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"Remnants of Past Troubles:" Self-Government Among Territories

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“Remnants of Past Troubles:” Defining Self-Government Among Territories
By
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I. Introduction

The United Nations has declared the years 2001-2010 to be the Second International Decade for the Eradication of Colonialism.† In the wake of this declaration, it is necessary for scholars of international law and intra-state relationships to determine exactly what the process of decolonization entails. In order to determine if the goal of complete decolonization has been achieved within the deadlines set, the international community needs a method of measuring self-government.

Over the course of its first fifty years, the UN was quite successful in achieving the goal of decolonization. At its inception, the UN listed 72 countries as non-self-governing under Article 73 of the UN Charter.‡ As of 2007, that number had dropped to just 16.§ Most of these territories have pursued the path of independence, the preferred outcome for non-self-governing territories.** However, many remain integrated or in free-association with their metropolitan or administering powers, and many of the remaining 16 have formed some sort of unique relationship with those powers. The United Kingdom, administering power for 10 of the remaining 16 non-self-governing

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† “Delegates Urge Eradication of Colonialism During Second Decade, As Fourth Committee Begins General Debate,” UN DOC GA/SPD/284.
territories, has argued that the UN’s definition of self-government is overly restrictive.†† It argues for a more expansive view of self-government, that can take into account the variety of inter-governmental relationships it has set up with its overseas territories.‡‡ Another example of the need for clearer definitions comes from the United States. The United States currently has five unincorporated territories – territories under the control of the US Government that are not, and are never intended to be, states.§§ The UN recognizes two of them, Puerto Rico and the Commonwealth of the Northern Mariana Islands to be self-governing, while the other three, the US Virgin Islands, Guam and American Samoa, are on the list of non-self-governing territories.*** However, the United States government treats these territories in a similar manner, and the differences that exist don’t cut across obvious lines. For example, the Commonwealth of the Northern Marianas (CNMI) does not have a non-voting delegate in the U.S. House of Representatives, while the other four territories do.††† These would seem to indicate that the CNMI is less self-governing than the others, yet it is not viewed that way by the UN.

This leads to the following question: What factors make a territory self-governing? What criteria can outside observers use to determine if an overseas territory has been decolonized?

The search for criteria isn’t easy. The UN itself has addressed the question in a variety of General Assembly resolutions, which list various factors that may be taken into account.

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‡‡ Id.
§§ For a further discussion on unincorporated territories, see Tauber, Alan, “The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories,” 57 Case W. Res. 147 (Fall, 2006).
*** See supra note 3.
††† The Northern Marianas instead has a “Resident Representative,” who has no floor privileges and an office off Capitol Hill. See 48 U.S.C. §§ 891, 1711, 1715, 1731, 1735. See also “Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America” § 901.
However, no list claims to be exhaustive, and territories can be deemed to be self-governing even when they don’t meet all or even most of the criteria listed in a particular resolution. The UN resolutions still appear to offer the best hope in finding useful criteria, while the literatures on territories, self-government and federalism are less useful.

First, this Article will review the literature on federal systems and territories. Next, it will lay out an analytical framework, including a variety of hypotheses to test regarding self-government in the territories. In the third major section, the Article will operationalize the various variables that will be used to test the hypotheses. I will then explain the cases that I have chosen to study followed by a brief explanation about how information about the cases was garnered. Then I will launch into an analysis of the data collected, and discuss the results found. Finally, the Article concludes with an examination of what these findings mean, and suggestions for the future.

II. Literature Review

As we begin a comparative examination of federal systems and how they deal with territories, we must keep a few things in mind. Watts notes that the comparison of federal systems must be undertaken with caution. Even where similar institutions are in place, different circumstances may lead them to operate in a different fashion. This is bolstered by Elazar’s note that “no federal systems are identical; each has achieved its

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‡‡‡ See, e.g. UN Res. 1514 (XV), 1541 (XV) 742 (VIII)
§§§ See infra the discussion on current territories.
own equilibrium in division and sharing of powers.”†††† Like Elazar, Stevens finds that “each associated state possesses a unique set of political institutions, distribution of authority, and patterns of political behavior.”‡‡‡‡ This argues against the existence of simple definitions or lists of criteria that can be broadly applied across territories to determine their current political status. So there may not be a clear cut comparison to be made when comparing federal systems. The existence of an institution in both countries A and B does not mean one can automatically assume that that institution operates in the same manner. With this caution in mind, we now turn to the question of why study this issue.

Before turning to the specific issue of territories, I wish to first look at the question of why study comparative federalism? As Elazar points out, the “[i]dentification and understanding of the possible forms of constitutional noncentralization in terms of what is possible and what actually exists, is one of the major concerns of the study of federalism.”§§§§ This is especially true when studying the territories, where what is defined and what exists does not match up. The whole point of this study is to try and reconcile the differing definitions of various political statuses with the political realities that exist and are recognized by the U.N.

One reason that studying the territories is so important is because their political and constitutional status is one of the keys to politics and development in territories.***** Political status is key because it “determines the legal personality of the territories”

§§§§ Elazar, supra note 13, at 192.
within the courts and legislation. Without an adequate understanding of the political status of the various territories across the globe, we cannot hope to end colonialism, which is a defined goal of the U.N.

One problem with a comparative approach is that the comparative study of federalism often starts with the U.S. model as the basis. But as Stepan points out, the U.S. model of federalism offers an incomplete definition. It artificially limits the scope of federal options by requiring symmetrical treatment of all constituent units. Most democracies with federal systems have chosen not to follow the U.S. model, and pursue asymmetrical relationships with some or all constituent units. Therefore, we must search elsewhere for proper criteria, especially when domestic and international views of U.S. territories differ.

Given this embrace of asymmetrical federalism by many countries, it behooves us to embark on an examination of the meaning of asymmetrical federalism. McGarry states that asymmetrical federalism describes a situation where one region of a federal country enjoys a distinct form of autonomy, and often a distinct constitutional status, from other parts. He finds that four criteria seem to matter in determining which territories will be treated asymmetrically:

- Ethnicity – if a region’s people are not considered a part of the nation, then it is more likely to be treated asymmetrically.

