

VARIETIES OF DIFFERENTIATED CITIZENSHIP IN MULTILEVEL SYSTEMS: ASYMMETRIC AND MULTILEVEL CITIZENSHIP

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I. Introduction

Comparative citizenship scholars have recently shown a renewed interest in multilevel citizenship (“MLC”), which has led to a challenge to the traditional conceptions of citizenship as a “unitary and homogeneous legal status granted to an individual by a sovereign state”¹ There are many historical and contemporary examples of MLC, challenging the hegemonic narrative of a single, territorial and state-based citizenship.²

Both at the supranational level (the EU, for example) and at the sub-state level (regions in decentralized states, sub-state national societies in multinational states), there are institutions and political forces that demand a plural and heterogeneous understanding of citizenship and a recognition that it can manifest itself at more

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¹ WILLEM MAAS, MULTILEVEL CITIZENSHIP I (Willem Maas, ed., Philadelphia: University of Pennsylvania Press (2013).

² *Id.* at 1-2.

than one level. For example, in decentralized multinational democracies such as the United Kingdom, the institutional arrangements in the three devolved regions are themselves very different. The public attitudes of the citizens of Scotland and Wales demonstrate that we need to examine how they perceive their citizenship: whether in United Kingdom-wide or Scottish/Welsh-only frames or in more nuanced multi-levelled forms.³

Moreover, many forms of differentiated citizenship have been implemented by states in different regions and epochs.⁴ The specific rationales for civic differentiation have varied, as I explain below. In this article, I seek to distinguish several forms of differentiated citizenship of the sort described by Rogers Smith et al. I want to distinguish between forms of multilevel citizenship as described by Willem Maas and his collaborators, and another category I would label as forms of “asymmetric citizenship,” which has not been acknowledged properly in the literature. One could argue that all of them may be encompassed by the umbrella term “differentiated citizenship,” but these diverse forms of plural citizenship need to be disaggregated and their normative, constitutional, and empirical parameters need to be specified.

Multilevel citizenship is about vertical differentiation, between different levels of governance, above and below the state level. Asymmetric citizenship is a type of differentiation that within the same state and its territories establishes categories of citizenship, some of which are fragmentary, unique, ad hoc, or inferior, and thus essentially creating horizontal categories of state membership, or group-differentiated horizontal citizenship regimes. Perhaps the most interesting setting for examining asymmetric citizenship regimes has been in the political treatment given by Empires to their territories in the nineteenth and twentieth centuries, but there are a number of contemporary examples of asymmetric citizenship regimes in liberal democratic polities.

The term “asymmetric citizenship” is a novel one, but I think it is especially adequate to describe the constitutional status it denotes. Previous scholarship, both in constitutional law and in politics, is more likely to refer to this inferior constitutional status as “second class citizenship” or “substandard citizenship” or “inferior citizenship.” All of the former terms imply a simple ordinal relationship between a primary category of citizenship that enjoys all the privileges afforded by a political status and a secondary category of citizenship that enjoys lesser privileges. But, asymmetric citizenship is more about a categorical inferiority than a simple ordinal relationship. It also implies a system-wide duality between a large number of

³ CHARLIE JEFFERY & DANIEL WINCOTT, *CITIZENSHIP AFTER THE NATION STATE: REGIONALISM, NATIONALISM AND PUBLIC ATTITUDES IN EUROPE* 32 (Ailsa Henderson, et al. eds., 2014).

⁴ Rogers M. Smith, *The Insular Cases, Differentiated Citizenship and Territorial Statuses in the 21st Century*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

citizens that all possess the same privileges and a reduced number of citizens that are in possession of lesser privileges. Thus, the “asymmetry” in the phrase asymmetric citizenship implies that while most citizens enjoy a fairly symmetrical citizenship, being privy to the same privileges and status, there is also a category of citizens that, exceptionally, has been bestowed a cluster of rights and privileges that are different, and distinctly inferior.

