enter into the Covenant. The Covenant itself then provides the vehicle for federal legislative powers, and all of its provisions doing so were already in effect before the Territorial Clause could possibly have applied.<sup>163</sup> This makes the treaty power—not the Territorial Clause—the ultimate constitutional source of all federal power exercised in the Northern Marianas.<sup>164</sup> Fourth, although the Northern Marianas' "territorial" status

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Commonwealth, they would have done so directly in section 501(a), the section that enumerates all of the constitutional provisions applicable to the Commonwealth[.]”).

<sup>161</sup> See *Hillblom v. United States*, 896 F.2d 426, 429 n.1 (9th Cir. 1990) (“It should be noted that section 501 of the Covenant explicitly enumerates the parts of the U.S. Constitution which apply to the CNMI, and despite the concerns of the Task Force [that the US will attempt to govern the CNMI through the Territorial Clause], the territorial clause is not included in the list.”). See also *Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1439 (9th Cir. 1997) (recognizing omission of Territorial Clause as “noteworthy”).

<sup>162</sup> See *supra* note 75 and accompanying text.

<sup>163</sup> Section 105 became effective with approval of the Covenant in 1976, and Sections 501 and 502 at the inauguration of the Commonwealth government in 1978. See COVENANT, *supra* note 2, § 1003 (providing effective dates of various sections of the Covenant).

<sup>164</sup> In other words, while the Trusteeship Agreement was in effect, the United States was empowered to and did establish a mechanism through which it might continue to legislate in the future even after the Agreement terminated, in aid of the self-governing regime it was required to create. Likewise, it was empowered to, and did, establish a federal court in the Northern Marianas, which survives the Trusteeship. See 48 U.S.C. § 1821 (establishing District Court for the Northern Mariana Islands).

In a recent decision, the Supreme Court referred to the District Court for the Northern Mariana Islands as an “Article IV territorial court.” *Nguyen v. United States*, 123 S.Ct. 2130, 2133 (2003). This was, however, unsupported by any authority or analysis, and a review of the record demonstrates that the Court simply followed the lead of the parties, both of whom also, and equally without any supporting authority or analysis, described the Northern Marianas district court as an Article IV court. See, e.g., Petitioner’s Brief, 2003 WL 359292 at \*1; Respondent’s Brief, 2003 WL 548057 at \*4. Indeed, the only support even offered by either party for this description, *Guam v. Olsen*, 431 U.S. 195, 196 n.1 (1977) (cited in Petitioner’s Brief at \*20), refers only to the District Court of Guam, and its only relevance to the CNMI rests in the unstated, and erroneous, assumption that what is true of Guam must necessarily also be true of the CNMI. See also Transcript of Nguyen oral argument at 9 (court and counsel failing to differentiate between Northern Marianas and Guam) (copy on file with author). *But see* *Ngiraingas v. Sanchez*, 858 F.2d 1369, 1371

has sometimes erroneously been assumed,<sup>165</sup> in fact the threshold question of whether the CNMI is a “territory” of the United States to which the clause *could* apply has explicitly been left open.<sup>166</sup> Indeed, this question seems impossible to answer if the text and history of the Clause is considered in isolation,<sup>167</sup> especially since even its application to the

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n.1 (9th Cir. 1988), *aff’d* 495 U.S. 182 (1990) (“Guam’s relation to the United States is entirely different” from the CNMI’s).

This lack of precision resulted from the nature of the issue in *Nguyen*—whether a panel of the Court of Appeals may include a non-Article III judge. It was of no import to either party’s position whether that judge was an Article IV judge or an Article I judge. The petition for writ of certiorari, and the opposition thereto, described the issue solely in terms of a “non-Article III” judge, without specifying as to Article I or Article IV. *See, e.g.*, Petition for Writ of Certiorari at 4; Brief for the United States in Opposition at 4,5 (copies on file with author). At oral argument as well, members of the Court sometimes followed the parties’ usage of “Article IV” judge or “territorial judge,” but often instead cast the same issues in terms of “Article I” judges, indicating that the distinction was immaterial to the issues in the case. *See, e.g.*, Transcript at 20 (“I cannot think of—why it’s wrong to ask an Article III judge to take on this additional adjudicatory function with an Article I judge sitting next to him.”); *Id.* at 25 (“Supposing here, instead of the Article I judge, you had a British judge and they asked him to sit”); *Id.* at 29 (“They constituted themselves a different sort of tribunal, including the Article I judge, and no one claims that was unfair to anybody in Guam.”).

In sum, the *Nguyen* Court’s description of the Northern Marianas district court as an “Article IV” court is a perfect illustration of the truth of the following cautionary passage from *Downes*:

It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

*Downes v. Bidwell*, 182 U.S. 244, 258-59 (1901) (Brown, J.) (quoting *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821)).

<sup>165</sup> *See Saipan Stevedore Co. v. Office of Workers’ Comp. Programs*, 133 F.3d 717, 720 (9th Cir. 1998) (“Because the Commonwealth is a United States territory . . .”).

<sup>166</sup> *See Northern Mariana Islands v. Atalig*, 723 F.2d 682, 691 n.28 (9th Cir. 1984) (not deciding, but finding “credible,” the argument that the Commonwealth is neither an incorporated nor an unincorporated territory).

