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Sovereignty Studies in Constitutional Law: A Comment

T. Alexander Aleinikoff

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Constitutional law casebooks are based on an unstated, and perhaps unrecognized, set of assumptions that link constitutional law to a strong conception of the nation-state. This is the explicit message of the periodicization of constitutional law into a Founding Period, Reconstruction, and the New Deal forward. Each stage represents a new and larger understanding of the reach of federal power. Concomitant "rise of rights" narratives reinforce the onward and upward march of the state. The rights are state-based—that is, they arise from constitutional provisions and statutes, not international law or human rights conventions—and state-enforced. Their implementation has required the deployment of significant state resources and the development of sophisticated state apparatuses. There is surprisingly little in either orthodox or revisionist accounts that destabilize the state. (While post-modern and critical perspectives offer obvious destabilization vantage points, traditional conservative and liberal theory could do the same through notions of natural rights and universalism.)

Don't get me wrong. I'm a fan of the nation-state. It is, I believe, the only organized political force able to effectively pursue social justice and social peace. My purpose here is to note the rather unselfconscious way in which constitutional casebook writers "assume the state." By this I mean that casebooks begin with an implicit model of a state exercising (lawful) authority over a people (citizens) and territory. The major questions addressed are the scope of that authority and its distribution among various state agents (federalism, separation of powers). Citizens are figured as both authors (*Marbury*) and objects of state power (regulated, e.g., under the commerce clause); and significant attention is paid to constitutional norms condemning

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"second-class citizenship" (equal protection, privileges and immunities).

But this seems to start the story in the middle. "We the People" are busy governing and being governed while we reside on the territory of the United States. Yet we have not investigated who fits within the category of "We the People," nor how territory was acquired. More important, it is also a very limited story: it does not seek to problematize membership rules or examine whether state power extends beyond territorial borders; it ignores other polities within our midst (Indian tribes; territorial governments); it doesn't recognize levels of membership (immigrants, residents of the District of Columbia); and it fails to ask what force legal norms established outside the nation-state could or should have.

Perhaps this is a somewhat random list of topics. But I think the issues fit within a category I will call "sovereignty studies." First let me note the range of questions that could be addressed under this heading. Then I will suggest why doing so might be worthwhile.

THE CONTENT OF "SOVEREIGNTY STUDIES"

Constitutional casebooks would not have to craft unlikely hypotheticals to address issues related to nation-state sovereignty. The U.S. Reports offer up a wide array of interesting, already-decided cases. Consider the following:

1. *Citizenship*: The issues here are as challenging as they are obvious: what are the norms for determining who constitute "We the People"? Most casebooks have snippets from *Dred Scott* (including the infamous lines that permit an easy expression of outrage—and ignoring interesting questions about congressional regulation of the territories and state regulation of citizenship). But there is almost no discussion of the background of, or justification for, the American system of jus soli (written into the Constitution to overturn *Dred Scott*).[1]

1. For a discussion of the case for *jus soli*, see generally Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. Rev. 54 (1997) (discussion of birthright citizenship rationale and impact of a departure from "birthplace rule"); see also Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (Yale U. Press, 1985) (arguing that Fourteenth Amendment does not mandate citizenship for children born in the United States to undocumented aliens).

Nor is there mention of the birthright citizenship of tribal Indians (denied, as a constitutional matter, in *Elk v. Wilkins*) or persons born in the territories, or of the dramatic Warren Court cases all but eliminating Congress' power to terminate U.S. citizenship (*Afroyim v. Rusk*.and its progeny). (Bickel has an interesting critique of the denationalization cases in *The Morality of Consent*; but they have otherwise gone largely unnoticed among constitutional generalists.)

2. *Immigration*: Citizenship law regulates access to state membership; immigration law regulates access to state territory.

The Constitution does not specifically list the power to enact immigration laws, and early immigration cases declared such power to be "inherent" in the national state. These cases display a source of power not usually examined in casebook chapters on congressional authority. (We frequently talk of enumerated rights, but rarely of the state's unenumerated powers.) Recent scholarship has noted the influence of these cases on the Court's *Curtiss-Wright* decision, suggesting that recognition of a broad foreign affairs powers owes more to 19th century precedents than to New Deal ideas about expansive federal authority.[2] (*The Chinese Exclusion Case* and other immigration cases of the day are also remarkable social texts—on a par with *Dred Scott*—regarding attitudes towards immigrants of color.)

