N. KING DRAFT 3/29/77

Restrictions on Alienation of Long-Term Interests in Real Property

A. Nature of the Restrictions

Article XII of the Northern Marianas Constitution restricts the "acquisition of permanent and long-term interests in real property within the Commonwealth" to "persons of Northern Marianas descent."*/ The term "acquisition" is defined broadly to include transfers "by sale, lease, gift, inheritance or other means . . ." -- although transfer by inheritance to a spouse and foreclosure by a mortgagee that disposes of its interest within five years are specifically excluded from the definition.**/ The real property interests covered by the provision are freehold interests***/ and leasehold interests of more than forty years' duration including renewal rights.****/

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*/ Northern Marianas Constitution, Article XII, § 1. A transaction made in violation of this restriction is deemed to be void ab initio. Northern Marianas Constitution, Article XII, § 6. If a corporation that qualifies as a "person of Northern Marianas descent" ceases to be so qualified, any covered real property interest that it acquired after the effective date of the Constitution is forfeited to the Commonwealth. Id.

**/ Northern Marianas Constitution, Article XII, § 2.

***/ These are intended to include all freehold estates of inheritance (i.e., fee simple and fee tail) and life estates, regardless of whether the interest is held alone or is shared with others. See Analysis of the Constitution 179 (1976); Report to the Convention by the Committee on Personal Rights and Natural Resources: Committee Recommendation Number 8: Restrictions on Land Alienation 7 (1976) (hereafter referred to as "Report on Land Alienation").

****/ Northern Marianas Constitution, Article XII, § 3.

To qualify as a "person of Northern Marianas descent," an individual must satisfy two criteria: First, the person must be a citizen or national of the United States.*/ Second, the person must be of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof.**/ This reference to ancestral bloodline was not intended to establish a racial or ethnic basis for determining qualification to acquire land.***/ Rather, the reference to Chamorro and Carolinian blood should be viewed as a term of art, since an objective benchmark is provided to determine whether a person satisfies this second criterion.

For purposes of determining descent under Article XII, a person is deemed to be a full-blooded Northern Marianas Chamorro or Carolinian if he or she

> "was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth." Article XII, § 4.

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*/ The term "national" applies to persons who are not citizens of any nation other than the United States and who owe permanent allegiance to the United States but who are not United States citizens. See 8 U.S.C. §§ 1101(a)(21), (22), 1408. At the present time, only natives of American Samoa appear to be noncitizen nationals. See Hampton v. Mow Sun Wong, 426 U.S. 88, 90 n.1 (1976). Section 302 of the Covenant provides that persons who become United States citizens after the Trusteeship terminates by virtue of having been born or domiciled in the Northern Mariana Islands and satisfying various other conditions may, within six months, elect to become a national but not a citizen of the United States.

**/ Northern Marianas Constitution, Article XII, § 4. The test is also satisfied by a child who, while under the age of eighteen, was adopted by a person of Northern Marianas descent. A corporation is considered to be a person of Northern Marianas descent if it is incorporated and has its principal place of business in the Commonwealth and if at least fifty-one percent of its directors and the owners of fifty-one percent of its voting shares are persons of Northern Marianas descent. Northern Marianas Constitution, Article XII, § 5.

***/ See Analysis of the Constitution, supra, at 181; Report on Land Alienation, supra, at 9.

Thus, the second criterion is keyed to descent from persons who were born or domiciled in the Northern Marianas before a specified date and who became (or become or were treated as) citizens of the TTPI for any period of time between 1947 and the date on which the Trusteeship Agreement is terminated with respect to the Commonwealth.*/ In short, the references to Chamorro and Carolinian blood were used as a shorthand. Descent is to be traced from constructive Chamorros or Carolinians. As a corollary, a person who traces descent from actual ethnic Chamorros or Carolinians who were born and lived outside the Northern Marianas before 1950 would not qualify as a "person of Northern Marianas descent" under Article XII.

Land -- which has served as "the basis of family organization in the islands" -- was perceived as being "one of the principal sources of social stability" in a Commonwealth comprising only a few hundred square miles of territory.**/ Because the islanders have had virtually no experience with real estate transactions, it was feared that they would be easy marks for more experienced investors from countries with well-developed economies. If no protection in the form of restrictions on alienation were imposed, the land -- from which the communities constituting the Commonwealth derive much of their character

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*/ See Analysis of the Constitution, supra, at 181-184 (1976).

**/ Id., at 175.

and strength -- might be lost to outsiders, with consequent economic and cultural dislocation in the islands.*/ Thus, Article XII was designed to restrict the acquisition of long-term real property interests to "persons who are a part of the community that has made the creation of the Commonwealth possible . . . ."**/ The result, it was hoped, would be

> "to protect the culture and traditions of the people of the Northern Mariana Islands, to promote the political growth needed in the first critical years of the Commonwealth, to accomplish the political union with the United States with a minimum of cultural and economic dislocation, and to provide the stablity needed to survive in the family of nations." ***/

It is important to bear in mind that the restrictions on land alienation were not adopted by the drafters of the Commonwealth Constitution solely on their own initiative. The basic concept of a land alienation restriction was imposed upon the Commonwealth by the United States Government as an integral part of the Covenant. Specifically, Section 805 of the Covenant requires that, for at least twenty-five years after the termination of the Trusteeship Agreement, the acquisition of permanent and long-term real property interests in the Commonwealth be restricted to "persons of Northern Mariana Islands descent. . . ." As

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*/ Id., at 175-176.

**/ Id., at 177.

***/ Id. at 174-175.

stated in the Covenant, this requirement was imposed

> "in view of the importance of ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency." */

Indeed, restricting ownership of land to persons of Northern Marianas descent was deemed to be so important that legal provisions designed to implement the restriction were specifically exempted from the operation of any other provisions of the Covenant or of the Constitution, treaties or laws of the United States if such provisions would otherwise have served to invalidate the restrictions. **/

B. Do the Restrictions on Alienation of Long-Term Interests in Real Property in the Northern Marianas Violate the United States Constitution?