II. Varieties of Differentiated Citizenship

Multilevel citizenship is a form of vertical “differentiated citizenship,” while asymmetric citizenship is about horizontal civic differentiation. Differentiated citizenship is the overarching term that refers to forms of civic differentiation, which also generally challenge the hegemonic conception of citizenship as a single, unitary, and symmetric legal status granted equally to all the “citizens” of a sovereign state. In the U.S. context, historically some of the most important forms of differentiated citizenship have been repudiated as systems of unjust inequality.⁵ In liberal democracies, there has been a powerful tendency insisting on civic equality and a universal status for all citizens, but historically there have been forms of differentiated or second-class citizenship, especially for non-whites, ethnic minorities, and women. Yet, in the contemporary period, it has been argued that forms of differentiated citizenship -- including distinct forms of territorial membership -- are necessary to achieve “meaningfully equal membership statuses.”⁶

According to Smith’s typology, the varieties of differentiated citizenship are as extensive as its many forms, but four general patterns can be discerned. Remedial differentiated citizenship refers to policies aiming to overcome the inequalitarian consequences of past unjust differentiations and at opposing current forms of invidious discrimination.⁷ Accommodationist differentiation refers to “policies structured to recognize various persons’ and groups’ distinctive senses of their identities, values, and interests by varying legal regulations and public services so they can flourish in their own ways, yet equally with other citizens.”⁸ Preservationist differentiation reflects conservative visions “reflecting the desires of powerful political actors to distinguish – usually to limit --- the civic status of some who they see...as threats to current arrangements that these powerful actors value.”⁹ Legacy differentiated citizenship are forms of differentiation that originated as “inherited policies created for reasons that have lost force, so that they actually have few strong supporters

⁵ *Id.* at 103.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

now... Yet persist because no clear or intensely motivated consensus on alternative policies exists..."¹⁰ The first two types of differentiation are forms of progressive differentiated citizenship, whereas the last two are essentially conservative visions of differentiated citizenship.

The first two (remedial and accommodationist) are often interrelated. In recent times, it is accommodationist civic differentiation arguments that have been gaining supporters. Based on such rationales, the phenomenon of differentiated citizenship has been growing, despite the commonly held belief in the ideals of uniform citizenship.¹¹ The pervasive success of the accommodationist rationale is evident in the increasing acceptance of multi-level citizenships, dual or multi-national citizenships, etc.¹² The rationale behind accommodationist civic differentiation is that it creates "more meaningful equality of status and opportunities for persons while recognizing their distinct histories, aspirations, and needs, rather than as departures from norms of equal membership. But if they are forms of equal citizenship, they are also generally forms of differentiated citizenship."¹³

Multilevel citizenship is a form of civic differentiation that is essentially based on accommodationist rationales, whereas asymmetric citizenship endures in some states or sub-state regions as a form of civic differentiation on the basis of legacy or preservationist rationales.

A. Multilevel Citizenship and the Myth of a Homogeneous and Single Nation-State Citizenship

The hegemonic conception of citizenship as a single, unitary, monolithic, symmetric, unidimensional, and linear legal status granted equally to all the "citizens" of a sovereign state is increasingly challenged in recent scholarship. The (sometimes mythical) nation-state has traditionally been seen as a singular polity perfectly aligning one nation with one state and serving as a monochromatic political container. As Brubaker noted, modern citizenship serves as both an "object" and an "instrument" of social closure. Together, citizenship's instrument- and object-of closure functions mutually reinforce each other.¹⁴ "This circularity permits nation-states to remain... relatively closed and self-perpetuating communities, reproducing their membership in a largely endogenous fashion, open only at the margins to the exogenous recruitment of new members."¹⁵ Brubaker's conceptualization of

¹⁰ *Id.*

¹¹ *Id.* at 105.

¹² *Id.* at 107.

¹³ *Id.*

¹⁴ CHRISTIAN JOPPKE, *CITIZENSHIP AND IMMIGRATION* 17 (Cambridge: Polity Press 2010).

¹⁵ ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 34 (1992).

citizenship as social closure is an enduring contribution, but a corrective needs to be added. If states are polities using citizenship as a mechanism of social closure, states themselves are more multilayered, polychromatic, and more heterogeneous than usually allowed, and moreover, developments at the sub-state and supra-state levels are creating the conditions for a multi-levelled citizenship.