<sup>167</sup> The only serious historical explication of the original understanding of the Territorial Clause—the *Dred Scott* decision—concluded that it applied only to territory held at the time of independence from Great Britain. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 432 (1856). If we do not adopt that view, we have nowhere to look but to where the Clause has been applied in practice, and that is susceptible to various interpretations. It is clear, at least, that application of the Clause is not co-extensive with U.S. sovereignty (e.g., the states and the District of Columbia) since it does not apply to some areas under U.S. sovereignty, yet has been applied to some areas *not* under U.S. sovereignty (e.g., the Panama Canal zone, and U.S. military bases in foreign countries). *See, e.g.*, Vermilya-

conventional territories has never been conclusively established.<sup>168</sup> Finally, the application of the Territorial Clause would be superfluous, since all federal powers which would be constitutionally available under it (the Insular Cases, applied as set out above, delineating the limits of territorial as well as inherent powers) already extend to the Northern Marianas through the Covenant. Indeed, *no* constitutional source for the federal legislative power in the Northern Marianas is necessary, as the power was granted not by the American people in the Constitution, but directly by the Northern Marianas people in the Covenant.<sup>169</sup>

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*Brown Co. v. Connell*, 335 U.S. 377, 383-85 (1948) (applying Territorial Clause to U.S. base in Bermuda). However, no bright line rule for the Clause's application is apparent from these examples.

<sup>168</sup> It has never been clear whether Congress' power over territories derives from the Territorial Clause, or whether it is inherent in the power to acquire them, which is itself inherent in the very existence of the United States as a sovereign nation—and/or derives from the war and treaty powers. The Supreme Court has often declined to choose between these theories, stating only that such power exists, whatever its source may be. *See, e.g.*, *DeLima v. Bidwell*, 182 U.S. 1, 196 (1901); *Downes v. Bidwell*, 182 U.S. 244, 290 (1901) (White, J.); *First Nat'l Bank of Brunswick v. County of Yankton*, 101 U.S. 129, 132-33 (1879); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542-43 (1828); and *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336-37 (1810).

In *Scott*, the Court explicitly held that Congress' territorial powers are “the inevitable consequence of the right to acquire territory,” and do *not* derive from the Territorial Clause. *Scott*, 60 U.S. at 443. However, probably due to the disrepute into which that decision (for entirely unrelated reasons) fell, the choice did not stick, although it was echoed in *United States v. Kagama*, 118 U.S. 375, 379-80 (1886) (stating that Congress' powers arise “not so much from” the Territorial Clause as from “the ownership of the country”). On other occasions, the Court has stated that Congress' power derives from *both* of these sources. *See Dorr v. United States*, 195 U.S. 138, 149 (1904); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890).

The more recent practice is to cite the Territorial Clause alone. *See, e.g.*, *Examining Bd. of Eng'rs v. Flores de Otero*, 426 U.S. 572, 585 (1975). This practice, however, would seem to be a form of convenient judicial shorthand rather than an actual purported resolution of the constitutional issue.

<sup>169</sup> An analogy may be drawn to Andorra, where the President of France and Bishop of Urgel, Spain, serve as co-princes. *See generally* 1 *ENCYCLOPEDIA AMERICANA* 818-19 (1999). The powers and duties of these princes, as such, bears no relation to their powers or duties in their respective foreign offices, but rather are conferred on them *by Andorra* by virtue of their holding those particular offices. *Id.* Similarly, the queen of England is recognized as sovereign of the Channel Islands of Jersey and Guernsey not as queen of England or of Great Britain, but rather as successor, through William the Conqueror, to the title of Duke of Normandy. *See generally* 6 *ENCYCLOPEDIA AMERICANA* 278 (1999). The Northern Marianas people could likewise confer legislative power on anyone they wish, from the US Congress to the Pope. Indeed, in addition to Congress, they have conferred it on the American Law Institute, whose Restatements are enforced as law in the CNMI in the absence of contrary local law or custom. *See* 7 CMC § 3401 (CNMI choice-of-law statute).

## 2. No Plenary Powers

The foregoing are all reasons why the Territorial Clause could not apply to the Northern Mariana Islands even if its import were entirely innocuous. It is even more certain that it cannot apply if its application would have the effect of conferring permanent plenary powers on Congress. The vesting in Congress of plenary powers over the internal affairs of the CNMI would amount to the precise situation shown above to be inadmissible because contrary to the purpose of the Covenant, to the Trusteeship Agreement, to the law of nations, to principles fundamental to all free government; and, on account of the last three of these, contrary to the United States Constitution.<sup>170</sup>

The clash with the purpose of the Covenant is evident from the fact that, if the Covenant served only to establish a plenary-powers territory, then its adoption was a pointless act, because such status is indistinguishable from the colonial, mandate, and trust territory governments that preceded the Commonwealth—namely, “benevolent but heavy-handed despotism.”<sup>171</sup> By the time the Covenant was adopted, the Marianas had been ruled by foreign powers for more than 280 years.<sup>172</sup> Except for the first century of Spanish rule, which amounted essentially to a military occupation, there had been indigenous participation in government at the village level throughout this time. Sometimes these local officials were appointed, other times elected.<sup>173</sup> Sometimes they exercised substantial powers, other times almost

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<sup>170</sup> Additionally, if the Clause necessarily comes with sovereignty, and necessarily brings plenary powers with it, it stands in the way of the United States fulfilling its international obligations under the U.N. Charter to develop self-government in Guam, the Virgin Islands and American Samoa, by rendering it incapable of agreeing to any arrangement with them other than independence or statehood. It also puts the United States at a disadvantage relative to other countries, who are free to guarantee self-government to those who associate or integrate with them on other terms—just as the Insular Cases perceived other provisions of the Constitution getting in the way of imperial expansion. *See supra* note 151. *Cf. Waboll v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992) (“The Bill of Rights was not intended to interfere with the performance of our international obligations.”). If that can be said of the Bill of Rights, it can surely be said of the Territorial Clause.