1. Possible Constitutional Infirmities of the Restrictions on Land Alienation.

The restrictions on acquisition of long-term interests in real property in the Northern Marianas raise the possibility of

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*/ Covenant, § 805.

**/ Id. Section 501 of the Covenant provides that, to the extent they are not applicable of their own force, various provisions of the United States Constitution will be applicable within the Northern Mariana Islands as if the islands were one of the several States. Any provisions of the United States Constitution that do not apply of their own force within the islands and that are not specifically made applicable by Section 501 of the Covenant, are to apply only "with the approval of the Government of the Northern Mariana Islands and of the Government of the United States." Covenant § 501(a) However, Section 501(b) provides that the applicability of certain provisions of the United States Constitution "will be without prejudice to the validity and power of the Congress of the United States to consent to Sections 203, 205 and 805 . . . ." Similarly, Section 502(a) of the Covenant makes various laws of the United States applicable to the Northern Mariana Islands, "except as otherwise provided in this Covenant."

conflict with several provisions of the United States Constitution. The constitutional provisions with which the potential conflicts appear to be most substantial are the equal protection clause of the Fourteenth Amendment (and the due process clause of the Fifth Amendment to the extent that equal protection is encompassed within the Fifth Amendment due process concept)*/ and the privileges and immunities clauses of Article IV, § 2 and of the Fourteenth Amendment.**/ The applicability of these provisions will be considered at greater length below.

It might also be argued, although less convincingly, that, by limiting the class of potential purchasers of privately owned property in the Northern Marianas, the restrictions on alienation amount to a taking of property without just compensation in violation of the Fifth Amendment. However, the restriction on alienation does not take private property "for public use" within the meaning of the Fifth Amendment. Rather, it resembles the type of regulation of or limitation on private property rights inherent in zoning and other land use restrictions imposed by states

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*/ Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has held that a discrimination may be so egregious that it amounts to a denial of due process within the meaning of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Schneider v. Rusk, 377 U.S. 163, 168 (1964).

**/ Article IV, § 2, provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Section 1 of the Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

in the exercise of the police power.*/ Consequently, Article XII of the Northern Marianas Constitution should not give rise to any substantial just compensation claim.

Finally, it might be asserted that Article XII amounts to a regulation of interstate and foreign commerce or to an encroachment upon congressional authority to establish the terms and conditions for entry and naturalization of aliens**/ -- powers that are granted to Congress under Article I, § 8 of the United States Constitution. In light of the requirement, contained in Section 805 of the Covenant, that the Commonwealth Government restrict land alienation to persons of Northern Marianas descent, neither of these potential objections appears to be substantial, since the Commonwealth cannot be said to have improperly encroached upon federal power to regulate commerce and aliens when Congress has specifically directed that the Commonwealth adopt the restrictions at issue.***/

Section 805 directs that the restriction be framed in terms of persons of Northern Marianas descent. While it does not specifically provide that acquisition of long-term real property interests shall be limited to citizens and nationals

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*/ See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In denying a "taking" claim asserted by owners of a gold mine that had been forced by the Government to close during World War II, the Supreme Court observed that "the mere fact that the regulation deprives the property owner of the most profitable use of the property is not necessarily enough to establish the owner's right to compensation." United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

**/ See Graham v. Richardson, 403 U.S. 365, 376-380 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Hines v. Davidowitz, 312 U.S. 52, 66 (1941).

***/ See Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); cf. Buscaglia v. Ballester, 162 F.2d 805 (1st Cir.), cert. denied, 332 U.S. 816 (1947); cf. Mathews v. Diaz, 426 U.S. 67, 84 (1976).

of the United States, a fair reading of the Covenant as a whole indicates that the Government of the Northern Mariana Islands was being authorized to establish United States citizenship or nationality as one qualification for land acquisition in the islands. The Report of the Covenant Drafting Committee states the intention that

> "it will be the responsibility of the Government of the Northern Mariana Islands to implement the provisions of . . . Section [805]. In particular, the parties understand that the Constitution or laws of the Northern Mariana Islands will define the operative terms in this Section, including such terms as . . . 'persons of Northern Mariana Islands descent.'"

The Covenant does not otherwise indicate how the term "persons of Northern Mariana Islands descent" is to be defined. However, Section 301 of the Covenant does set forth qualifications which, if met, result in eligibility for automatic United States citizenship or nationality when the Trusteeship Agreement is terminated. The qualifications for automatic citizenship clearly were drafted with the intent of conferring upon all persons who -- by reason of birth, domicile, and, in some instances, participation in the local electoral process*/ -- can fairly be said to constitute

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*/ Assuming no allegiance to a foreign state exists, Section 301 confers United States citizenship upon (a) all persons born in the Northern Marianas who, on the day preceding termination of the Trusteeship Agreement, are citizens of the TTPI and are domiciled in the Northern Marianas or in the United States or in any territory or possession thereof, (b) all persons who, on the day preceding the termination of the Trusteeship Agreement, are citizens of the TTPI and have been domiciled continuously in the Northern Marianas for at least the previous five years, and who, unless under age, registered to vote in elections for the Mariana Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975, and (c) all persons who, on the day preceding the termination of the Trusteeship Agreement, are domiciled in the Northern Marianas and who, although not citizens of the TTPI, have been domiciled continuously in the Northern Marianas since before January 1, 1974.

part of the community that has made the creation of the Commonwealth possible.