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††††† † See supra note 1.
§§§§§ ***** Id.
++++++ †††††† ‡†‡‡‡‡ John McGarry, Asymmetrical Federalism and the Plurinational State, Position paper for the 3rd International conference on Federalism, Brussels, 3-5 March, 2005
• Population – when only a small portion of the population of the nation is involved, asymmetry is more likely.

• Location – geographic isolation makes asymmetry more palatable.

• Homogeneity of region – If a region has a largely homogenous population (differing in ethnicity from the main population), asymmetry is more likely.\\

Adding to this understanding, Watts identifies two kinds of asymmetry.\\

The first, political asymmetry, occurs due to the impact of “cultural, economic, social and political conditions” on the “relative power, influence and relations of different regional units with each other and with the federal government.” The second, constitutional asymmetry, is defined by the “degree to which powers assigned to regional units by the constitution of the federation are not uniform.” He notes that political asymmetry arises in all federations, due to size and other factors.

Additionally, Watts writes that constitutional asymmetry often leads to questions of asymmetrical representation within the federal legislature and other institutions. If these units are more autonomous, the argument goes, then perhaps they should have a correspondingly smaller role in the federal government.

Finally, Horn (2004) examines the reason for seeking asymmetric relationships in federal systems. According to Horn, ethnicity is an “important raison d’être of

[^Id. at 9.]
[^Watts, supra note 12, at 57.]
[^Id.]
[^Id.]
[^Id. at 62.]
federated micro-regions.” Asymmetric federalism occurs in these situations. Federation exists as an intermediate step between local autonomy and independence.

Two forms of asymmetrical relationships are most common, and they will be the focus of this paper. Those two forms are the federacy and associated statehood. While Quane notes that independence was the goal favored by the UN in its initial push for decolonization, it has since expanded its views to include these alternative relationships.

What exactly is a federacy? The definitions are numerous, but they all share some basic characteristics. At its most basic, a federacy is a federal relationship in which there is an asymmetrical relationship between a federated state and a larger federated power. It has been variously defined as “a territory within the international legal boundaries of a state that has been allocated some entrenched…final decision-making powers without being a member unit of a federation,” and “political arrangements where a large unit is linked to a smaller unit or units, but the smaller unit retains considerable autonomy and has a minimum role in the government of the larger one, and where the relationship can be dissolved only by mutual agreement.” This last requirement – mutual agreement to dissolve – is not universal.

The key difference between a federacy and a typical federal relationship is that the asymmetry allows the federated state to maintain a greater level of internal autonomy.

Id. at 585.

Quane, supra note 4, at 553.

This definition is distilled from the discussion of the literature which follows.


Watts, supra note 12, at 8.
An example of a federacy is the United States’ relationship to Puerto Rico or the Commonwealth of Northern Mariana Islands.

Furthermore, a federacy is a mode of political association which allows small communities to maintain their cultural identity though a separate political organization while maintaining ties with a larger, more powerful state. The associated power in a federacy is typically empowered to act as the agent of the associated state in international relations. Additionally, the distinguishing feature of a federacy is the “extraordinary protections of the integrity of the smaller state built into the terms of the association.” This implies that there is a bilateral relationship, spelled out in a specific document, between the associated state and power, though this is not always the case. Federacy has been called a “significant alternative model” to the previously recognized models of integration or independence.

The key characteristics of a federacy, according to the above definitions, are an asymmetrical relationship, a greater level of internal autonomy which is protected within the terms of the relationship itself and, often, an ethnically or culturally distinct population.

Turning now to the concept of associated statehood, Stevens best lays out the definition. Among the differences between the associated states and their powers is not just territory, but also culture. Stevens outlines four indicators of cultural differentiation: language, religion, ethnicity and economic activity. This seems

Elazar, supra note 13, at 190.
Stevens, supra note 14.
Id.
Id. at 184.
Id. at 201.
Id. at 191.
Id.
to indicate that territories with these differences may be better suited for federacy or associational status, rather than complete integration. This is bolstered by the fact that of the associated states studied by Stevens, 15 had large ethnic populations, making up a majority, distinct from that of the associated power.

The “most striking constitutional safeguard” of the associated state is the right of unilateral withdrawal from the associational relationship. The existence of this safeguard indicates that one potential criterion for determining if a territory is in free association with another power might be its freedom to withdraw from relations with the larger power. However, one must not read too much into this criteria, since at least three associated states are denied this power.

In sum, the major difference between free association and federacy is the degree of autonomy experienced by the smaller power. For example, Palau is in free association with the United States. Under the Compact of Free Association, the US handles all matters of defense for the territory, while the local government handles almost all other matters. On the other hand, Puerto Rico is a federacy of the United States. Puerto Ricans are U.S. citizens, and the island, while somewhat autonomous, is legally subordinate to the U.S. Congress. This is not the case for Palau.

Turning now to the central question of this paper, what indicia of territorial self-government mark the difference between a non-self-governing territory, as defined by the United Nations, and a territory which is fully self-governing and self-determining?

†††††††††††† Id.
‡‡‡‡‡‡‡‡‡‡‡ Id. at 192.
§§§§§§§§§§§ Watts, supra note 12, at 13.
†††††††††††† Watts, supra note 12, at 13.
The UN Charter, Article 73, requires administering powers to report on their territories “whose peoples have not yet attained a full measure of self-government.” It fails to provide any framework for determining what a “full measure of self-government” looks like or when it has been achieved. Quane concludes that self-determination can be formulated in abstract terms such as the “right of a people to determine its international status,” choosing from among the three options of independence, integration or free association. She goes on to note that international law fails to provide any institutional framework or guidelines for the examination of self-determination. This has led scholars to ask the question – how are the criteria for recognition of new states worked out? The criteria have changed over time and as a result, the question of “externally legitimate statehood is thus a paramount topic in contemporary international politics.” At first glance, the criteria for statehood have become more specific over time. However, Österud concludes that “no consistent pattern of rules for entry into the state system has emerged.” However, this hasn’t prevented both scholars and the international community from attempting to create such a pattern. Österud provides a broad definition when he argues that a state is independent if it is recognized as having no external authority which controls its constitutional foundation.

References:
+++ U.N. Charter, Article 73.
++++++ Quane, supra note 4, at 540.
+++++++ Id.
++++++ Id. at 537-38.
+++++++ Id. at 167.
+++++++ Id. at 168.
+++++++ Id. at 170.
The international community first attempted to define statehood in the
Montevideo Convention of 1933. The Montevideo Convention lists four
criteria for statehood in its first article: a permanent population, a defined territory, a
government, and the capacity to enter into relations with other states. However, this fails to answer the key question of self-determination for non-self-governing territories.