<sup>171</sup> ROGERS, *supra* note 150, at 74 (describing the Spanish government in the Marianas, but equally applicable to the others—although the “benevolent” part tended to waver in wartime).

<sup>172</sup> The oft-heard figure of 400 years, *see supra* note 142 and *infra* text accompanying note 196, counts from Magellan’s visit in 1521 and/or Legazpi’s claim of the islands for Spain in 1565. *See FARRELL, supra* note 4, at 115. However, Spain made no effort to enforce its claim until the arrival of San Vitores in 1668, and did not fully conquer the Marianas until after thirty further years of warfare. *See generally id.* at chs. 5 & 6 (describing Spanish discovery and conquest of the Marianas).

<sup>173</sup> In Spanish times, indigenous local officials were appointed beginning in 1791 and elected beginning in 1885. ROGERS, *supra* note 150, at 85, 105. *See generally CAROLINIANS IN THE MARIANA ISLANDS IN THE 1800’S* at 34-59 (Marjorie G. Driver & Omaira Brunal-Perry trans. & eds., 1996) (providing detailed documentation of late

none.<sup>174</sup> Ultimate political authority, however, was always with the ruling power, and the islanders' self-government was limited to whatever degree of self-government the ruling power felt inclined to approve at any given time.<sup>175</sup> If the Covenant established a territorial regime, it institutionalized that status while purporting to break from it. Under such a construction, the Covenant would even represent a step *backward*, since the Trusteeship's impetus to *develop* self-government would no longer be there.<sup>176</sup>

The inconsistency with the Trusteeship Agreement and law of nations is particularly evident in the fact that a plenary-powers territory is contrary to the United States' own express understanding of the "self-government" it was committed by that Agreement to develop. The United States has long admitted, even before the adoption of the U.N. resolutions defining self-government, that a U.S. "territory," with plenary powers in Congress, is a "*non-self-governing territory*" in the language of the U.N. Charter.<sup>177</sup> It freely listed with the U.N. as "non-self-governing territories" all of the territories it held at the time—Alaska, Hawai`i, Puerto Rico, Guam,

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Spanish-era elections on Saipan). The Germans reverted to the practice of appointments, which was initially continued by the Japanese. See FARRELL, *supra* note 4, at 263; ALEXANDER SPOEHR, SAIPAN: THE ETHNOLOGY OF A WAR-DEVASTATED ISLAND at 55 (1954). The Japanese re-instituted elections in 1936. SPOEHR, SAIPAN at 87. Under the Americans, the practice of electing local officials was adopted almost from the outset. FARRELL, *supra* note 4, at 527.

<sup>174</sup> In late Spanish times, "[l]ocal autonomy was particularly marked on Saipan, due to its remoteness from the seat of colonial power," and Chamorros and Carolinians "held all but the highest government offices." SCOTT RUSSELL, TIEMPON ALEMÁN: A LOOK BACK AT GERMAN RULE OF THE NORTHERN MARIANA ISLANDS 1899-1914 at 12 (1999). Under the Trusteeship as well, locally representative bodies exercised legislative powers. FARRELL, *supra* note 4, at 531. Under the German and Japanese, however, local officials' functions were generally limited to carrying out the instructions of the colonial government. See SPOEHR, *supra* note 173, at 45, 55; PEATTIE, *supra* note 96, at 75-76.

<sup>175</sup> Under the Trusteeship, vetoes by the High Commissioner could be overridden by a two-thirds vote of the Congress of Micronesia, but remained subject to a final veto by the Secretary of the Interior. Moreover, the Congress of Micronesia could only enact legislation consistent with applicable US laws, executive orders, and even orders of the Secretary of the Interior. See *Morgan Guar. Trust Co. v. Republic of Palau*, 639 F. Supp. 706, 708 (S.D.N.Y. 1986); *People of Saipan v. Secretary of Interior*, 356 F. Supp. 645, 655 (D. Haw. 1973). See generally *Temengil v. Trust Terr. of the Pac. Islands*, 881 F.2d 647, 650 (9th Cir. 1989) ("Ultimate discretionary control over the Trust Territory government was retained by the Secretary of the Interior.").

<sup>176</sup> Indeed, at the very outset the United States had specifically rejected a territorial status for the Northern Marianas and the rest of Micronesia in favor of developing self-government under the Trusteeship. See FARRELL, *supra* note 4, at 453-55, 461 (noting that some in the military wished to annex the islands, but were overruled by Presidents Roosevelt and Truman). To annex the islands *after* thirty years of trusteeship would amount to a bait-and-switch maneuver of historic proportions.

<sup>177</sup> Even without reference to the U.N. Charter, it has long been admitted that a territory is non-self-governing. See, e.g., *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) (the "right of local self-government" belongs to the people of the states, not the territories); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (stating that "a territory. . . has not, by becoming a State, acquired the means of self-government").

American Samoa and the U.S. Virgin Islands—and, with the exception the first three, continues to report to the U.N. about the progress each has made toward self-government.<sup>178</sup> Whatever “self-governing” and “non-self-governing” may mean, it is at least clear that they cannot, except in the most Orwellian of worlds, mean the same thing.<sup>179</sup>

And the clash with the fundamentals of free government is evident in the fact that plenary territorial powers, at least if not exercised only temporarily and for the purpose of developing self-government, cannot be distinguished from the powers asserted by the British Parliament in the Declaratory Act of 1766, which provided that the colonies:

have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and parliament of *Great Britain*; and that the King’s majesty, by and with the advice and consent of the lords spiritual and temporal, and commons of *Great Britain*, in parliament assembled, had, hath, and of right ought to have, full power and authority to

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<sup>178</sup> See U.N. CHARTER, art. 73(e), <http://www.un.org/aboutun/charter/index.html> (requiring such reports on non-self-governing territories); U.N. GAOR, 56th Sess., U.N. Doc. A/56/67 (2001), <http://www.un.org/documents/ga/docs/56/a5667.pdf> (Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations) (noting 2001 receipt of information from US on Guam, Virgin Islands and American Samoa); Clark, *supra* note 39, at 40 n.239 (describing United States as “admitted colonial power”).