It is reasonable to conclude that the drafters of the Covenant contemplated that the Commonwealth's constitution might be drawn with a similar conception of the Northern Marianas community and that this conception would be reflected in the definition of "persons of Northern Mariana Islands descent" for purposes of the land alienation restrictions. Since anyone falling within the parameters of this conception of the Northern Marianas community would automatically become a United States citizen or national pursuant to Section 301 of the Covenant, Congress' approval of the Covenant should be interpreted as at least impliedly authorizing the Government of the Northern Mariana Islands to establish United States citizenship or nationality as a condition for eligibility to acquire land in the Commonwealth.*/ Thus, Article XII does not constitute an improper assumption by the Commonwealth of congressional power to regulate interstate commerce or the status of aliens.**/

Even if Congress were not deemed to have authorized the restrictions imposed by Article XII, no impingement upon congressional power to regulate interstate commerce and aliens would exist.

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*/ If Article XII had defined "persons of Northern Mariana Islands descent" in the same terms that Section 301 of the Covenant uses for eligibility for United States citizenship, there could scarcely be any doubt that the definition would be within the contemplation of Congress. The fact that Article XII refers to a "citizen" or "national," rather than to the conditions that automatically qualify a person as a citizen or national, should not lead to a different result.

**/ Since Sections 502(a) and 805 of the Covenant specifically provide that the land alienation restrictions shall be implemented notwithstanding any otherprovisions of United States law that might be applicable to the islands, there can be no claim that the restrictions are unlawful because of a conflict with other laws of the United States. This is true whether the Covenant is viewed as a law or a treaty or both, since a treaty and a federal statute enjoy parity of status under the Constitution. See Reid v. Covert, 354 U.S. 1, 18 (1957); Whitney v. Robertson, 124 U.S. 190 (1888); Akins v. United States, 407 F. Supp. 748 (Cust. Ct. 1976).

Since the restriction is limited to the ownership of real property within the Commonwealth, Article XII does not have a prohibited effect upon interstate commerce.*/ In any event, state laws limiting the rights of aliens in the ownership or devolution of real property have been repeatedly upheld without any suggestion that the restrictions might unduly burden interstate commerce or encroach upon exclusive federal power to regulate the terms and conditions of the entry and naturalization of aliens.**/ Although more recent decisions have struck down state restrictions on the right of aliens to engage in specified occupations within the state even when special state interests were asserted,***/ those decisions acknowledged the existence of, and did not purport to overrule, decisions upholding state imposed alienage-based restrictions on the devolution and ownership of real property.**** Certainly, no suggestion has been made that such restrictions on land alienation would raise commerce clause or naturalization issues.

Thus, the only substantial constitutional issues that might be raised with respect to the restrictions on land alienation are those

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*/ Cf. Toomer v. Witsell, 334 U.S. 385, 408 (1948) (Frankfurter, J., concurring) (a State may enact legislation "to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States").

**/ See Terrace v. Thompson, 263 U.S. 197, 217 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923); Blythe v. Hinckley, 180 U.S. 333 (1901); Hauenstein v. Lynham, 100 U.S. 483 (1879).

***/ See Takahashi v. Fish & Game Comm'n, supra, 334 U.S. 410; Sugarman v. Dougall, 413 U.S. 634 (1973); In re Griffiths, 413 U.S. 717 (1973); Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572 (1976).

****/ See Takahashi v. Fish & Game Comm'n, supra, at 422 ("the power of states to control the devolution and ownership of land within their borders [is] a power long exercised and supported on reasons peculiar to real property"). See also Examining Bd. of Engineers v. Flores de Otero, supra, 426 U.S. at 603 n.34; Sugarman v. Dougall, supra, 413 U.S. at 644 n.11.

that may be implicated in equal protection, due process or privileges and immunities guarantees.*/ The pages that follow will consider the questions whether these constitutional guarantees have been preempted, so far as the land alienation restrictions are concerned, by the terms of the Covenant and, if not, whether a constitutional violation may be said to exist.

2. Has the Covenant Preempted the Application of the United States Constitution to the Restrictions on Land Alienation in the Northern Mariana Islands?

As noted above, Articles 501 and 805 of the Covenant purport to exempt the restrictions on land alienation in the Northern Mariana Islands from the application of any provisions of the United States Constitution that might otherwise operate to invalidate the restrictions. While the precise nature of the restrictions was not spelled out in the Covenant, it seems fair to conclude, as discussed above, that the restrictions contained in Article XII of the Northern Marianas Constitution (including the requirement of United States citizenship or nationality) fall within the contemplation of Section 805 of the Covenant. The initial question, then, is whether Congress, in approving the Covenant by joint resolution,**/ effectively immunized the land alienation restrictions from the application of the United States Constitution.

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*/ To the extent that the restrictions on alienation may be thought to create some burden upon the right to travel, the issue can be most usefully analyzed in terms of equal protection or privileges and immunities guarantees, since the right to travel has not been ascribed to any particular constitutional provision. See Graham v. Richardson, supra, 403 U.S. at 375; Shapiro v. Thompson, 394 U.S. 618, 629-630 & n.8 (1969); United States v. Guest, 384 U.S. 745, 757-758 (1966).

**/ Pub. L. 94-241, 90 Stat. 263 (March 24, 1976), 48 U.S.C. § 1681 note.

If the relevant provisions of the United States Constitution would otherwise have applied to the Northern Mariana Islands only as a result of congressional action, there would seem to be little question of Congress' authority to withhold the application of certain constitutional provisions in the limited context of land alienation, just as there is no reason to doubt that the Covenant effectively preempts the application of any conflicting United States laws. On the other hand, if the relevant provisions of the United States Constitution (i.e., the equal protection, due process, and privileges and immunities clauses) apply to the Northern Marianas of their own force, Congress' attempt to restrict their application would appear to be ineffective. As discussed below, the question whether these constitutional provisions apply of their own force defies a simple answer, for it is shrouded in obscure doctrines relating to the application of the Constitution to territories of the United States.*/

In a series of decisions -- the so-called Insular Cases**/

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*/ The Covenant attempts to finesse the question whether various provisions of the United States Constitution apply to the Northern Marianas of their own force. Under Section 501(a) of the Covenant, specified provisions of the United States Constitution are made applicable to the Northern Mariana Islands, "[t]o the extent that they are not applicable of their own force . . . ." By contrast, the constitutional rights to trial by jury and indictment by grand jury in civil actions or criminal prosecutions based on local law are specifically withheld "except where required by local law." Thus, the Covenant looks both ways and leaves to ultimate judicial determination, if necessary, the question whether certain constitutional provisions apply to the Northern Mariana Islands of their own force or only by virtue of congressional action.