It is rarely noted that most of the rights protected by the Constitution are not limited to citizens. How, then, ought constitutional membership be defined?[3] Why isn't the category of rights-holders congruent with the category of governors? Equal protection doctrine establishes separate rules for states and the federal government (compare *Graham v. Richardson* with *Mathews v. Diaz*). How does this structure comport with the usual story we tell about *Brown* and *Bolling v. Sharpe*?

3. *Indian cases*: Casebooks talk of the dual sovereignty of the federal government and the states. But from the earliest

2. See generally Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. Colo. L. Rev. 1127 (1999) (commentary on White's article and the issue of nineteenth-century origins of doctrine of inherent plenary power); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1 (1999) (review of early twentieth-century constitutional jurisprudence on foreign relations).

3. See generally T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const. Comm. 9 (1990) (suggesting that concept of membership might embrace legal resident aliens as well as citizens). *Plyler v. Doe* presents this question in most stark form.

days, Indian tribes have been recognized as sovereign political bodies. John Marshall's "trilogy" is rarely read, but speaks volumes about the preexisting sovereignty of the tribes, federal powers and federalism.

As with immigration, Congress is deemed to have "plenary authority" over the tribes, but the source and scope of such power is controversial and contested (again, an appropriate question for an introductory law class considering heads of federal power). The Court has held that the Bill of Rights does not apply to the actions of tribal governments (*Talton v. Mayes*). How can that be? How can there be a government on U.S. territory not bound by the Constitution?

4. *Territories cases*: The debate over territorial power at the turn of the 19th century is responsible for two well-known statements in constitutional law: that the Constitution "follows the flag" and that the Supreme Court "follows the election returns." *The Insular Cases* (and other territorial cases) represent great theoretical battles, as the Court had to come to grips with the constitutional implications of American empire building.[4] The Court's recognition of Congress' "plenary power" over the territories (compare Taney's view in *Dred Scott*) was based on the widely-shared view that the (uncivilized) residents of the new possessions required federal tutelage—they were, in Kipling's 1899 formulation, the "white man's burden." The cases thus resonated with the Court's race and Indian cases of the day, yet provide a marked contrast to the usual stories we tell about restrictions on state power in the age of *Lochner*.

Puerto Rico was established as a "Commonwealth" in 1952, but exactly what that means in constitutional terms has remained unclear. Congress has maintained that it has plenary power to alter the government of Puerto Rico as it sees fit; the Commonwealth has asserted that Congress may not change its organic law without Commonwealth consent. Puerto Ricans, who have been citizens since 1917, pay no federal income tax and do not vote in presidential elections. The Supreme Court has slowly granted residents of the island most constitutional rights, but federal laws treating them less favorably than citizens of the states are subject to minimal judicial review.

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4. The argument that the Constitution applied in the territories was an arrow in the anti-imperial quiver: since it was generally agreed that Filipinos and other new "nationals" were not civilized enough to assume full membership in the American polity, recognition that they were entitled to political rights would force Congress to dispose of the territories.

Twice in the past decade Puerto Ricans have voted on status. (The last time "none of the above" won.) The prospect of Puerto Rican statehood would align a state's borders with nationality, presenting very different kinds of federalism issues. The option of "enhanced commonwealth status"—under which Puerto Rico could resist the application of some federal laws—would strike at Congress' plenary power.[5]

5. *Extraterritorial authority of the state*: When the United States acts overseas against U.S. citizens or non-citizens, does the Constitution apply?—a question that might be of some interest in an era in which the U.S. is the only world superpower. Cases such as *Reid v. Covert* and *United States v. Verdugo-Urquidez* receive little or no treatment in most casebooks. Gerald Neuman's excellent book *Strangers to the Constitution: Immigrants, Borders and Fundamental Law* provides rich historical, theoretical and case-based materials.

WHY "SOVEREIGNTY STUDIES"?

One might offer the following response to this list of issues: So what? There are lots of interesting constitutional topics that don't fit into the curriculum (e.g., the *Gold Clause Cases*, *Abelman v. Booth* (my favorite), and the direct tax cases[6]). Life is short and class time even shorter. Why should space be made for the—admittedly interesting—sovereignty cases?

This answer, I believe, starts with the recognition that the nation-state is not "natural." That we live in a world of nation-states should not immunize that form of political organization from critical analysis. In particular, the claims of liberal democratic states to territorial sovereignty and control over the rules of membership need to be interrogated.