Alaska and Hawaii were removed from the list of non-self-governing territories when they achieved statehood in 1959. Puerto Rico was removed in 1952 after the establishment of the commonwealth government there, which was deemed at the time to satisfy the UN’s requirements for self-government. This was, however, a pre-1960 U.N. which was still dominated by colonial powers, and which had not yet fully articulated its views regarding colonialism. See, e.g., Clark, *supra* note 39, at 46 (stating that Puerto Rico could “barely pass muster” in 1952, and it is “extremely doubtful” it would today).

In addition, it is clearer in retrospect than it was at the time—although even now it is not as clear as it might be—that the establishment of the Puerto Rico commonwealth did not really effect any substantive change in that island’s relationship with the United States, and that it remains as fully subject to plenary congressional rule now as previously. Compare *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985) (Puerto Rico no longer subject to territorial clause since establishment of Commonwealth), with *United States v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993) (Despite establishment of Commonwealth, Puerto Rico remains a territory subject to plenary congressional power).

<sup>179</sup> The violation is also evident in the fact that, again by the United States’ own admission, a plenary-powers territory is just another name for a colony. See *O’Donoghue v. United States*, 289 U.S. 516, 537 (1933) (“[A] territory” of the United States . . . is a governmental subdivision which happened to be called a “territory,” but which quite as well could have been called a “colony” or a “province.”). As noted above, the establishment of a new colony, now or in 1976, would have violated international law. See *supra* notes 92-106 and accompanying text. Even the continued maintenance of existing colonies was then and is now lawful only to the extent they are being prepared for self-government. It is also clear that the U.N. has never regarded colonies, which abounded at the time of its founding, as “self-governing territories.”

make laws and statutes of sufficient force and validity to bind the colonies and people of *America*, subjects of the crown of *Great Britain*, in all cases whatsoever.<sup>180</sup>

The founders' conception of rights fundamental to all free government, described above, was asserted in specific opposition to the Declaratory Act.<sup>181</sup> Indeed, the American Revolution, and the very existence of the United States as an independent nation—one established by “we the people,” with all its institutions deriving their power, voice and legitimacy from the people—was and is nothing less than the living repudiation of the principles of that Act. If the Declaratory Act, or anything like it, is legitimate, then everything America is and has been since the Revolution is illegitimate. In other words:

A power [] in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form.<sup>182</sup>

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<sup>180</sup> DECLARATORY ACT (March 18, 1766), *reprinted in* DOCUMENTS, *supra* note 111, at 60-61. The Act is absolute in its terms, with no provision for self-government in the future. *Id.*

<sup>181</sup> *See, e.g.,* Hamilton, *supra* note 112, at 133 (“[T]he claim of parliament to *bind us by statutes in all cases whatsoever*, is unconstitutional, unjust and tyrannical[.]”); Thomas Paine, *The American Crisis*, No. 1, at 1 (“Britain, with an army to enforce her tyranny, has declared that she has a right (*not only to TAX*) but ‘*to BIND us in ALL CASES WHATSOEVER*,’ and if being bound in that manner, is not slavery, then there is not such a thing as slavery upon earth.”). *See also* DECLARATION OF INDEPENDENCE (indicting King and Parliament for “declaring themselves invested with Power to legislate for us in all cases whatsoever”).

<sup>182</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393, 448 (1856). *See also supra* note 138 and accompanying text (Justice Harlan making the same point in the *Insular Cases*).

It may be objected that similar language to the Declaratory Act appears in the Seat of Government Clause of the Constitution—as a permanent status, moreover—and thus must be constitutional. *See* U.S. CONST. art. I, § 8, cl. 17 (empowering Congress “to exercise exclusive Legislation in all Cases whatsoever” over the District of Columbia). The District, however, is a historical anomaly. Like the apportionment of the U.S. Senate, *see Reynolds v. Sims*, 377 U.S. 533, 574 (1964), the District arose from “unique historical circumstances,” and, were it not explicit in the Constitution, could be justified on no constitutional ground. *See generally* James B. Raskin, *Domination, Democracy, and the District: The “State” of Controversy*, 39 CATH. U. L. REV. 417, 423-24 (1990) (detailing historical origin of Seat of Government Clause). Certainly, Chief Justice Marshall’s attempt to rationalize it in *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820) (describing the District as having “voluntarily relinquished the right of representation, and [] adopted the whole body of Congress for its legitimate government”) is, unlike his parallel comment regarding territories, *see supra* note 142, hardly convincing two centuries after the fact.

The District is, moreover, very much the exception that proves the rule. Residents of the District, far from enjoying the blessings of free government, “are not so much being governed as being made an example of.” Louis Michael Seidman, *The Preconditions For*

### 3. Limited Territorial Clause

The only really good reason for even considering the possible application of the Territorial Clause to the Northern Marianas is that some of the framers of the Covenant plainly believed and intended that it would apply.<sup>183</sup> However, a few anomalous comments in the legislative and negotiating history to the contrary notwithstanding,<sup>184</sup> the framers of the Covenant intended that it apply only within the limitations imposed by the Covenant, not as a vehicle for full plenary powers, and not as it applied in the other territories.<sup>185</sup> In other words, the Territorial Clause would serve as,

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*Home Rule*, 39 CATH. U. L. REV. 373, 377 (1990). “By legislating for the District, Congress can take a highly visible stand without actually restricting the activities of any voters in their home districts.” Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 314 (1990). This situation realizes Wilson’s fear that “[i]t may become popular and reputable at home [for Parliament] to oppress us.” Wilson, *supra* note 112, at 734. It provides contemporary proof for his thesis that a place will always be governed in the primary interest of those who govern it. *See also, e.g.*, Hamilton, *supra* note 112, at 93 (“To oppress us may serve as a recommendation to their constituents.”).