**/ De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Balzac v. Porto Rico, 258 U.S. 298 (1922).

-- decided after the acquisition of Hawaii, the Philippines and Puerto Rico at the close of the nineteenth century, the Supreme Court dealt with the question of what provisions of the United States Constitution applied in the newly-acquired territories. The decisions recognized a distinction between what were termed "incorporated territories" (in which the provisions of the Constitution were said to apply of their own force) and "unincorporated territories" (in which only certain "fundamental" but largely undefined constitutional rights applied of their own force).*/ Although the distinguishing characteristics of the incorporated territories do not emerge with crystal clarity from the decisions, the factors that seemed to be of principal importance were as follows: (1) Was it contemplated that the territory would become a state?**/ (2) Did Congress, at the time the territory was acquired, intend to confer the full political and civil rights of American citizens upon the inhabitants of the territory?***/ (3) Did Congress expressly indicate that it intended to incorporate the territory into the United States****/ The cases

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*/ This distinction between incorporated and unincorporated territories seems to have originated in Justice White's concurring opinion in Downes v. Bidwell, supra, 182 U.S. at 287, and was followed by the Court in subsequent decisions, particularly in Dorr v. United States, supra, 195 U.S. 138, Rassmussen v. United States, supra, 197 U.S. 516, and Balzac v. Porto Rico, supra, 258 U.S. 298.

**/ See, e.g., Balzac v. Porto Rico, supra, 258 U.S. at 311; Granville Smith v. Granville-Smith, 349 U.S. 1, 5 (1955); Examining Board of Engineers v. Flores de Otero, supra, 426 U.S. at 599 n.30.

***/ See Rassmussen v. United States, supra, 197 U.S. at 522; Balzac v. Porto Rico, supra, 258 U.S. at 309.

****/ See Rassmussen v. United States, supra, 197 U.S. at 522; Balzac v. Porto Rico, supra, 258 U.S. at 306.

suggest that, so far as overseas territories are concerned, "incorporation [is] not to be assumed without express declaration, or an implication so strong as to exclude any other view."*/

It is clear that the Northern Mariana Islands do not satisfy the criteria for incorporation enunciated in the Insular Cases. There has been no indication of congressional intent specifically to incorporate the Northern Mariana Islands into the United States, and there is no basis for concluding that the Northern Marianas are destined for statehood. Nor can it be said that Congress has manifested an intention to confer all of the political and civil rights of American citizens uon the inhabitants of the Northern Marianas. Indeed, the Covenant's specific limitations on the applicability of particular constitutional guarantees -- such as the right of trial by jury and indictment by grand jury -- would contradict any such inference. In light of the foregoing, the fact that the vast majority of the inhabitants of the Northern Marianas will become United States citizens when the Trusteeship Agreement is terminated does not make the islands into an incorporated territory.**/ In short, the Commonwealth -- which will enjoy a

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*/ Balzac v. Porto Rico, supra, 258 U.S. at 306.

**/ Although the Jones Act, 39 Stat. 951 (1917), gave United States citizenship to the vast majority of the inhabitants of Puerto Rico, that was held not to indicate an intention to incorporate Puerto Rico into the United States. Balzac v. Porto Rico, supra, 258 U.S. at 307-308.

status more similar to Puerto Rico than to anything else -- should, like Puerto Rico*/ not be deemed to constitute an incorporated territory.

Under the doctrine of the Insular Cases, the fact that the Northern Mariana Islands are not an incorporated territory means that the provisions of the United States Constitution do not apply to the islands in toto of their own force. For present purposes, the significant question is whether the equal protection, due process and privileges and immunities guarantees of the United States Constitution necessarily follow the flag into unincorporated territories**/ to a degree that would preclude the Government of the Northern Mariana Islands from imposing the restriction on land alienation contained in Article XII even when specifically authorized and directed to do so by Congress.

In determining whether a particular constitutional right is so "fundamental" that it applies of its own force to an unincorporated territory, the Insular Cases considered whether the constitutional provision at issue was consistent with

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*/ Puerto Rico was held not to be an incorporated territory before 1952, when Congress adopted a joint resolution approving the Constitution and new Commonwealth status of Puerto Rico. See Balzac v. Porto Rico, supra, 258 U.S. 298; Figueroa v. Puerto Rico, 232 F.2d 615 (1st Cir. 1956). And the adoption of the joint resolution in 1952 has been held not to have changed this result. See Fournier v. Gonzalez, 269 F.2d 26 (1st Cir. 1959). For a general discussion of the applications of the United States Constitution in Puerto Rico, see Leibowitz, "The Applicability of Federal Law to the Commonwealth of Puerto Rico," 56 Geo. L.J. 219 (1967).

**/ Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953); cf. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5.

the needs, capacities, and established customs of the territory's inhabitants.*/ The "fundamental" constitutional rights that were identified in the Insular Cases and their progeny as applying of their own force in the unincorporated territories included certain aspects of due process**/ and apparently the right to just compensation.***/ Although there were intimations in dicta that the broad spectrum of basic "natural" or "personal" rights -- such as freedom of speech and the press, free access to courts of justice, entitlement to due process of law and equal protection of the laws, and "such other immunities as are indispensable to a free government"****/ -- might also fall within the category of "fundamental" rights applicable to unincorporated territories, the issue remained ambiguous, for the cases focused principally upon identifying constitutional guarantees that were not deemed to apply of their own force in the unincorporated territories.*****/ Thus, for all that has been written, the "incorporation" doctrine and the

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*/ See, e.g., Dorr v. United States, supra, 195 U.S. at 148.