The UN General Assembly has also tried to provide useful criteria. Resolution 1514(XV) sets the determinative factor of self-government as independence. As noted above, the UN has expanded the acceptable forms of decolonization in the intervening years such that this is no longer true. However, this was not the end of Resolution 1514. It also “defines self-determination as the right of peoples ‘to freely determine their political status and freely pursue their economic, social and cultural development.’”

Turning now to indicia of federal relationships, they may vary with the type of relationship created – federacy or freely associated statehood. However, one facet of federal relationships appears to be universal - typically, in federal relations with territories, foreign policy falls within the authority of the federal governments.

Looking at federacies, one indica of federacy status is the existence of a common court system. This may take the form of either the entire judicial branch, or

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49 Stat 3097.
Article I.
Osterud, supra note 50, at 175.
U.N. Resolution 1514 (XV). See also, Quane, supra note 4, at 549.
Id. at 550.
Horn, supra note 28, at 581.
Stevens, supra note 14, at 195.
through a common court of final appeal. Another indication of federacy status is through political integration by including territorial representatives in the federal legislative branch. These representatives may be full members of the federal body or they may, and often are, limited in some fashion. Finally, the existence of a separate citizenship may be indicative of a federacy relationship, although it is by no means dispositive. In fact, of the federacies examined by Stevens, the majority – ten – merely extended national citizenry to the residents of the associated state.

However, as noted above, the search for criteria may well be futile. Even where all of these factors co-exist within several federated states, the individual relationships will still be specific to their situations, thus rendering a search for common criteria potentially meaningless. However, since the international community seems bent on creating such criteria, it is logical for scholars to determine if they are effective. Additionally, Österud notes two reasons that criteria are needed – first of all, admission to global organizations can not be regulated by recognition, since this would beg the question. Second, statehood was never assumed to be a requirement for membership, and thus cannot serve as indicia of that status. Thus, as Österud notes, “UN membership is neither a sufficient nor a necessary criterion of independent statehood.” This runs quite counter to the UN’s own attempts at defining self-government, at least some of which look to eligibility for UN-
membership as one indication of decolonization. Given these problems with laying out
criteria, Österud again returns to a broader definition, concluding that sovereignty is
marked by constitutional independence, rather than empirical independence or
strength.

Given this definitional confusion, the task set before scholars seems almost
hopeless. However, it appears that there is some consensus as to the most basic
definitions of independence and self-government, and given this core agreement, it may
yet be possible to make sense of territorial self-government. Self-determination appears
to be a universally-recognized criterion. So long as the population of a territory has a say
in their current status, and that determination is respected by the larger power, then a
territory can be said to be self-governing. This baseline criterion can be a starting point
for a broader search for others.

Despite Österud’s conclusion, and the ample support for it, I agree with his earlier
statement that criteria are needed, and attempt to discover if the UN’s own criteria, which
in theory govern their determination of a territory’s political status under Article 73,
sufficiently explain the current status of several territories across the globe. The
hypotheses are presented in the next section.

III. Hypotheses

The literature leads me to the following four hypotheses.

Ten of the 16 non-self-governing territories belong to the United
Kingdom. Based on the White Paper presented to the United Nations
defining the United Kingdom’s views regarding their territories, as well as Britain’s long

history with empire, it is my belief that the British Overseas Territories will have very similar indicia of self-determination among them, and that these will be considerably different than the other territories, both self-governing and not. Given the long history with running an empire, I expect the British Government to treat all of their territories identically, and thus the territories will share similar measures of self-government, or the lack thereof. Among these will be limitations on local sovereignty and control of local constitutions. I also believe the British Crown will retain more control over the territorial executive. Thus, the first hypothesis:

H1: There will be significant differences in the indicia of self-government between the British territories and the other territories, but there will be a high amount of unity within the British territories.

The next hypothesis explores the differences between the five U.S. unincorporated territories, which first brought me to this question. Both U.S. law and practice fails to draw sharp distinctions between the five territories, despite varying political statuses. However, the UN does draw a distinction between the commonwealths (Puerto Rico and the Northern Marianas) and the remaining U.S. territories (Guam, American Samoa and the Virgin Islands). Based on the U.S.’s treatment of its five territories, I don’t expect that my analysis will reveal large differences between the territories. As an addendum to this hypothesis, I believe that what differences do exist will not cut clearly across the divide as recognized by the United Nations. Thus, the second hypothesis:

H2: There will not be significant differences in the indicia of self-government between the US territories and the US Commonwealths.
The third hypothesis serves as an alternative to Hypothesis Two, and theorizes that the measures laid out by the United Nations will show that indicia of self-government are higher for the non-self-governing territories than for the UN-recognized self-governing territories. In other words, the UN’s own criteria will put the lie to the differing views of U.S. territories. If correct, this hypothesis will further show the flaws with the current UN definitions of self-government as regards territories. Hence, the third hypothesis:

H3: Some US territories will be more self-governing than the US Commonwealths.

The fourth hypothesis focuses specifically on the three territories (Guam, American Samoa and the US Virgin Islands) that are on the UN list of non-self-governing territories. It theorizes that these three territories will be more self-governing according to UN criteria than territories deemed to be self-governing by the UN Special Committee on Decolonization. Thus, the fourth hypothesis:

H4: The US non-self-governing territories will be more independent than UN-recognized self-governing territories.

IV. Operationalization of Variables

The UN recognizes three possible statuses that non-self-governing territories can strive for under UN General Assembly Resolution 1514 (XV). Those three statuses are independence, integration and free association. Of the three, independence is the most favored by the UN, but they recognize the other two as possible goals. UN General Assembly Resolution 742 (VIII) also allows for

††††††††††††††††††† UN General Assembly Resolution 1514 (XV).
‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ See, supra note 30, and accompanying text.
“Other Separate Systems of Self-Government” without defining specifically what those systems might be. However, both 742 and 1541 contain annexes of “factors” or “principles” of self-government.