<sup>183</sup> *See, e.g.*, Report of the Drafting Committee (copy on file with author) (“It is understood that the authority of the United States under this section [105] will be exercised through, among other provisions of the United States Constitution, Article IV, Section 3, Clause 2.”); *Covenant Analysis*, *supra* note 143, at 14 (“Article IV, Section 3, Clause 2 will continue to be the mechanism through which Congress will legislate with respect to the Northern Marianas.”). Note the use of “continue,” although the Territorial Clause had not been the mechanism for legislation up to that point.

<sup>184</sup> The most prominent such comment is the following passage from a U.S. Senate Report on the Covenant:

Although described as a commonwealth, the relationship is territorial in nature with final sovereignty invested in the United States and plenary legislative authority vested in the United States Congress.

S. REP. NO. 94-596, at 2 (1976).

This has been quoted in at least two court decisions in support of a territorial view of the CNMI. *See* *Micronesian Telecomm. Corp. v. NLRB*, 820 F.2d 1097, 1100 n.2 (9th Cir. 1987); *Saipan Stevedore Co., Inc. v. Director, Office of Workers’ Comp. Programs*, 133 F.3d 717, 721 n.9 (9th Cir. 1998). However, a prominent scholar of U.S. territorial relations points out that the Senate simply “put in legislative history protective of its own authority,” which is “not consistent with the negotiating intentions or indeed the testimony of the negotiators before the Congress.” ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* (1989) at 543 [hereinafter LEIBOWITZ, *DEFINING STATUS*]. Leibowitz also criticized a substantially identical passage in an earlier report: “The Senate report is only self-serving and should be accorded little significance. It suggests that the entire Covenant negotiations were of no consequence, of no more importance than any other action by the U.S. Congress.” *Id.* at 534 (citing S. REP. NO. 94-433, at 15 (1975)).

<sup>185</sup> *See* WILLENS & SIEMER, *supra* note 21, at 61 (Marianas negotiators recognize need to “get the United States to agree to limit [territorial clause] congressional authority”); *Id.* at 88 (commission proposes “specific limitations on the plenary powers of Congress under [the Territorial Clause] . . . which would make clear that the Commonwealth of the Marianas has maximum (or paramount) control over its internal affairs”); *Id.* at 118 (“The

at most, a procedural vehicle for the federal legislative powers which the Covenant allows, within the limits which its guarantees of self-government and mutual consent impose, not as a Trojan horse within which plenary powers might enter the walls of the CNMI by stealth. It would be procedural handmaid to the Covenant, not a twin sister with independent powers, and certainly not a master.<sup>186</sup>

It was in doubt for some time whether the clause could be so limited,<sup>187</sup> but *Richards* would seem to have settled the issue once and for all when it forcefully rejected the Inspector General's attempted reliance on independent territorial powers, writing:

At the outset, we *emphasize* that “the authority of the United States towards the CNMI arises *solely* under the Covenant.” The Covenant has created a “unique” relationship between

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US representatives agreed with the commission that the legislative authority of Congress in the Marianas could be limited. . . . They agreed that US sovereignty over the Northern Marianas could co-exist with a limited application of the Territorial Clause.”); *Id.* at 174-75 (parties agree to “express recognition of an independent right to local self-government”); *Id.* at 210 (self-government “guaranteed”); *Id.* at 211 (“self-government cannot be changed without mutual consent”).

*See also Covenant Analysis, supra* note 143, at 16-17 (“This guarantee of local self-government . . . is a limitation on the plenary authority of the United States with respect to the Northern Marianas, and provides an enforceable assurance that the basic relationship between the Northern Marianas and the United States will be governed by the Covenant unless the people of the Northern Marianas agree to a change.”); *Id.* at 2-3 (“The commonwealth relationship contained in the Covenant provides assurances of local self-government which would not be available under a traditional territorial relationship.”); *Id.* at 10-11 (“This [Section 103] is a guarantee of local self-government which has not been made by the United States to territories such as Guam and the Virgin Islands.”).

<sup>186</sup> Note the use of “mechanism” in the passage from the *Analysis* quoted in note 183, *supra*, indicating a mechanical rather than substantive role for the Clause.

<sup>187</sup> *See, e.g.,* Arnold H. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L.J. 19, 27 n.30 (1981) [hereinafter Leibowitz, *Marianas Covenant Negotiations*] (“Of course, it cannot be said with certainty what courts will say about the restrictions which may be imposed in this agreement on Congress' authority under IV-3-2 [the Territorial Clause.]”); Van Dyke, *supra* note 50, at 472 (“If the Congress agrees to a negotiated compact or covenant with an island community, does that agreement serve to restrict the power of subsequent Congresses to legislate under the Territory Clause?”).