**/ See Balzac v. Porto Rico, supra, 258 U.S. at 312-313; Mora v. Mejias, supra, 206 F.2d at 382.

***/ See Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953)

****/ Downes v. Bidwell, supra, 182 U.S. at 282-283; Balzac v. Porto Rico, supra, 258 U.S. at 312-313.

*****/ See, e.g., Hawaii v. Mankichi, supra, 190 U.S. 197 (constitutional rights to indictment by a grand jury and unanimous petit jury verdict in criminal cases do not apply of their own force to the Hawaiian Islands); Dorr v. United States, supra, 195 U.S. 138 (constitutional right of trial by jury does not apply of its own force to an unincorporated territory); Balzac v. Porto Rico, supra, 258 U.S. 298 (same).

subsidiary issue of what constitutional provisions apply of their own force in the unincorporated territories remain confused and ambiguous.*/

More recently, a helpful framework for analyzing these issues was provided by the Supreme Court in Reid v. Covert,**/ a case dealing with the issue of court-martial jurisdiction over civilian dependents of armed service personnel stationed overseas. In Reid, three members of the Court joined Justice Black in focusing upon the fact that the unincorporated territories involved in the Insular Cases "had entirely different cultures and customs from those of [the United States]."***/ Thus, according to Justice Black, the determination that only certain "fundamental" constitutional rights applied of their own force in unincorporated territories was based upon the fact that the territories involved had "wholly dissimilar traditions and institutions" from the continental United States.****/ It was for this reason that Congress' Article IV, § 3 power to govern and regulate such territories was deemed to be subject only to certain "fundamental" constitutional restrictions.

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*/ See Figueroa v. Puerto Rico, supra, 232 F.2d at 619 ("We really do not know for sure just what provisions of the Constitution of the United States became applicable ex proprio vigore in this unincorporated territory.").

**/ 354 U.S. 1 (1957).

***/ Id., at 13.

****/ Id., at 14.

While Justice Black's opinion properly recognized the importance, in the Insular Cases, of the special traditions, institutions, and customs of the unincorporated territories, it did not provide a suitable framework for analyzing the question whether a particular constitutional provision should be deemed to apply in such a territory. In their separate concurrences in Reid, Justices Frankfurter and Harlan did suggest such a framework. Justice Frankfurter stressed that the Insular Cases presented the problem of "harmonizing constitutional provisions [--specifically, harmonizing Congress' power under Article IV, § 3 to make all needful rules and regulations for the territories with constitutional limitations on its powers --] which appear, separately considered, to be conflicting."*/ As Justice Frankfurter read the Insular Cases, the appropriate approach to resolving any conflict among the constitutional provisions is to engage in a "detailed examination of the relation of the specific 'Territory' to the United States" in order to determine whether, in the particular case, "a specific provision of the Constitution" should be deemed to restrict Congress' Article IV, § 3 power to govern the territory.**/

Justice Harlan agreed with the Frankfurter analysis and went on to explain that the Insular Cases should be read

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*/ Reid v. Covert, supra, 354 U.S. at 41, 54.

**/ Id., at 53-54.

as standing for the proposition "that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."*/ Adherence to a specific constitutional guarantee in an overseas territory should not be required when it would be impracticable and anomalous.**/ "The question," according to Justice Harlan,

> "is which guarantees of the Constitution should apply [in the overseas territory] in view of the particular circumstances [of the local setting], the practical necessities, and the possible alternatives which Congress had before it. The question is one of judgment, not of compulsion." ***/

Thus, the unincorporated territory doctrine of the Insular Cases, as interpreted in Reid, stresses that the testing issue in determining whether a particular constitutional provision applies to an unincorporated territory is whether the provision is consistent with the needs, customs, traditions, culture and institutions of the territory in any given situation. To be sure, when a more basic or fundamental guarantee of personal liberty is at issue, a greater inconsistency should be required before the constitutional provision is found to be inapplicable than when a less fundamental constitutional guarantee is involved. But in either case, an assessment should be made of whether blanket application of the constitutional provision to the territory would unduly interfere with the

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*/ Reid v. Covert, supra, 354 U.S. at 65, 74.

**/ Id.

***/ Id., at 75.

culture, traditions and institutions of its inhabitants.

Cases dealing with the application of constitutional provisions to American Indian tribes provide precedent for adopting the analytical approach suggested by Reid. A series of decisions beginning with Talton v. Mayes,*/ established the proposition that the provisions of the Bill of Rights and Fourteenth Amendment do not apply to tribal governments.**/ Taken literally, the decisions can be said to rest upon the view that the tribes are not states***/ (hence, the Fourteenth Amendment does not apply) and are not exercising powers of the federal government****/ (hence, the Bill of Rights does not, for the most part, apply).*****/

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*/ 163 U.S. 376 (1896).

**/ In the exercise of its plenary authority over the self-governing tribes, Congress has, however, enacted the Indian Civil Rights Act, imposing on the tribal governments specific restraints that, for the most part, are copied verbatim from the Constitution. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301 et seq.). However, the provisions of the Indian Civil Rights Act have not been interpreted as strictly as the constitutional provisions on which they are modeled. See, e.g., Daly v. United States, 483 F.2d 700 (8th Cir. 1973). For a discussion of the constitutional immunity doctrine as applied to tribal government, see Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343 (1969) (hereafter cited as "Indian Bill of Rights").

***/ See, e.g., Glover v. United States, 219 F. Supp. 19, 21 (D. Mont. 1963).

****/ See Talton v. Mayes, supra, 163 U.S. 376.

*****/ The same has been said about the unincorporated territories. See Examining Bd. of Engineers v. Flores de Otero, supra, 426 U.S. at 606-608 (Rehnquist, J., dissenting).