Culling through those two resolutions, I have created a series of twenty variables that measure some aspect of self-government as identified by the UN. To these factors, I have added three of my own, which are further measures of self-government. Finally, I incorporate a dummy variable for each of the administering or metropolitan powers, indicating which power is responsible for which territory. There are four such dummies. This brings the total number of variables to 27.

The UN resolutions recognize four different relationships between self-governing territories and their metropolitan powers.\footnote{See UN General Assembly Resolutions 742 (VIII), 1514 (XV) and 1541 (XV).} The four categories are Integration under Resolution 1541, Independence under Resolution 742, Free Association/Integration under Resolution 1541 and “Other Forms of Self-Government” under Resolution 742. Thus, the variables can be grouped into four different categories, with no category containing all variables. Of the 20 variables the UN identifies, the largest category, “Other Forms of Self-Government” contains 13. Another, Integration, contains only 4. Independence contains 5 (although self-determination can be added, bringing the total to 6), while Free Association/Integration contains 12.

Before defining the variables and the methods of coding them, it is necessary to discuss the method of analysis. Two methods of analysis will be used to answer the question posed and analyze the hypotheses posited. To determine which governments are more self-governing, a scaled model of the variables has been created, that allows me to
create a continuum of the cases, falling on a scale between 0 and 1. This allows for a spatial comparison and makes analysis of the data very easy to comprehend.

For the second analysis, a variation of Qualitative Comparative Analysis (QCA) posited by Charles Ragin (1986) has been used. Relying on Boolean Algebra, the QCA method allows a researcher to take a variety of dummy variables and determine when the presence and absence of those variables leads to a given outcome. The downside of the QCA method is that it does require the variables to be dichotomous, which either fails to capture the nuances of the data, or requires the proliferation of dummy variables to capture all possible combinations. In order to solve for this, Dr. Lasse Cronqvist developed TOSMANA, the Tool for Small-N Analysis.

This is a piece of software that utilizes Boolean algebra to reduce variables to prime implicants, but does so with non-dichotomous data. This allows for more flexibility while still using the simplified algebra to create robust solutions. Additionally, the software creates a truth table which allows the investigator to examine in more detail cases where there is a conflict – where the same set of circumstances are present, but the outcomes are different.

Taking the list of criteria listed by the UN in General Assembly Resolutions 742 and 1541, I created a group of mostly dichotomous variables to measure self-government. All variables were coded so that findings in favor of self-government were higher. The

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ To read a TOSMANA output, one uses the same rules as any QCA output. Multiplication is read as the Boolean AND, while addition is read as the Boolean OR. Therefore, an outcome such as SELFGOV[2]ETHNIC[1] + TERRGOV[1]CONEQUAL[1] would be read as the presence of a value of 2 for SELFGOV AND a value of 1 for ETHNIC, OR a value of 1 for TERRGOV AND a value of 1 for CONEQUAL.
outcome variable was also dichotomous, with territories recognized as self-governing coded a 1 and the locations on the UN’s list of non-self-governing territories coded 0.

The first variable, SELFDET, measures a territory’s attempts at self-determination. This is a four category variable which measures the extent to which the residents of the territory have determined their own status through full adult suffrage. It is coded 0 for territories where no vote has taken place, 1 where a vote took place with less than full adult suffrage, 2 where full adult suffrage occurred, but the metropolitan power has not acted on the results, and finally, it is coded 3 if the territory has had a vote with full adult suffrage and the metropolitan power has followed through.

The next two variables, STATUSCHOICE and STATUSCHANGE deal with the territorial residents and their ability to affect their political status. STATUSCHOICE asks if the territory is entitled to choose the full range of status options recognized by the United Nations. STATUSCHANGE looks at the ability of the territory to change its status by a vote of the citizenry. These are dichotomous variables, coded 1 if the territory can choose from all options, or if their vote can change their status and 0 if this is not the case.

The fourth variable, SOVLIM, examines limitations on local sovereignty. Specifically, it asks if any limitations on local sovereignty were voluntarily made by the territory to the metropolitan power. It is a dichotomous variable coded 0 if any limitations were not voluntarily made and 1 if limitations were voluntary.

The fifth variable, GOVFORM, examines the ability of the territorial citizens to choose the form of their government. It is a trichotomous variable, with a 0 for no choice, a 1 for some choice and a 2 for full choice.
The next variable, TERRGOVT, looks at the amount of interference the local government experiences from the administering power. This is a somewhat subjective variable. It is coded 0 for total or large levels of interference, 1 for some interference and 2 if the metropolitan power does not interfere with local government. Occasionally, the metropolitan power will have the legal ability to interfere, but failure to exercise this power is still coded as a 2.

The next variable, ECOSOC JUR, examines the extent of jurisdiction the territorial government has over economic, social and cultural affairs. It is a categorical variable. It is coded 0 for no jurisdiction, 1 for little jurisdiction, 2 for less than complete but not insignificant jurisdiction and 3 for complete jurisdiction. Again, this is a subjective variable.

The next variable is UN ELIG. This asks whether a territory is eligible to join the UN. It is a dichotomous variable, coded 0 if the territory is not eligible to join and a 1 if it is. Although the UN identifies this as a measure of self-government, it is highly endogenous. I fear that UN eligibility is more a reflection that a territory is seen to have achieved self-governance than a factor in determining that status.

The next variable is DIRECTREL. This measures the extent to which a territory can engage in direct relations with foreign governments or international organizations. It is a trichotomous variable, coded 0 if all foreign relations are handled by the metropolitan power, 1 if the territory has membership or observer status in regional or other international organizations and 2 if the territory may freely enter into direct relationships with foreign powers.
The variable ETHNIC looks to the extent to which the population of the territory is ethnically different from the population of the administering power. It is a trichotomous variable, coded 0 if there is very little or no difference, 1 if an ethnic group makes up a sizable minority of the territorial population and 2 if the different ethnic group is a majority of the territorial population.

The variable TERRLEG looks at the extent to which the local territorial legislature passes the laws applicable in the territory. It is a trichotomous variable, coded 0 if most or all laws are handed down from the administering power, 1 if some of the laws are passed by the local legislature and 2 if all the laws are passed by the local legislature. In federal systems, such as the United States, where national laws may preempt state or local laws, a territory can still achieve a code of 2 if the laws of local concern are passed by the local legislature, and the national legislature restricts itself to legislating on matters of national concern.

