

“Disembodied Shades”: Teaching the Territories of the United States

Introduction

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The 87th annual meeting of the Southern Political Science Association (SPSA), which met January 7–9, 2016, in San Juan, Puerto Rico, was the first SPSA meeting ever convened outside of the American states. The irony, however, is that Puerto Rico and the other US territories are virtually invisible within the political science discipline. This is especially true in the classroom. This article, which introduces “Disembodied Shades: Teaching the Territories of the United States,” explains how systematic thinking about the US territories can benefit political science as a discipline and its subdisciplines.

The purpose of this symposium is to explain why the study of the US territories is integral to political science. All of the symposium’s contributors either include or anticipate the incorporation of the US territories in their courses. They explain why the study of the territories evokes issues central to their field of study, why the territories merit more rigorous investigation by students of American politics and government, and how the territories might be routinely included in course syllabi and political science curricula. Their contributions address the political, legislative, racial and ethnic, economic, strategic, and constitutional ramifications of the fact of the US territories, both past and present.

More than four million (i.e., 4.10 million) residents live in the present-day permanently inhabited US territories (US Census Bureau 2010), which encompass the islands—or, more accurately, island groups—of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the US Virgin Islands. The combined population of these territories is greater than 24 of the 50 states, with an overall population size compared to Kentucky (4.3 million) and Oregon (3.8 million). With its territories (and territorial waters), the United States has the largest area of territorial sovereignty of any country in the world, with only China and Hong Kong, Macao, and (arguably) Tibet having

a larger territorial population. Furthermore, except for the original 13 states and six others—Vermont, Kentucky, Maine, West Virginia, Texas, and California, which was a military district from 1848 to 1850—the United States has always included separate, nonstate areas among its possessions.

The neglect of the US territories by political science students and faculty exists despite the remarkable geographic development of the United States (Glassman 2007; Heumann 2011) and the storied histories of the conquest, settlement, and political development of the American West, Alaska, and Hawai’i. This expansion continued after the overwhelming US victory in the Spanish–American War and the annexation of Puerto Rico, the Philippines, and Guam. Puerto Rico became an organized territory in 1900, the Philippines in 1902, and Guam in 1950 (which was previously administered by the US Department of the Navy). American Samoa was annexed in 1899 and made an unorganized territory in 1900; Congress approved its territorial status in 1929.

The United States purchased St. Thomas and San Croix from Denmark in 1916, on the eve of the Great War; in 1936, Congress established the US Virgin Islands as an organized territory. In 1975, the residents of the Northern Mariana Islands voted overwhelmingly in a referendum to become a US territory; in 1976, Congress and President Ford agreed to annex the Commonwealth of the Northern Mariana Islands (CNMI).

This symposium contends that the United States is distinguished by its *geography* as much as by the US Constitution, its Enlightenment values, its immigrant population, its history of slavery, its ethnic pluralism, and its two-party presidential system of government. The vast lands, favorable climate, rich minerals, and other resources—timber, grazing lands, rivers, lakes, availability of fresh water—supported high birth rates and a large immigrant population, facilitated economic growth, gave rise to a strong industrial economy, and enabled the United States to become a great power. As the country acquired additional area, it created district governments, established territories, and admitted new states. Because of this aggregative process, Riker (1964, 6) claimed that “federalism is the main

alternative to empire as a technique of aggregating large areas under one government.”

This expansion was “imperial” insofar as the residents of the areas added by the United States (i.e., Creoles and free blacks in Louisiana, Hispanics in the Southwest, British residents of the Oregon Territory, and residents of overseas US territories, among others) had no voice in the acquisition of their homelands by the United States (except for the inhabitants of the Northern Mariana Islands), and they were (and continue to be) subject to the plenary power of the US government. By virtue of the territory clause (US Constitution, Article IV, Section 3, Clause 2) and the continued application of the incorporation doctrine established in the *Insular Cases*, moreover, the US government retains ultimate authority over the people and government of the Northern Mariana Islands, the US Virgin Islands, American Samoa, Guam, and Puerto Rico.

in the aftermath of the 1898 Treaty of Paris concluding the Spanish–American War (Sparrow 2006, 257–8; see also Burnett and Marshall 2001; Neuman and Brown-Nagin 2015; Rivera Ramos 2001; Torruella 1985). In the *Insular Cases*, a Supreme Court majority ruled that Congress could exercise plenary power over the new island possessions by virtue of the authority granted under the US territory clause, which empowered Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States” (Article 4, Section 3, Clause 2). With the decision in *Downes v. Bidwell* (182 US 244 [1901])—the single-most important of the *Insular Cases*—the Supreme Court upheld a tax on trade between New York and Puerto Rico, seemingly in violation of the uniformity clause (Article 1, Section 8, Clause 1). In other words, the Court used one of the Constitution’s own provisions, the territory clause, to deny residents of these new territories the privileges and protections of the Constitution’s other provisions.