But the doctrine of constitutional immunity for tribal government is supported by a more general recognition, both in Congress and in the courts, that the Indian tribes have a special need for protection against exploitation by outsiders, that the United States Government stands in a guardian-ward relationship to the tribes,*/ and that it is important, as well as constitutionally permissible, to preserve Indian cultural institutions and autonomy.**/ These same concerns (coupled with the fact that the Constitution confers plenary power on Congress to regulate commerce with the Indians and authorizes the President to make treaties with the advice and consent of the Senate) have served as the cornerstone for decisions holding that it is permissible for Congress to single out Indians for preferred (or at least special) treatment vis-a-vis other Americans.***/ It has been suggested that Indians "should not be excluded completely from the protection of the Constitution," but that they should be deemed to have a constitutionally cognizable interest "in maintaining traditional

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*/ Citing United States v. Kagama, 118 U.S. 375 (1886), the Court in Board of County Commissioners v. Seber, 318 U.S. 705, 715 (1943), noted that the United States Government has assumed the duty of protecting the Indians "against the selfishness of others and their own improvidence." See also Kills Crow v. United States, 451 F.2d 323, 326 (8th Cir. 1971), cert. denied, 405 U.S. 999 (1972)

**/ See, e.g., Daly v. United States, supra, 483 F.2d at 705. See generally, "Indian Bill of Rights," supra, at 1344-1345 & n.8.

***/ See Morton v. Mancari, 417 U.S. 535, 551-555 (1974); Kills Crow v. United States, supra, 451 F.2d at 325-326.

practices that conflict with constitutional concepts of personal freedom developed in a different social context."*/

The grounds for recognizing a doctrine of constitutional immunity (or at least such limited constitutional immunity as is necessary to protect a dependent society and preserve its cultural values) apply with equal force in the case of the Northern Marianas. As in the case of the Indian tribes, the inexperience of the people of the Northern Mariana Islands leaves them vulnerable to exploitation by outsiders from countries with more well-developed economies. As in the case of the Indians, the United States Government, in the Trusteeship Agreement, has assumed a type of a guardian-ward relationship with the islanders. And the people of the Northern Marianas, like the Indians, have special cultural values and institutions, distinct from those of the continental United States, that Congress, in the Covenant, has recognized and attempted to preserve. Finally, as in the case of the Indians, congressional power to deal with the Northern Marianas derives from special constitutional provisions -- in this case, the Article IV, § 3 power to "dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging

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*/ "Indian Bill of Rights," supra, at 1351. The commentator suggested that such an interest might be recognized by analogy to the doctrine of unincorporated territories. Id, at 1351-1352.

to the United States," coupled with the Presidential treaty making power of Article II, § 2.

In sum, under the analysis developed in Reid (as supported by the analogy to the doctrine of constitutional immunity for Indian tribes), there appear to be sound and, indeed, compelling reasons to conclude that the equal protection, due process, and privileges and immunities provisions of the United States Constitution should not be applied to invalidate the land alienation restrictions contained in Article XII of the Northern Marianas Constitution, if those restrictions play an essential role in (1) protecting the islanders against their own improvidence and exploitation by outsiders and (2) preserving their cultural traditions and identity. Both the United States Congress and the people of the Northern Mariana Islands have explicitly found that the land alienation restrictions will play an essential role in accomplishing these objectives, and there is no reason to question their judgment. Consequently, the doctrine of unincorporated territories, as enunciated in the Insular Cases and expounded in Reid, should be construed so as to make the equal protection, due process, and privileges and immunities guarantees of the United States Constitution inapplicable to the Northern Mariana Islands insofar as Article XII's restrictions

on land alienation are concerned.*/

3. Would the Restrictions on Land Alienation in the Northern Mariana Islands Violate the Equal Protection, Due Process or Privileges and Immunities Provisions of the United States Constitution if Those Provisions Were Not Preempted by the Covenant?

At pages ___ - ___, supra, it was shown that, on the basis of the unincorporated territory doctrine as elaborated in Reid v. Covert, the equal protection, due process and privileges and immunities provisions of the United States Constitution should not be deemed to apply of their own force to the Northern Mariana Islands so far as the land alienation restrictions of Article XII are concerned. Although the analysis was framed in

*/ It is true that the courts have long accepted the principle that certain due process and equal protection guarantees are applicable in Puerto Rico, without identifying whether the Fifth Amendment or Fourteenth Amendment is the source of the constitutional guarantee. See Examining Bd. of Engineers v. Flores de Otero, supra, 426 U.S. at 601; Calero-Toledo v. Pearson Yacht Leasing Co., supra, 416 U.S. at 662 n.5; Mora v. Mejias, supra, 206 F.2d at 382; Stagg, Mather & Hough v. Descartes, 244 F.2d 578, 583 (1st Cir. 1957). But see Ward v. Board of Examiners of Engineers, 409 F. Supp. 1258 (D.P.R. 1976) (assuming that the equal protection clause of the Fourteenth Amendment applies to Puerto Rico). However, the Joint Resolution of Congress approving the Constitution of the Commonwealth of Puerto Rico subjects the Puerto Rican Government to "the applicable provisions of the Constitution of the United States," 66 Stat. 327, and does not purport to restrict the applicability of the due process or equal protection guarantees that were involved in the foregoing cases. Moreover, there is no reason to believe that application of the particular due process and equal protection guarantees involved in those cases posed any threat to the cultural values and traditions of Puerto Rico. Consequently, the cases applying due process and equal protection concepts to Puerto Rico should not be deemed to require that due process and equal protection guarantees of the United States Constitution must be applied to the Northern Marianas with respect to the restrictions on land alienation contained in Article XII.

terms of the applicability or nonapplicability of the constitutional provisions, it should be recognized that the factors underlying that analysis are appropriate matters to consider in analyzing whether the constitutional provisions would be violated if they were deemed to be applicable. When the issue is analyzed in this manner, the restrictions on alienation should be found to be constitutionally unobjectionable.