TERRGOV is a variable which examines control over the selection of the local governor. It is a dichotomous variable, which is coded 0 if the governor is selected or appointed by the metropolitan power. It is coded 1 if the governor is locally elected by the populace or local legislature.

The question of control over territorial courts is a complex one. In order to properly code it, I created two related variables. TERRCOURTS-1 is a dichotomous variable which inquires into the existence of local courts. It is coded 0 if there are no local courts and 1 if there are. In a system like the United States, this variable looks only at the equivalent of state courts. The existence of federal courts is not noted.
The second variable, TERRCOURTS-2, asks - for those territories where local courts exist, who appoints the judges. It is a dichotomous variable, coded 0 if the judges are appointed by the metropolitan power and 1 if the local legislature or executive appoints the judges.

APPEAL, is the first variable that I have added that is not recommended by the UN. It is a dichotomous variable examining whether or not the local courts are courts of last resort, or if an appeal lies with the High Court of the administering power. It is coded 0 if there is an appeal to higher courts and 1 if the local courts are courts of last resort. I have added this variable because one would expect independent territories to contain courts of last resort.

The next variable, ASSOC, asks if the territory is associated with the metropolitan power via treaty or bilateral agreement. It is a dichotomous variable. If there is no agreement or treaty governing the relationship, then the variable is coded 0. It is coded 1 when such an agreement exists.

CONEQUAL asks if the national constitution, if one exists, applies with equal force to the territories and the citizens thereof. For example, at the turn of the 20th Century, the U.S. Supreme Court issued a series of opinions known as the “Insular Cases.” These cases held that the full Bill of Rights did not apply to Puerto Rico and similarly situated territories. Specifically, there was no constitutional right to a jury trial. As a result of these cases, which are still good law, the U.S. territories are not coded as
CONEQUAL. It is a dichotomous variable coded 0 if the constitution does not apply equally; coded 1 if it does apply equally.

However, this variable does not capture the full range of nuance that can occur in the application of the metropolitan constitution to the territories. While the constitution may not be applied equally, it can be unequally applied in favor of or against the territory and its residents. Therefore, I have created two dichotomous variables, CONUNEQUALBAD and CONUNEQUALGOOD to capture these differences. However, CONUNEQUALBAD is multiplied by -1 to keep the directionality the same. Therefore, CONUNEQUALBAD is coded as -1 if the constitution applies unequally to the detriment of the territory or its inhabitants and 0 otherwise. CONUNEQUALGOOD is coded 1 if differences in treatment under the metropolitan constitution benefit the territory or its residents and 0 otherwise.

LEGEQUAL is a measure of the equality of representation in the metropolitan legislature for the territory. It is a trichotomous measure, coded 0 if there is no representation, 1 if there is unequal representation (in terms of rights of the legislators, not in numbers) and 2 if there is equal representation for the territory. The coding on this variable was difficult, because lack of representation may indicate independence. However, since most of the territories are associated with or controlled by federal

\[ \text{As a note, for ease of calculation, I have coded the British territories as 0 because there is no written constitution to apply. It allows the software to run more smoothly without changing the outcomes derived.} \]

Both variables are needed for two reasons. First, it is possible for the Constitution to be unequal in both favorable and unfavorable ways at the same time. For example, in the Northern Marianas, there is no right to a jury trial under the U.S. Constitution’s Sixth Amendment, which is unequal in a negative direction. However, the 14th Amendment’s Equal Protection Clause has also been interpreted not to interfere with the policy of the Northern Marianas to sell land only to local citizens, so this would be a positive inequality. Additionally, for purposes of the spatial measure of self-government discussed above, it was necessary to subtract a point for negative inequalities, as these tend to hamper self-government.
powers, the bias is in favor of equal representation. Additionally, the scalar measure solves for independent powers, by not factoring this variable into the calculation.

The variable CITIZEN asks if the residents of the territory are also citizens of the metropolitan power. It is a dichotomous variable. It is coded 0 if the territorial citizens are not also citizens of the metropole. It is coded one if they are. The same problem concerning independent territories arises, but it is again solved by eliminating this variable from the scalar model.

The final two UN variables deal with the territory’s local constitution. The first variable, CONSTITUTION, asks the question whether a local constitution exists. It is coded 1 if there is a territorial constitution and 0 if there is not. The second variable, CONCONTROL, looks at the ability of the territory to control their constitution. If the territory can make changes without the approval of the administering power, the variable is coded 1. If the administering power must approve changes to the local constitution, it is coded 0.

Finally, I created 4 dummy variables to account for which metropolitan power is in charge of which non-self-governing territory. These variables are BRITADMIN, USADMIN, FRENCHADMIN and NZADMIN, to take account of British, US, French, New Zealand administration.

V. Case Selection

The cases I will use to examine this question come from two primary sources. First, I looked to the UN’s list of non-self-governing territories. I exclude the Falkland Islands/Malvinas because of the sovereignty dispute between the

†††††††††††††††††††† See, supra, note 3.
United Kingdom and Argentina. While a similar dispute occurs over Gibraltar, the British and Spanish governments have signed a treaty indicating that the British are the power primarily responsible for administering the territory. Next, due to difficulties in both location of information and in coding information once found, I have chosen to exclude Western Sahara. This also helps simplify much of the analysis that I conduct later.

This yields 14 cases comprising American Samoa, Anguilla, Bermuda, the British Virgin Islands, Cayman Islands, Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St. Helena, Tokelau, Turks and Caicos Islands, and the United States Virgin Islands. To provide a contrast to these non-self-governing territories, I include another 14 territories. I include eight federacies identified by Ronald Watts in his comparative study of federal systems (Faroes Islands, Azores, Madeira, Guensey, Jersey, the Isle of Man, the Commonwealth of the Northern Mariana Islands and Puerto Rico).‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ I then add six freely associated states (the Netherlands Antilles, Cook Islands, Niue Islands, Marshall Islands, Federated States of Micronesia and Palau).§§§§§§§§§§§§§§§§§§§§ Independent nations are excluded because this paper is concerned with a study of federal systems.

These cases provide a variety of points for comparison. The territories are located in the Pacific, Caribbean, and Atlantic Oceans, and are affiliated with a variety of federal powers. Additionally, they range in size from 5 sq kilometers to over 266,000, and in population from a small of 46, on Pitcairn, to nearly four million in Puerto

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Watt, supra note 12, at 11.
§§§§§§§§§§§§§§§§§§§§ Id.