Furthermore, there is no reason to assume that the nation-state form will be around forever. We are currently witnessing

5. See generally T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 Const. Comm. 15 (1994) (overview of constitutional issues on scope of federal power over Puerto Rico and rights of its residents). The territories are diverse in their interests and their political relationship with the mainland. Guam, where the indigenous Chamorro people have lost majority status, would like to be able to adopt its own immigration policy. The people of American Samoa are nationals but not citizens of the United States. The people of the Freely Associated States of Micronesia are neither U.S. citizens nor nationals, yet the U.S. government assumes responsibility for their external security.

6. See generally Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1 (1999).

serious challenges to nation-state sovereignty from three directions. First, supra-national norms and structures (international human rights law, the WTO) impinge upon sovereignty in unprecedented ways. The claim here is not that states have been hermetically sealed up to this point; it is rather that interference in state sovereignty is now being justified in legal terms that carry increasing weight around the world.

Second, subnational groups are demanding (and receiving) increasing degrees of autonomy (Scotland, East Timor, Canadian Indian bands). In the United States, devolution has largely been discussed in federalism terms; and demands of minority groups have generally followed a civil rights/anti-discrimination agenda. But throughout much of the rest of the world, indigenous and ethnic groups have pursued more robust models of self-governance.[7] Although all but ignored by constitutional casebooks, these issues have been seriously debated in the United States for more than two centuries (regarding the sovereignty of Indian tribes) and are currently major topics in Puerto Rico and Guam.[8]

As international norms regarding the rights of indigenous people continue to mature,[9] their importance for U.S. constitutional law should increase. More importantly, political movements elsewhere in the world will likely influence activities in the territories and on the reservations. In short, these will be significant constitutional questions in the days ahead.

I will label the third dimension along which sovereignty is under challenge as "transnationalism"—the presence within state borders of communities of non-nationals with significant ties across borders. Transnationalism is a function of the high levels of immigration that most liberal democratic states have witnessed in the past several decades.[10] Immigrant populations expose a fundamental paradox in liberal democratic thought: liberalism purports to be grounded on universal norms of individual rights, yet democracies need a definition of "the demos" in order to be functioning polities.[11]

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7. See generally Will Kymlicka, *Multicultural Citizenship* (1993).

8. There is a small and sophisticated group of scholars exploring issues relating to tribal sovereignty but almost no scholarly attention to Guam.

9. See generally James Anaya, *Indigenous Peoples in International Law* (Oxford U. Press, 1996).

10. The numbers here are not trivial: almost 10% of the U.S. population today is foreign-born.

11. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982): "The exclusion of

By placing outsiders inside—making immigrants subject to state control but not permitting participation in governance—immigration makes this tension palpable. In legal terms, it is the tension between *Plyler v. Doe* and Proposition 187; between equal protection and the 1996 immigration acts that made permanent resident aliens ineligible for means-tested social benefits.

Transnationalism is also a story about the growing ties between immigrant populations and their countries of origin (as well as increasing levels of dual nationality). To some, transnationalism presents real risks to the nation-state because it produces dual loyalty. Double commitments may be especially troubling to states that have no unifying ethnic or religious basis and thus look primarily to forms of civic attachment to hold heterogeneous populations together. Concerns are heightened when the governments of the countries of origin seek the support of their extra-territorial populations in relations with receiving states. One forum in which these concerns play out is the controversy over naturalization oaths that demand that new citizens renounce allegiance to all other states. (The United States has had a renunciation requirement since its first naturalization statute in 1790; Australia and Canada do not require renunciation.) Such requirements are increasingly problematic because of new laws in sending states that permit nationals to naturalize elsewhere without losing their original citizenship.[12] How does the receiving state assure itself of the "loyalty" of new citizens—a loyalty now considered more important in light of the challenges to sovereignty just identified?

Together, these issues make our usual assumptions about sovereignty appear naïve. American constitutional law can continue to proceed as if we know who "We the People" are, as if sovereignty is absolute and indivisible, but the world is changing around us. There are ample materials at hand with which to begin to address these increasingly important issues. I suggest we begin to put them front and center in our teaching materials.

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aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government . . . begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition outside of this community." See generally Linda S. Bosniak, *Membership, Equality and the Difference That Alienage Makes*, 69 N.Y.U. L. Rev. 1047 (1994) (analysis of alien status under law).

12. See generally Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 Emory L.J. 1411 (1997) (overview of dual nationality and problems with attempts to curb dual nationality).