Although it has been assumed thus far that the relevant constitutional provisions include due process and privileges and immunities as well as equal protection, the constitutional analysis can, as a practical matter, be subsumed within the notion of equal protection. The basic issue is whether the distinction drawn between those who are eligible to acquire long-term real property interests in the Northern Marianas and those who are not is, under the circumstances, constitutionally permissible. A determination that it is not permissible would amount to a finding that the distinction drawn is such an egregious and invidious discrimination that it offends notions of due process as well as equal protection and that the governmental interest served by the distinction is too slight to justify the resulting interference with the privilege and immunity of a United States citizen to acquire property in the islands.*/ Although equal protection and

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*/ As a related matter, it might be asserted that, by prohibiting a United States citizen on the mainland from acquiring land in the Northern Marianas, the restriction has a chilling effect on the constitutionally protected right to travel, since a person may be deterred from moving to an area where he knows he cannot acquire a long-term interest in land.

privileges and immunities claims have sometimes been treated separately,*/ the constitutional analysis of the two issues has generally been merged into a single inquiry, couched largely in terms of equal protection.**/

As noted above, the distinction drawn in Article XII of the Northern Marianas Constitution is twofold. First, there is a distinction between United States citizens and nationals on the one hand and aliens on the other. Second, there is a distinction between those United States citizens and nationals who can trace descent from persons born or domiciled in the Northern Marianas before 1950 (and who became citizens of the TPPI) and those who cannot. The combined effect of these distinctions is to limit eligibility to acquire long-term interests in real property in the islands to those "persons who are part of the community that has made creation of the Commonwealth possible . . . ."***/

Since the eligibility requirements disadvantage aliens, the classification, if imposed by a state, would ordinarily be subject to what has been termed "strict judicial scrutiny" under the equal protection clause,****/ and, to be upheld, it would have to be shown that

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*/ See, e.g., Toomer v. Witsell, supra, 334 U.S. at 403.

**/ See Examining Bd. of Engineers v. Flores de Otero, supra, 426 U.S. at 599-606 (the question whether aliens have been deprived of privileges or immunities secured by the Constitution is analyzed as an equal protection issue); Sugarman v. Dougall, supra, 413 U.S. 634; In re Griffiths, supra, 413 U.S. 717; Graham v. Richardson, supra, 403 U.S. 365; Shapiro v. Thompson, supra, 394 U.S. 618.

***/ Analysis of the Constitution, supra, at 177.

****/ See, e.g., Graham v. Richardson, supra, 403 U.S. at 371-372; For a discussion of the rationale for judicial review of differing severity depending upon whether or not a suspect classification or fundamental personal interest is involved, see "Developments in the Law -- Equal Protection," 82 Harv. L. Rev. 1065, 1076-1133 (1969).

the government's "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."*/ Under the rigors of this judicial test, state-imposed alienage-based classifications have faced rough sledding in the courts in recent years. Beginning in 1948, when the Court struck down a California statute that made it more difficult for the son of an alien who was ineligible for United States citizenship to acquire land than for the son of a citizen or eligible alien to do so,**/ there has been a virtually unbroken string of decisions invalidating discriminations against aliens.***/ However,

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*/ In re Griffiths, supra, 413 U.S. at 721-722.

**/ Oyama v. California, 332 U.S. 633 (1948).

***/ See Takahashi v. Fish & Game Comm'n, supra, 334 U.S. 410 (striking down a California statute denying commercial fishing licenses to aliens ineligible for citizenship); Graham v. Richardson, supra, 403 U.S. 365 (striking down Arizona statute establishing citizenship or fifteen year residency as a condition to receiving welfare); Sugarman v. Dougall, supra, 413 U.S. 634 (striking down New York statute that established citizenship as a qualification for certain positions of state employment); In re Griffiths, supra, 413 U.S. 717 (striking down a Connecticut statute establishing citizenship as a requirement for admission to the bar); Examining Bd. of Engineers v. Flores de Otero, supra, 426 U.S. 572 (striking down a Puerto Rican statute establishing citizenship as a requirement for a civil engineer license); Norwich v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976), appeal pending as No. 76-808, 45 U.S.L.W. 3467 (Sup. Ct. January 11, 1977) (striking down New York statute barring aliens for employment as public school teachers unless they have applied for United States citizenship); Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976), probable jurisdiction noted, 45 U.S.L.W. 3329 (Sup. Ct. November 2, 1976) (striking down New York statute disqualifying resident aliens from receiving scholarship assistance). See also Hampton v. Mow Sun Wong, supra, 426 U.S. 88 (invalidating a Civil Service Commission rule denying aliens eligibility for most civil service positions). Hampton, however, rested upon a finding that there had been no clear delegation of authority by Congress or the President to the Civil Service Commission to establish the particular eligibility requirement. Three of the Justices joining in the majority

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the courts have not had occasion to rule upon the constitutionality of alienage-based restrictions on the ownership or devolution of real property, and a state's special interest in controlling the use and transfer of real property within its borders may still constitute a sufficient basis for distinguishing decisions striking down discrimination against aliens in other contexts.*/ Thus, even if this were a simple case of state-imposed discrimination, there would be a substantial question as to whether the land alienation restriction was invalid.

But this is not a simple case of state-imposed discrimination. The Northern Marianas are not a state but an unincorporated territory entering into a unique relationship with the United States. And, as discussed at pages ___ - ___ above, restricting the acquisition of long-term real property interests in the Northern Marianas to United States citizens or

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(Continued from page 27)

opinion noted, without deciding, that if Congress or the President had established the citizenship requirement in the federal service, "overriding national interests [might have provided] a justification . . . even though an identical requirement may not be enforced by a State." Id. at 100-101. The four dissenters concluded that Congress could have excluded aliens from the civil service. Id. at 127. (Rehnquist, J., dissenting). And in Mathews v. Diaz, supra, 426 U.S. at 84-85, the Court stated that the equal protection analysis "involves significantly different considerations . . . [when the issue] concerns the relationship between aliens and the States rather than between aliens and the Federal Government."