This does make it difficult to compare and contrast the situations of the territories with one of the UN-recognized categories – independence.
Rico. They are also representative of a variety of administrative powers, both traditionally colonial powers, like the UK and Portugal, and former colonies, such as New Zealand.

Finally, with the exception of the Falklands (Malvinas) and Western Sahara, these data represent the universe of non-self-governing territories. While other federacies and freely associated states exist, those chosen more closely mimic the non-self-governing territories in location and other characteristics. Many, such as the Federated States of Micronesia, Palau and Marshall Islands, were former trust territories, and have transitioned to a self-governing status.

VI. Data Collection

Data collection was accomplished primarily through the use of the United Nations’ Fourth Committee, dealing with decolonization. Every year, the UN Secretariat produces reports on the non-self-governing territories, based on information provided by the Administering powers, pursuant to their responsibilities under Article 73. I used the 2007 editions of these reports, produced between January and March of 2007.

Information was supplemented by visits to official territorial government websites.

+++ See, supra note 3.
Information on the self-governing territories was located though government websites, the CIA factbook, and relevant texts on the subject of federacies and former colonies. Data were coded by the author in as objective a manner as possible. Obviously, there will be some subjective judgments. However, as data analysis will show, most of the key variables, or prime implicants, in the language of QCA, were able to be coded objectively. Additionally, for cases where subjectivity was more likely, the data allowed for multiple outcomes including the subjective variables. This adds to the robustness of the data and makes the findings more reliable.

VII. Analysis

Two techniques were used to analyze the data. First, I created a continuum of self-governing territories. To do this, the values for all the coded variables were added, and divided by the theoretical maximum. If I had data on 15 variables, I added up the values I coded for that territory, then set those 15 variables at their maximum, and totaled up their value. I then divided the actual result by this theoretical maximum, and came up with a scaled score (percentage) for all territories that fell on a scale between 0 and 1. Since the variables were coded such that higher values correspond with greater self-government, the closer to one a territory scores, the greater the level of self-government. This scalar effect solved the problem for freely associated states that were self-governing, but wouldn’t have scores, or would have counterintuitive scores, for variables such as CONEQUAL and LEGEQUAL. Since

In the future, I would like to have the data coded by others to achieve greater reliability. I conducted this analysis before I put in 0s for values that were not relevant, such as CONEQUAL for British administered territories. This provides a true scalar measure, while the added 0s make the software run faster without altering results.
these were not coded initially, they would not be part of the denominator. Indeed, as will be seen below, the freely associated states were among the most self-governing, which confirms the scaling measure worked properly.

The second technique involved the use of Boolean algebra, conducted by the software program TOSMANA. The data were run a multitude of ways. First, all of the data were run for all territories, with the dependent variables of interest being selected based on the definitions set out by the UN in Resolutions 742 and 1541. This led to four sets of data. Integration, under Resolution 1541, included the variables SELFDET, CITIZEN, CONEQUAL and LEGEQUAL. Independence under Resolution 742 included the variables DIRECTREL, UN ELIG, GOVFORM, TERRGOVT and ECOSOC JUR.

Free Association/Integration under Resolution 742 included the variables SELFDET, STATUSCHANGE, CONSTITUTION, CONCONTROL, ETHNIC, ASSOC, CONEQUAL, LEGEQUAL, CITIZEN, TERRGOV, TERRLEG and ECOSOC JUR. Finally, “Other Forms of Self-Government” under Resolution 742 included the variables SELFDET, STATUSCHOICE, STATUSCHANGE, SOVLIM, TERRGOVT, ECOSOC JUR, UN ELIG, DIRECTREL, ETHNIC, TERRLEG, TERRGOV, TERRCOURTS-1 and TERRCOURTS-2.

Additionally, I ran the data with specific outcome variables, in order to control for each type of test. For the integration test, I therefore focused on the federacies, rather than the freely associated territories, since these are not integrated, and thus would add noise to the data. For free association/integration under 742, only the freely associated

---------Because the literature indicated that self-determination was one of the watchwords of self-government, I also ran an analysis that included the SELFDET variable added with the other five.
states were run. “Other Forms of Self-Government” was not rerun. For independence under 742, I did not have any truly independent territories, so I used the three states freely associated with the United States. They are the closest to independent, and they also scored the highest on the continuum.

Finally, I ran the data just for the United States territories (excluding the freely associated states) in order to access information designed to answer Hypothesis 2. In this analysis, I rejected the UN definitions and ran all of the variables for which I had data, in order to provide a more complete picture of the differences between the US unincorporated territories.

VIII. Results

The preceding analysis led to the following results. Figure 1 is the scaled graph of self-governance for each of the territories in the sample. The territories listed in black (the darker labels) are the UN-defined non-self-governing territories. The territories listed in green (the lighter labels) are the federacies and freely associated states, recognized by the UN to be self governing.
Figure 1 helps us answer a few of the hypotheses listed above. First of all, it disproves hypothesis three, that some of the U.S. territories would be more self-governing than the Commonwealths. The US territories on the list of non-self-governing countries have a smaller degree of self-government than the two federacies, Puerto Rico and the Commonwealth of the Northern Mariana Islands. This is especially true in light of the fact that I was able to obtain equivalent information for all the territories, so even absent scaling, the results would be the same.

However, Figure 1 also lends support to hypothesis four, which states that some of the US non-self-governing territories have more indicia of self-government than federacies not on the list. Specifically, the US territories are all more self-governing than the English Channel Islands – Guernsey, Jersey and the Isle of Man.

While the territory with the least amount of self-governance (Pitcairn) is on the list of non-self-governing territories, some of those territories, such as Tokelau and Bermuda, have more indicia of self-government than over half of the federacies or freely associated states. This indicates that the UN criteria for self-government do not provide clear cut answers as to what it means to be self-governing, which in turn calls for a redefinition of what self-government looks like.