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Racial composition influenced which US territories would be admitted as states and under what terms. Congress was slow to admit Oklahoma, New Mexico, Arizona (i.e., New Mexico and Arizona together constituted the territory of New Mexico from 1863 to 1912), and Hawai’i as states; it was more willing to include states dominated by white Americans. The US government and Americans in the states likewise consider the residents of Puerto Rico, the US Virgin Islands, Guam, and other present-day territories as ethnic and racial minorities— notwithstanding the fact that the majority of Puerto Ricans, for instance, self-identify as white.

In short, citizens and nationals of the territories occupy a liminal world in the US political system, with only partial membership in the American polity. They can vote in presidential primaries and caucuses, but not in general elections. Their delegates can sponsor bills and serve on committees but cannot vote on the House floor. (Unlike the other territories, whose delegates have a normal two-year term in the House, Puerto Rico has a “Resident Commissioner” with a unique four-year term in office.) The territories have their own governors and their own judges, too, but territorial policy can be overruled by the US Congress and federal courts. Indeed, in the 2015–2016 term, the US Supreme Court decided two cases on Puerto Rico: a double-jeopardy criminal case (*Puerto Rico v. Sanchez Valle*), and one on the application of US bankruptcy laws (*Puerto Rico v. Franklin California Tax-Free Trust*). The Court in both cases reaffirmed the subordinate political status of the territories and their citizens.

THE INSULAR CASES

The liminal condition of present-day US territories and second-class status of territorial residents are direct products of the Supreme Court’s rulings in the *Insular Cases*. The *Insular Cases* constituted a series of 35 cases decided between 1901 and 1922,

It was the 1900 Foraker Act’s apparent violation of the uniformity clause and the consequent threat it posed to commerce that led Chief Justice Fuller in *Downes v. Bidwell* to vigorously dissent, joined by Justices John Marshall Harlan, Rufus Peckham, and David Brewer. As Fuller quoted from Chief Justice Marshall’s ruling in *Loughborough v. Blake* (15 US 317, 364 [1820]), the “United States” “is the name given to our great republic, which is composed of the States and territories,” District of Columbia, and “territory west of Missouri,” just as it did “Maryland or Pennsylvania.” Accordingly, “the principles of our Constitution, the uniformity in the imposition of imposts, duties, and excises should be observed” throughout the United States, including the territories. The Constitution is “a law for rulers and people, equally in war and in peace,” Fuller proclaimed, citing Judge Thomas Cooley, “and covers with the shield of its protection all classes of men, at all times and under all circumstances” (*Downes v. Bidwell*; see also *Ex Part Milligan* 71 US 2, 120–121 [1866]).

The ruling in *Downes v. Bidwell* departed from this norm. “The contention seems to be,” Fuller wrote in dissent, “that, if an organized and settled province of another sovereignty is acquired by the United States,” then “Congress has the power to keep it like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions” (*Downes v. Bidwell*). The Court’s distinction between the “incorporated” previous territories and the new nonincorporated territories, Fuller continued, “assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories.” It was a government that “substitutes for the present system of republican government a

system of domination over distant provinces in the exercise of unrestricted power" (*Downes v. Bidwell*).

A system of "unrestricted power" exercised "over distant provinces" would not come to pass. The US acquisition of "countries throughout the world" or remote possessions peaked in 1899 with the annexation of Eastern Samoa. In 1902, the United States withdrew its forces from Cuba, which was made possible by the 1901 Platt Amendment. The Platt Amendment gave the United States the authority to militarily intervene in Cuba if necessary and permitted the lease of Guantanamo Bay "as a coaling or naval station." The United States purchased the Danish West Indies shortly before entering World War I and later annexed the Northern Mariana Islands. However, it granted the much more populous and larger Philippines its independence in 1946 and did not subsequently acquire other

delegates, created more standing committees, and adjusted its political agenda. The bases of partisanship shifted commensurately. Yet, congressional scholars who study the institutional development of Congress (Aldrich 1995; James 2000; Schickler 2001) have thus far not examined the changes that accompanied the addition—or anticipated addition—of members of Congress from newly admitted states; neither have they studied the roles of the territorial delegates in Congress (but see Stewart and Weingast 1992).

Likewise, students of the presidency and federal bureaucracy would secure a better grasp of executive power and public administration by incorporating the study of the US territories, given that the United States' acquired possessions and established territories came under the authority of US agencies (e.g., the Department of War and the Department

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provinces or countries—the CNMI excepted—notwithstanding its victories in World War I, World War II, and the Cold War.

Chief Justice Fuller and his fellow dissenters may have been wrong in *Downes v. Bidwell* in foreseeing the US acquisition of a far-flung territorial empire. However, they were correct in that the Supreme Court's ruling in *Downes v. Bidwell* and subsequent cases put the US territories in an "ambiguous" constitutional position, which has persisted and will likely persist "for an indefinite period." In subsequent rulings in the *Insular Cases*, the Supreme Court denied territorial residents protections with respect to the prohibition against self-incrimination in criminal cases, the right of the accused to confront witnesses, and the right to a speedy and public trial (Sparrow 2006, 204–206).