R.B.S. argues forcefully and persuasively that Congress can so limit itself. *See* R.B.S., *supra* note 45. The author notes that a state ceding land to the United States under Article IV Section 3 may attach conditions retaining certain powers for itself, and that these conditions will be enforced against the United States. R.B.S., *supra* note 45, at 1056-59. *See also Downes*, 182 U.S. at 244, 318-19 (White, J.) (noting that the United States can acquire territory “subject to a condition”). R.B.S. also points out that Congress, having the power to completely dispose of a territory, must necessarily have the lesser power of disposing of some of its rights over that territory. R.B.S., *supra* note 45, at 1059-60. This latter point has become a staple of constitutional theory in Puerto Rico, where full territorial powers unquestionably applied prior to 1952. *See, e.g.,* *United States v. Figueroa*, 984 F. Supp. 71, 78-79 (D.P.R. 1997). Its application is less clear to the Commonwealth, where such powers do not appear ever to have existed in the first place.

the United States and the CNMI, and its provisions *alone* define the boundaries of those relations. For this reason, we find *unpersuasive* the Inspector General's reliance on the Territorial Clause as support for enforcement of the federal audit. He argues that because the CNMI is governed through the Congress' power under the Territorial Clause, Congress has plenary legislative authority over the CNMI. The applicability of the Territorial Clause to the CNMI, however, is not dispositive of this dispute. *Even if the Territorial Clause provides the constitutional basis for Congress' legislative authority in the Commonwealth, it is solely by the Covenant that we measure the limits of the Congress' legislative power.*<sup>188</sup>

And yet, even since *Richards*, ambiguities persist. Courts have continued to flirt with territorial-type analyses,<sup>189</sup> and the U.S. Justice Department even claimed at one point in 1994 to have "reevaluated the issue," and concluded that mutual consent provisions limiting U.S. territorial powers were "legally unenforceable."<sup>190</sup> Ambiguities exist, moreover, in the Covenant

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<sup>188</sup> United States *ex rel.* Richards v. De Leon Guerrero, 4 F.3d 749, 754 (9th Cir. 1993) (emphasis added) (citations omitted).

<sup>189</sup> See, e.g., *Saipan Stevedore*, 133 F.3d 717 (9th Cir. 1998). In this post-*Richards* case, the court offered the following watered-down version of the language from *Richards* quoted *infra* note 186:

[A]lthough the territorial clause provides the Constitutional basis for Congress' legislative authority in the Commonwealth, it is by the Covenant that we measure the limits of that power

*Saipan Stevedore*, 133 F.3d at 721. This appears to be an unstated and misguided attempt to reconcile *Richards* with *Micronesian Telecomm.*, which had analyzed the application of federal law in the CNMI partly in terms of the powers and intent of the original enacting Congress, wrongly implying that this alone would be sufficient to support the act's application without reliance on the medium of the Covenant. *Micronesian Telecomm.*, 820 F.2d at 1100. *But cf.* *DeNueva v. Reyes*, 966 F.2d 480 (9th Cir. 1992); *A&E Pac. Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68 (9th Cir. 1989); and *Fleming v. Dep't of Public Safety*, 837 F.2d 401 (9th Cir. 1988) (relying on the Covenant alone to reach conclusions regarding applicability of federal laws).

In a later case, the court properly gave priority to the Covenant's formula over the intent of the original enacting Congress, but at the same time arguably insinuated that the Covenant has only the status of another federal statute. *Northern Mariana Islands v. United States*, 279 F.3d 1070, 1072-73 (9th Cir. 2001).

<sup>190</sup> WILLENS & SIEMER, *supra* note 21, at 355. The Department of Justice magnanimously offered to continue to honor the Covenant's mutual consent provisions, "in spite of its reevaluation of this problem." *Id.*

The idea that mutual consent is "legally unenforceable" goes beyond even the "institutional self-government" theory the United States espoused in *Richards*. There, at least, the United States admitted that plenary powers are limited to the extent that Congress cannot simply abolish the Commonwealth government, as it could a territorial government.

negotiations themselves, once we look beyond the broadest level of generality.<sup>191</sup> Apparently, no one suggested the specific mechanism endorsed by this Article—suspension of locally objectionable federal laws by the Northern Marianas people—but nor was there any suggestion or agreement as to precisely how, as a practical matter, local self-government *would* be secured from federal interference. The only agreement was that, somehow, it would.

Given this level of ambiguity in the details, our analysis must remain on the big picture, and our interpretation of the Covenant must not rise and fall based upon what any individual said or thought, or did not say or think, about the issue. Like a constitution, or any document depending on popular ratification for its authority, we must read it so as to effectuate the substantive intent not only of its framers, but also of the people adopting it. This means placing strong emphasis on the plain, sensible meaning,<sup>192</sup> and

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*See United States ex rel. Richards v. De Leon Guerrero*, Misc. No. 92-001 (D. N. Mar. I., July 24, 1992), slip op. at 54 n.27. This limitation, of course, is meaningless if Congress has the power to nullify every act of a government it cannot formally abolish. *Cf. Downes*, 182 U.S. at 270 (Brown, J.) (“If the constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such[.]”).

<sup>191</sup> *See* MCHENRY, *supra* note 46, at 168 (“[I]t should not be forgotten that the meaning of some of the language used in the covenant is still subject to dispute. Some ambiguities seem to have been deliberately built-in in the give-and-take of negotiation.”).

Particularly on the prickly issue of federal legislative authority, the overriding mutual desire of the United States and Northern Marianas to form their political union caused both to blur, defer, and sometimes outright ignore their differences, with the result that the legislative and negotiating history is elliptical and sometimes impenetrable, and abounds in ambiguities and contradictions. *See, e.g.*, Ambassador Williams’ assertions to the Senate that the Covenant is fully consistent both with traditional U.S. territorial status, Covenant Hearing, *supra* note 39, at 213, and with the U.N. resolutions on self-government, *id.* at 60, 237; or his tortured attempt to avoid the ramifications of the term “territory:” “It seems to me that we are meeting right now on U.S. territory, all of the States of the Union are the territory of the United States, unincorporated.” *Id.* at 237. *See generally* LEIBOWITZ, *supra* note 184, at 530-45; Leibowitz, *Marianas Covenant Negotiations*, *supra* note 187, at 25-29; and WILLENS & SIEMER, *supra* note 21, at 60-67, 81-90, 114-119, 171-175 (describing legislative history and Covenant negotiations).