Turning now to the outcomes of the TOSMANA program, the results are highly interesting. Looking at the UN’s measure of integration, under General Assembly Resolution 1541, when all territories are included, there are six combinations of factors that produce the outcome of self-government. They are as follows:
When two or more variables are multiplied, it has the equivalent of the Boolean AND. A plus sign indicates the Boolean OR. Therefore, one interprets these results as follows:

When SELFDET is coded 3, AND LEGEQUAL is set at 0, OR when SELFDET is coded 3 AND CONEQUAL is coded 1 AND CITIZEN is coded 0, OR when SELFDET is coded 3 AND CITIZEN is coded 0, AND LEGEQUAL is coded 2, OR when SELFDET is coded 3, AND CONEQUAL is coded 1, AND CITIZEN is coded 1 AND LEGEQUAL is coded 2, OR when SELFDET is coded 3, AND CONEQUAL is 0, AND CITIZEN is 1, AND LEGEQUAL is 1, OR when SELFDET is 2, CONEQUAL is 1, CITIZEN is 1 AND LEGEQUAL is 2. Those six combinations explain all the outcomes where territories are viewed as self-governing by the United Nations.

Where things get particularly interesting is when we examine the truth table for these variables, we get two contradictory outcomes:

<table>
<thead>
<tr>
<th>Case Name</th>
<th>SELFDET</th>
<th>CONEQUAL</th>
<th>LEGEQUAL</th>
<th>CITIZEN</th>
<th>OUTCOME</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Caledonia,Faroe Islands</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>C</td>
</tr>
<tr>
<td>US Virgin Islands,Puerto Rico</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>C</td>
</tr>
</tbody>
</table>

The “C” for the outcome variable indicates a contradiction between two or more territories with the same combination of factors. For this set of variables, New Caledonia and the Faroe Islands have similar characteristics, yet opposite results – New Caledonia is
on the UN’s list of non-self-governing territories, while the Faroe Islands are not. Yet, according to the UN’s own definitions, they should be treated identically. The same holds true for the US Virgin Islands and Puerto Rico. Therefore, according to the UN, under Resolution 1541, both New Caledonia and the US Virgin Islands should be viewed as self-governing, or, alternatively, that the Faroe Islands and Puerto Rico should not.

When looking only at the federacies which are currently integrated, and removing the freely associated states from the mix, we get a slightly different outcome. The same contradictory findings exist, but the explanatory variables are different. They look like this:

$$\text{SELFDET} \{1\} * \text{CONEQUAL} \{1\} * \text{LEGEQUAL} \{2\} * \text{CITIZEN} \{1\} +$$  
$$\text{SELFDET} \{3\} * \text{CONEQUAL} \{0\} * \text{LEGEQUAL} \{1\} * \text{CITIZEN} \{1\} +$$  
$$\text{SELFDET} \{3\} * \text{CONEQUAL} \{0\} * \text{LEGEQUAL} \{0\} * \text{CITIZEN} \{1\} +$$  
$$\text{SELFDET} \{2\} * \text{CONEQUAL} \{1\} * \text{LEGEQUAL} \{2\} * \text{CITIZEN} \{1\}$$

The first, second and last set of factors here match the last set given above. The third set of factors explain only the CNMI. Both the first and second sets of factors explain contradictory outcomes.

Turning now to the UN definition of independence, under Resolution 742, we get three possible sets of characteristics which explain all of the self-governing territories. They are as follows:

$$\text{GOVFORM} \{2\} * \text{TERRGOVT} \{2\} * \text{ECOSOC} \text{ JUR} \{3\} * \text{UN ELIG} \{0\} * \text{DIRECTREL} \{0\} +$$  
$$\text{GOVFORM} \{2\} * \text{TERRGOVT} \{2\} * \text{ECOSOC JUR} \{3\} * \text{UN ELIG} \{0\} * \text{DIRECTREL} \{1\} +$$  
$$\text{GOVFORM} \{2\} * \text{TERRGOVT} \{2\} * \text{ECOSOC JUR} \{3\} * \text{UN ELIG} \{1\} * \text{DIRECTREL} \{2\}$$
What is interesting about these results is that for some territories, it is the ability to enter into direct relations with foreign nations that matter, while in others it appears that the absence of this ability is definitive.

I lack any truly independent countries in the data, so in order to test these criteria against a more specific set of countries, I chose the freely associated states identified by Watts (the Netherlands Antilles, Cook Islands, Niue Islands, Marshall Islands, Federated States of Micronesia and Palau).

Due to the importance of self-determination identified in the literature, I decided to add the measure for self-determination to the model and seeing if the outcomes changed. When adding a variable for Self-Determination to this mix, which appears to be one of the key criteria for determining self-government, the results remain consistent:

<table>
<thead>
<tr>
<th>SELFDET{3} *</th>
<th>SELFDET {3} *</th>
<th>SELFDET {3} *</th>
</tr>
</thead>
<tbody>
<tr>
<td>GOVFORM{2} *</td>
<td>GOVFORM {2} *</td>
<td>GOVFORM {2} *</td>
</tr>
<tr>
<td>TERRGOVT{2} * ECOSOC</td>
<td>TERRGOVT {2} * ECOSOC JUR {3} * UN</td>
<td>TERRGOVT {2} * ECOSOC JUR {3} * UN</td>
</tr>
<tr>
<td>JUR{3} * UN ELIG{0} * DIRECTREL{0} +</td>
<td>ELIG {0} * DIRECTREL {1} +</td>
<td>ELIG {1} * DIRECTREL {2}</td>
</tr>
</tbody>
</table>

The only difference is the presence of the SELFDET variable, indicating that it is also a key factor in determining if a territory is independent under Resolution 742.

Turning to the measure for Free Association/Integration under Resolution 742, things become less clear. This lack of clarity is partially because Free Association and Integration are on opposite sides of the spectrum. Also, given the large number of variables to take into account, it’s not surprising that we arrive at multiple solutions. The model provides three sets of four combinations to explain all outcomes:
Looking at these data, the outcomes are somewhat non-sensical. They indicate that at least one factor, which can explain free association/integration by itself is that the population of the territory is not diverse when compared to the population of the metropolitan power. That can’t possibly be correct.