Congress created this constitutionally ambiguous position for the US territories by design. Before the signing and ratification of the Constitution, the Confederation Congress already had passed the Ordinance of 1787 establishing a system of government for the Northwest Territory. The text of the Northwest Ordinance and the delegates' discussions at the Constitutional Convention (Farrand 1937) made it clear that the status of the people and areas coming under US sovereignty but located beyond the several states was to be only temporary. These were states "in embryo," under the tutelage of the US government until they were ready to be admitted into the Union on an "equal footing" with the extant states (Resolution of 1780; Ordinance of 1787, Section 13, and Article 5). They "were never regarded as mere possessions" but were called "states" (Bestor 1973, 13–44). "A Territory, which may be called an inchoate or rudimentary State," Bryce wrote at the end of the nineteenth century, "looks forwards to becoming a complete State" (Bryce 1891, 556; Eblen 1968; Pomeroy 1969).

As the United States acquired more territories and as more territories became states, Congress added more territorial

of the Interior). Indeed, the Constitution provides conflicting and only partial guidance about how its provisions apply to people and property coming under the sovereignty of the United States but residing outside the boundaries of the American states. The history of the *Insular Cases* and subsequent federal court and Supreme Court decisions involving the territories show that the US government has considerable latitude under the "incorporation doctrine" regarding which constitutional provisions apply to any issue that involves the territories. The Supreme Court's recent decisions in *Puerto Rico v. Sanchez Valle*, *Puerto Rico v. Franklin California Tax-Free Trust*, and *Tuaua v. United States* (a case involving the extension of Fourteenth Amendment citizenship to American Samoans, which the US Supreme Court declined to review) simply underscore the continued relevance of the *Insular Cases* and point to Congress's and the US government's continued plenary control over the territories.

The fact that the Constitution and federal laws apply only partially to the US territories suggests the distinctiveness of these quasi-sovereign polities. They share features with the District of Columbia, American Indian reservations, and the territories of other states, such as the Caribbean and Pacific territories of France and Great Britain. Nevertheless, the preferences of territorial citizens themselves are in no way obvious. For example, Puerto Ricans appear to be divided over statehood, and many American Samoans have no desire to fully become a part of the United States. Issues of decolonization, democratic representation, and potential statehood coincide with questions of how best to protect valued indigenous cultures and traditional lifestyles.

In summary, an explicit and systematic inclusion of US territories in political science holds the promise of providing a more complete and consistent discipline for reasons that the

following articles make apparent. The contributors address why the study of the US territories evokes issues central to their field of study, why the territories accordingly merit more rigorous investigation, and how the territories might be routinely included in course syllabi and political science curricula.

CONTRIBUTORS

In his article on teaching introductory courses in American politics and government, Bartholomew Sparrow considers how the geopolitical implications of territorial expansion challenge the commonplace understanding of the United States as a federal republic. Sparrow suggests that students of American politics and government would be well served by exploring implications of the fact that the United States is not simply a voluntary federation of states.

The unusual role of the territories in the US federal system is evident in the system of partial representation that the territories have in the federal government, as Jonathan Lewallen explains. He discusses the territories' unique forms of congressional representation and suggests that the study of the roles and behaviors of the territorial delegates could lead to new ways for students to think about legislatures and political representation.

Colin Moore examines how the study of the expansion and governance of the US territories illuminates three topics central to scholarship in American political development: the development of the American state, the role of race and ethnicity in political development, and the uneven and incomplete democratization of the American polity.

Peter Harris illuminates how the inclusion of the territories in a US foreign-policy course enables students to grapple with race and empire, issues at the core of foreign policy, since the study of the territories at once raises questions about the liberal, democratic, and republican foundations of the United States and undermines notions of American exceptionalism.

Rachel Wellhausen addresses the semi-sovereign status of the territories—a status not unlike that of American Indian and Alaskan Native tribes. The territories sometimes interact with the global economy as units of the United States, whereas on other occasions they exist outside of the strictures of American tax laws, minimum-wage requirements, and other regulations.

Charles Venator-Santiago conducts a close analysis of the relevant legal history to explore how territories are only partially sovereign—in contrast to the separate states—even though their residents are US citizens. He shows the four different logics by which territorial residents can be considered US citizens and explains why they are still not yet full members of the American polity.

Because the US Constitution has no provision for colonies or territories, Gordon Silverstein observes how the Supreme Court effectively amended the Constitution in the *Insular Cases* so that the United States could include territories on a more-or-less permanent basis. Silverstein further reveals how the *Insular Cases* fit within a larger history of the Supreme Court's crucial role of reconciling a weak and decentralized

political system for domestic policy with a potent and capable government with respect to foreign policy and international relations.

José Javier Colón-Morera concludes the symposium by discussing how the current situations in Puerto Rico and other US territories reflect the array of complex political factors behind the asymmetries of political power between the federal government and the territories. Colón-Morera integrates the arguments and insights of the symposium contributors to indicate how the serious political issues evoked by the study of present-day US territories at once illuminate and problematize several fundamental issues of American national politics and the federal system of government.

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