*/ See, p. 10, note **/, supra. The Supreme Court has suggested, for example, that a state's special interest in defining the "political community" may justify establishing citizenship as a criterion for voting and office holding. See Sugarman v. Dougall, supra, 413 U.S. at 647-649. The Supreme Court of Colorado has recently held that provisions denying aliens the right to vote in local school elections do not violate equal protection or interfere with federal authority to regulate immigration and naturalization. Skafte v. Rorex, 553 P.2d 830 (Colo. 1976), appeal pending as No. 76-951, 45 U.S.L.W. 3548 (Sup. Ct. February 15, 1977).

nationals can be said to have been authorized by Congress when it approved the Covenant. Since Congress, "[i]n the exercise of its broad power over naturalization and immigration,"*/ regularly treats aliens less favorably than citizens without thereby violating equal protection concepts embodied in the Fifth Amendment due process clause,**/ the fact that Article XII's alienage-based distinction is congressionally-derived rather than state-imposed should itself be sufficient to save the land alienation restriction from successful equal protection or due process challenge. This is particularly so since Congress is also empowered to make distinctions among aliens***/ -- thereby suggesting that the second criterion of Article XII (i.e., the requirement of Northern Marianas descent) is also legitimate.

Quite apart from the fact that the distinctions drawn in Article XII of the Northern Marianas Constitution are congressionally-derived rather than state-imposed, the restrictions on land alienation should survive an equal protection-due process attack because of the unique situation involved. As noted above, the islanders are particularly vulnerable to economic predation by outsiders and possess

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*/ Mathews v. Diaz, supra, 426 U.S. at 79-80.

**/ Id., at 77-80. As the Court has observed, different considerations are involved when the equal protection test is applied to "the relationship between aliens and the States rather than between aliens and the Federal Government." Id., at 84-85.

12 U.S.C. § 619 requires that a majority of the shares of capital stock in a corporation organized to engage in banking or other financial operations in a dependency or insular possession of the United States must at all times be held and owned by citizens of the United States or by corporations or firms controlled by citizens of the United States. The provision has apparently never been challenged and was cited by the Supreme Court as an example of the types of federally-imposed distinctions between citizens and aliens that have long existed. See Mathews v. Diaz, supra, 426 U.S. at 78 n.12.

***/ Mathews v. Diaz, supra, 426 U.S. at 81-84.

a land-based culture and social organization that would suffer massive dislocation if the land were lost. In these circumstances, if the equal protection concept is to be applied to the land alienation restriction at all, the strict scrutiny to which the classification might be subject in other contexts should be tempered by a recognition of the special considerations involved.

The land alienation restriction in the Northern Marianas does, to be sure, specifically single out a designated group for special treatment, and the explicit intent to protect and benefit members of the favored group is a matter of public record. Thus, there is no need to explore issues of "purpose" versus "effect" in making the constitutional analysis.*/ But the fact that the conceded intent is to protect and benefit the class of those eligible to acquire land does not make the restriction constitutionally infirm.**/

Again, reference to the constitutional treatment of American Indians is illuminating. The Supreme Court has explicitly recognized that congressional legislation affording specific preferences to Indians does not constitute invidious racial discrimination in violation of the equal protection and due process provisions of the Constitution.***/ Because of the

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*/ Cf. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 45 U.S.L.W. 4073 (Sup. Ct. January 11, 1977).

**/ Cf. Califano v. Webster, 45 U.S.L.W. 3626 (Sup. Ct. March 22, 1977) (upholding a Social Security Act provision that was specifically intended to compensate women for the past history of economic discrimination and disabilities).

***/ Morton v. Mancari, supra, 417 U.S. at 551-555.

Federal Government's special protective relationship to the Indian tribes and because federal power to deal with the Indians derives from special constitutional provisions, legislation that singles out Indians for special treatment is not deemed to constitute invidious racial discrimination.*/ So long as the legislation or regulations at issue could be deemed to relate to a "legitimate nonracially based goal" -- i.e., furthering the cause of Indian self-government -- no equal protection violation would exist.**/

The land alienation restrictions in the Northern Marianas are susceptible of a similar analysis. As discussed at pages ___ - ___ above, the islanders can be compared to the Indian tribes in terms of their need for federally-sanctioned protection against outside exploitation, their nurturing of special cultural values and institutions,***/ and the fact that Congress' power to deal with the islands derives from special constitutional provisions. Moreover, the concerns underlying the

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*/ Id., at 551-552. Since Congress, rather than a tribal government, established the distinction at issue, the case could not be disposed of on the basis of the constitutional immunity enjoyed by the tribes in their dealings with tribe members. See pp. ___ - ___, supra.

**/ Id., at 554. In characterizing the goal as being "non-racially based," the Court must have had in mind that the legislation and implementing rules were not adopted for the purpose of disadvantaging non-Indians, although that would be the inevitable effect.

***/ It has been suggested that "the needs for self-definition and cultural preservation, taken together, may well . . . [present] compelling justification for [a sex-based] classification [within an Indian tribe]. There would undoubtedly be sufficient justification [for such a classification] under the rational relationship test." "Note, Equal Protection under the Indian Civil Rights Act," 90 Harv. L. Rev. 627 (1977).

land alienation restriction in the Northern Marianas appear to be at least as legitimate, nonracially-based and compelling as the goals served by the Indian preference rules sustained in Morton v. Mancari.

Consequently, if the equal protection clause is to be applied to the Northern Marianas land alienation restriction at all, its rigor should, as in the case of Indian tribes, be tempered by a respect for the islanders' legitimate interests in being protected from outside exploitation and preserving their cultural values and institutions.*/ When the issue is analyzed in these terms, no invidious discrimination or other constitutional infirmity should be found.

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*/ Cf. "Indian Bill of Rights," supra, at 1351.