Therefore, I reran the data, including only those territories recognized by Watts to be in free association with their metropolitan powers. I achieved the following, more logical, results:

This model provides three possible sets of two combinations, which explain all the outcomes observed. Moreover, in the first and third set of results, the second group of factors explains only the Netherlands Antilles. This indicates that, as far as determining self-government in free association under Resolution 742, the key factors seem to be that a territory has a local constitution and that they can, without permission of the administering power, change that constitution.
Finally, turning to the last set of relationships defined by the UN, “Other Forms of Self-Government,” an analysis results in three sets of somewhat non-sensical outcomes:

| ETHNIC\{0\} + | SELFDET\{0,1\}STATUSCHANGE\{0\} + | STATUSCHOICE\{1\}TERRLEG\{2\}TERRCOURTS-1\{1\} |
| ETHNIC\{0\} + | SELFDET\{0,1\}TERRCOURTS-1\{0\} + | STATUSCHOICE\{1\}TERRLEG\{2\}TERRCOURTS-1\{1\} |
| ETHNIC\{0\} + | STATUSCHANGE\{0\}TERRCOURTS-1\{0\} + | STATUSCHOICE\{1\}TERRLEG\{2\}TERRCOURTS-1\{1\} |

Again, these data seem to indicate that mere homogeneity of ethnic groups is enough, and that lack of self-determination, coupled with a lack of local courts, would make a country independent. These results run counter both to common sense and to what we know to be the case.

All of these findings lend credence to the argument that the UN criteria are unhelpful. UN criteria, especially for this last category, do not provide clear cut answers to the question of self-government. Perhaps this is why the UN abandoned a list of factors in favor of a set of principles, outlined in Resolution 1541 (XV). However, these data show that even those principles are not as helpful in answering the question “What does it mean to be self-governing?” Therefore, a redefinition of what self-government looks like, as called for by the British Government, is in order.

Turning finally, to the first two hypotheses, we find the following. When comparing only the US territories to the US federacies, the program finds the only factor that matters is TERRLEG\{2\}. This indicates that so long as the territorial legislature passes all of the local laws, a territory should be regarded as self-governing. Given the subjectivity in coding this particular variable, and considering it was the only variable of

^See Cook, supra note 5.
interest, out of the 23 entered into the model, hypothesis two appears to be correct – there is no significant difference between the US non-self-governing territories and the two US federacies identified by Watts. This is in accord with the US Government’s own views about its unincorporated territories.

As for the British territories, Figure 1 indicates that they cover the range of self-government from least self-governing to among the most self-governing of the non-self-governing territories. As a result, a definitive conclusion as to the truth or falsity of hypothesis one cannot be reached.

IX. Conclusion

Overall, the concept of self-government is not an easy one to understand. Territories controlled by the same powers are viewed differently by the international community, even if they are not treated differently by their metropolitan powers. From a purely objective viewpoint, many of the so-called non-self-governing territories bear greater indicia of self-government than territories recognized the world over to be self-governing. At the end of the day, this indicates that a new definition of what it means to be self-governing is needed, and that the world needs to move away from static definitions of what a federal relationship should look like. Rather, it needs to take note of the various experiments going on in self-government in these laboratories of democracy and federalism.

So what would this new order of self-government look like? I have some suggestions. First and foremost, self-determination appears to be the *sine qua non* of self-government. But it must be a self-determination that is respected by the administering power. Additionally, when discussing self-determination, it must be
meaningful self-determination. It must include full adult sufferage, or the vote is not binding, as the international community recognizes the concept. Under this formulation, Guam, the British Virgin Islands, New Caledonia, the Turks and Caicos Islands and the Faroe Islands would not be self-governing, because their self-determination votes have occurred, but have not been acted upon by their metropolitan powers. Moreover, Pitcairn and the Channel Islands (Guernsey, the Isle of Man and Jersey) would be non-self-governing for failure to hold a vote at all. While this does mean that some territories currently recognized to be self-governing would not be, it would comport with the consistently expressed view of the international community.

But self-determination alone is still not enough to determine self-government. Meaningful control over a variety of local institutions and a certain legislative portfolio are also key to determining if a territory is self-governing. Specifically, the territory should have local control of who acts as governor, substantial control over local affairs through the territorial legislature, appointment of local court judges, if local courts exist and substantial control of social and cultural affairs, as well as local economic affairs. Finally, in those territories which are integrated with their metropolitan powers, or are seeking such integration, at least some representation in the metropolitan legislature, equal treatment under the Constitution and citizenship are called for.

In terms of the variables outlined above, this means that TERRGOV should be coded 1, TERRLEG 1 or 2, TERR COURTS-2 should be 1, where TERR COURTS-1 is a 1, ECOSOCJUR should be coded 2 or 3, and where applicable, CONEQUAL should be 1, LEGEQUAL should be 1 or 2 and CITIZEN should be coded 1. Looking at TERRGOV, this means that St. Helena, the Cook Islands, Turks and Caicos Islands,
Netherland Antilles, Jersey, Guernsey, the Isle of Man, Madeira, the Azores, Pitcairn,
Gibraltar, the British Virgin Islands, Bermuda, Montserrat, Anguilla and the Cayman
Islands would not be self-governing, because they do not choose their own governor.
Under TERRLEG, only Pitcairn would not be self-governing. Under TERRCOURTS,
Jersey, the Netherlands Antilles, St. Helena, Montserrat, the British Virgin Islands,
American Samoa, the Cayman Islands, Guernsey and Anguilla are not self-governing.

When examining ECOSOCJUR, only Pitcairn and the Turks and Caicos Islands
fail to be self-governing. When looking at LEGEQUAL, the British territories (including
the Channel Islands), the Netherlands Antilles and the Northern Mariana Islands are not
self-governing. For those territories where the Metropolitan power has a constitution, it
is applied unequally only in the U.S. Territories. Finally, only American Samoa’s
residents are not citizens of their metropolitan power, although they are U.S. nationals.

Under this formulation, only the three Freely Associated States of Palau, the
Marshall Islands and the Federated States of Micronesia, along with the two New
Zealand territories of the Niue Islands and Tokelau are self-governing in all respects. If
we relax some of the constraints, such as the need for constitutional equality, then Puerto
Rico and the U.S. Virgin Islands join this list. With the addition of a non-voting
representative in Congress, the Northern Mariana Islands would also join this list.

In the final analysis, the formulation offered above is not necessarily any better
than what the international community has come up with so far. At best, if applied
properly, it would be consistent. There is no clear definition of self-government that is
currently utilized by the international community. While my proposed list of factors
might upset some territories who wish to view themselves as self-governing but would
not be under my formulation, it is a start to trying to clarify what it means to be self-governing.