<sup>192</sup> *See, e.g.*, *Lake County v. Rollins*, 130 U.S. 662, 671 (1889) (“There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. *The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.*”) (emphasis added); *Maxwell v. Dow*, 176 U.S. 581, 602 (1900). (“In the case of a constitutional amendment [congressional debate] is of less materiality than in that of an ordinary bill or resolution.”).

correspondingly little emphasis on the remarks of individuals.<sup>193</sup> The simplest and most obvious interpretation of “self-government” is that the substantive authority over the affairs of the community lie in the hands of the community’s members, and this must therefore be considered the people’s intent.<sup>194</sup> To the extent that the framers’ intent *is* considered, what is relevant is not their view as to the application of a particular clause or mechanism, but rather their understanding of the substantive type of government they were creating. There was unanimous agreement among the framers on both the United States’ and Northern Mariana Islands’ sides that the American ideals of democracy, equality and popular sovereignty be established and put into practice in the Marianas, and that there be a break from the colonial past, not a continuation of it under another name.<sup>195</sup> Their

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<sup>193</sup> See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 254 (1901) (Brown, J.) (“The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts.”).

It is well to adhere to this rule in this case, since the “assumed necessities of the situation” dictated much of what was said with respect to the Covenant. Presuming Congress hostile to any unconventional status or constitutional innovation, the United States and Northern Marianas sometimes conspired to camouflage controversial ideas in hopes of getting them approved. See WILLENS & SIEMER, *supra* note 21, at 176-77 (“We don’t want to red flag this.”); *Id.* at 197 (“[We are] trying to make this section as inconspicuous as possible”). Given the repeated concern that Congress would oppose a status materially different from other territories, see, e.g., *id.* at 110, 117-18, 172, it would have been natural to play down to Congress—even deny to the extent political candor allows—the very real differences that existed. Cf. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 507 (1856) (Campbell, J., concurring) (noting claim of Gouverneur Morris, author of the Territorial Clause, that he anticipated the US acquiring Canada and Louisiana, and intended that it should “GOVERN THEM AS PROVINCES, AND ALLOW THEM NO VOICE IN OUR COUNCILS” -- but that he concealed this from the convention, knowing that “HAD IT BEEN MORE POINTEDLY EXPRESSED, A STRONG OPPOSITION WOULD HAVE BEEN MADE”).

It must be recognized, moreover, that the U.S. and Northern Marianas sides, in the course of their negotiations, may not always have been fully candid with each other either. Cf. Appellee’s Brief in *Richards* at 28 n.35 (on file with author) (“The [CNMI]’s repeated arguments that the United States ‘kept secret’ its view of the Covenant until this litigation is obviously untrue. It is the CNMI that never made known to the US the interpretation of the Covenant that it now puts forward here.”).

<sup>194</sup> Cf. *Borja v. Goodman*, 1 N.M.I. 225, 266 n.38 (Hillblom, J., concurring) (“After voting for ‘self-government’ in section 103, what reasonable person would conclude that . . . the United States had unfettered authority to legislate in the NMI . . . ?”).

<sup>195</sup> See, e.g., Remarks of Edward DLG. Pangelinan (Chairman of Commission negotiating the Covenant on NMI side) at the signing of the Covenant (1975) (*reprinted in* Marianas Political Status Negotiations, Fifth and Final Session (2d part)) at 10-12:

The spirit of almost two hundred years of democracy, of a society which practices the theory that government should be “of the people, by the people, and for the people” . . . was brought to the Marianas by the United

intent was best expressed in Ambassador Williams' public statement at the signing of the Covenant, and the intent and understanding of the people who then proceeded to ratify it must also surely have been in the truth of that statement:

Commonwealth, as defined by the dictionary, means "an agreement of the people for the common good." *It also means a government in which authority is vested in the people. The Commonwealth concept is thus wholly consistent with the ideals of American democracy—the sovereignty rests not with the state but with the people—* that governments derive their power from the people—from the consent of the governed.

. . .

The next to the last step would be the election of your new government under your new constitution and the installation of a new government, *which would make the Northern Marianas for the first time in 400 years fully self-governing* under its own elected chief executive and legislature, and under its own laws and local courts.

. . .

The Covenant is not a perfect document. It does not include in it everything that everyone wanted. That would have been impossible. It does include however some very important basic guarantees that provide protection and opportunity for the individual and *maximum local self-government and assurances against external interference in the internal affairs of your future government.*<sup>196</sup>

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States. . . . The concept of democracy has become very important and significant to us.

. . .

[T]hese negotiations reflect the high value which we place on the freedoms and democratic form of government which mark the American political system. We want a government which assures these rights and freedoms and which recognizes the fundamental equality of all men under the law.

*Id.* at 10-11.

<sup>196</sup> Statement by Ambassador F. Haydn Williams at the signing ceremony of the Covenant (Feb. 15, 1975), *reprinted in* Marianas Political Status Negotiations, Fifth and Final Session (2d pt.) at 6-8, and in S. REP. NO. 94-433, at 332 (1975) (emphases added). Moreover, the United States so often repeated assurances about its intended "restraint" or "forbearance" from interfering with internal matters that, even if the Marianas negotiators themselves quite properly had "no confidence whatsoever" in these, *see* WILLENS & SIEMER, *supra* note 21, at 118, they must have informed the public understanding, and thus acquired binding force as part of the founding intent.

This is the intent that must be effectuated, by whatever mechanism the text allows. As for the Territorial Clause, the evident belief of those among the framers who considered its application was that they could have free, democratic, non-colonial self-government—“a government in which authority is vested in the people”—and the Clause too. If they were right, then let it apply. It is unnecessary and both historically and textually anomalous, but it harms no one, so long as its limits are clearly understood.<sup>197</sup> *But* if it is impossible to reconcile the vital and substantive intent of the Northern Marianas framers and people that there be free, democratic “maximum local self-government” in the Northern Marianas with the secondary, technical intent of some of the framers that Congress’ legislative power would proceed from the Territorial Clause, such that one or the other of those intents must be sacrificed in the interest of preserving the other, it is the Territorial Clause, not self-government, which must go.

## V. CONCLUSION

Several state constitutions remind us that free government depends upon “frequent recurrence to fundamental principles.”<sup>198</sup> This indeed has been the history of the United States. It is true that we have often lost sight of our own fundamental principles, and still more often have looked right at them, yet have failed or refused to see how they could not be reconciled with much that we have done: the keeping of slaves and later segregation and disfranchisement of free black citizens, the long exclusion of women from the political process, and, not least, the prolonged denial of self-government to the people of Indian reservations and unincorporated territories. Yet it is equally true that the strength of our fundamental principles is such that they are never altogether lost, and indeed often remain as seeds at the very moment of their denial, which in time will grow and

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<sup>197</sup> The real practical problem with saying that Congress’ authority under the Covenant is constitutionally grounded in the Territorial Clause is that the jurisprudence of the Clause is so long-established and so well-known, and grants such expansive powers to Congress, that it becomes difficult conceptually to set aside that traditional view of the Clause, and adopt instead a view in which those powers are limited by the Covenant.

When Congress, the courts, or federal lawyers think “Territorial Clause,” they think “plenary power,” and the risk is great that the objection, “but these powers, though proceeding from the same source, are limited in the case of the CNMI,” will get lost in the shuffle, just as the important point that the CNMI may occupy a status distinct from both incorporated and unincorporated territories got lost on the journey from *Atalig* through *Wablol* to *Saipan Stevedore*.

<sup>198</sup> See ARIZ. CONST. art. II, § 1; ILL. CONST. art. I, § 23; MASS. CONST. pt. 1, art. 18; N.H. CONST. pt. 1, art. 38; N.C. CONST. art. I, § 35; OHIO CONST. § 18; S.D. CONST. art. 6, § 27; UTAH CONST. art. 1, § 27; VT. CONST. ch. 1, art. 18; VA. CONST. art. 1, § 15; WASH. CONST. art. 1, § 32, W. VA. CONST. art. 3, § 20; and WIS. CONST. art. 1, § 22.

supplant the whole.<sup>199</sup> These moments of returning to fundamental principles—the abolition of slavery, the desegregation of schools, etc.—are, and always will be, the proudest moments in our history.

The establishment of the Commonwealth of the Northern Mariana Islands is one such moment. It is, in its way, perhaps the greatest and proudest thing the United States has ever done, on a par with the Revolution itself. The entry into the Covenant has redeemed the United States from its more recent neo-colonialist diversion, and returned it to its revolutionary roots. It has redeemed decisions that were bad in their original effects, brought out the seed of justice lying asleep within them, and transformed them into guardians of freedom.<sup>200</sup> But the establishment of the CNMI is not the end of the road. Together with their liberty, the Northern Marianas people have inherited the concomitant necessity of eternal vigilance. The nature, the extent, and even the reality of their right of self-government have been and continue to be subject to repeated threats, challenges and disputes by scholars, courts, legislators, and advocates of various kinds. The entry into the Covenant was itself a return to fundamental principles, but we must continue to have recourse to these principles as we construe and apply the Covenant, now and into the future.

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<sup>199</sup> Thomas Jefferson never freed his own slaves, but his principle that “all men are created equal” ultimately led to the overthrow of the entire institution of slavery in the United States, inspiring Lincoln to state:

When the white man governs himself, that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government – that is despotism. If the negro is a *man*, why then my ancient faith teaches me that “all men are created equal,” and that there can be no moral right in connection with one man’s making a slave of another.

Abraham Lincoln, *Speech on the Kansas-Nebraska Act* (1854), *excerpted in* LINCOLN ON DEMOCRACY (Mario M. Cuomo & Harold Holzer eds., 1990) at 65, 71. These words of Lincoln, as well as the Declaration of Independence, were in turn cited in opposition to the U.S. annexation of the Philippines – in vain at the time, but ultimately effectively. See PLATFORM OF THE AMERICAN ANTI-IMPERIALIST LEAGUE (Oct. 18, 1899), *reprinted in* DOCUMENTS, *supra* note 111, at 192-93 (quoting Lincoln’s speech).

<sup>200</sup> This means chiefly, of course, the Insular Cases, but also *Latter-Day Saints* and, especially, *Dred Scott*, which, though justly condemned for its baneful and misguided racial views, may yet be praised for, and saved for the cause of freedom by, its recognition that the people of a territory “cannot be ruled as mere colonists, dependent upon the will of the general government, and to be governed by any law it may think proper to impose.” 60 U.S. at 447. *Cf.* *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (upholding wartime restrictions on Japanese Americans, yet enunciating the “strict scrutiny” doctrine for racial classifications, which would become the most powerful judicial weapon against just such discrimination).