As Maas notes, we need to free citizenship from its entanglement with assumptions about territoriality and exclusivity, opening up new possibilities for exploring the statuses and identities of individuals, groups, and nations “in the interstices of sovereignty.”¹⁶ We need to revise the traditional unitary conception of citizenship to take into account new political phenomena, both at the sub-state and supra-state levels. On the one hand, important developments in European Union citizenship may result in meaningful supra-national rights. On the other hand, in multinational federal political systems, the demand for differentiated group rights and for more self-government by territorially-based sub-state nations also challenges the traditional conception of a single, symmetric, and homogeneous legal status for all citizens in a state. In fact, in historical perspective, the “comparative history of citizenship provides rich examples of multilevel citizenship in theory and practice, although such examples are today often forgotten or obscured by the dominant narrative of a single and homogeneous, territorial, state-based citizenship...Indeed, unitary citizenship is the historical exception; more common are varieties of multilevel citizenship.”¹⁷

Theorists of a more heterogeneous and multi-levelled conception of citizenship thus seek to critique narrow, statist, and unidimensional notions of citizenship. Part of the problem, they would argue, is related to one of the common characteristics of postwar social science: its methodological nationalism, which is the unproblematic assumption that the nation-state is the “natural” unit of analysis.¹⁸ There is also a critique of the epistemological presuppositions of methodological nationalism. They put forward the notion that sub-state or regional scales (or sub-state national ones, as in the United Kingdom or Spain), as well as supra-national ones, have become much more important as political place-makers in the last thirty to forty years. They underscore the extent to which citizens “define and pursue collective goals at regional scales and through regional institutions as well as at the scale of the nation-state” and the supra-national level.¹⁹ Thus, they are proponents of both multilevel governance (particularly in the EU context) and the new regionalism in

¹⁶ Mass, *supra* note 1, at vii.

¹⁷ *Id.* at 1-2.

¹⁸ CHARLIE JEFFERY, INTRODUCTION: REGIONAL PUBLIC ATTITUDES BEYOND METHODOLOGICAL NATIONALISM *in*, CITIZENSHIP AFTER THE NATION STATE: REGIONALISM, NATIONALISM AND PUBLIC ATTITUDES IN EUROPE 1 (Ailsa Henderson, et al. eds., 2014).

¹⁹ *Id.* at 1-2.

Europe.²⁰ No longer is there an unreflective preoccupation with the nation-state as an “unchallengeable framework for public action.” Now, instead both the region and the supra-national level are seen as important scales for social mobilization, economic activity, and public policy.²¹

Theorists of multileveled citizenship thus consider conceptions of citizenship that are “not necessarily tied to particular states but rather exist over, under, around, and through them.”²² Multilevel citizenship scholars see a need to capture the nuance of citizenship in theory and practice in the contemporary world, showing the “artificiality and arbitrariness of the sovereign state’s monopoly on conferring citizenship.”²³ This is not to say that the nation-state has become redundant or insignificant as regional-scale and supranational-scale politics become more important.²⁴ It may yet be that the state-wide scale remains the primary political focus of most citizens, but a purely statist perspective on citizenship would be tantamount to mischaracterizing the contemporary political world. Citizenship needs to be recast as a form of political community that responds to the demands of distinctive regional (or sub-state national) political communities, the supranational level, as well as the state-wide scale.²⁵ No one is foreseeing the disappearance of the state by regionalizing or supranational tendencies, but rather “the consolidation of a multileveled statehood.”²⁶

B. Multilevel Citizenship in Practice: Public Attitudes in European States and Regions

Multilevel citizenship can be observed in practice by referring to regional-scale public attitudes. One of the best available data sets of this sort is the Citizenship After the Nation-State (“CANS”) project developed by the team led by Charlie Jeffery, Ailsa Henderson, et al. of the University of Edinburgh. Designed to measure public attitudes at regional scales and to explore how citizens negotiate multi-levelled statehood, ultimately this project involved research teams in Austria, France, Germany, Spain, and the United Kingdom. Analyzing public attitudes in fourteen sub-state regions, this project delved into public attitudes in Salzburg, Upper Austria, Vienna, Alsace, Brittany, Île de France, Bavaria, Lower Saxony, Thuringia, Catalonia, Galicia, Castilla-La Mancha, Scotland, and Wales.²⁷

²⁰ MICHAEL KEATING, *ASYMMETRICAL GOVERNMENT: MULTINATIONAL STATES IN AN INTEGRATING* (1999).

²¹ JEFFERY, *supra* note 18, at 2-4.

²² MAAS, *supra* note 1, at 3.

²³ *Id.* at 2.

²⁴ JEFFERY, *supra* note 18, at 7.

²⁵ *Id.* at 8-9.

²⁶ *Id.* at 8.

²⁷ JEFFERY, *supra* note 3.

Catalonia, Scotland, or Wales are regions with a clear sense of nationhood rather than mere administrative units, while other regions present more of a “regional” identity.²⁸ This project sought to inquire in the first place into the “extent to which citizens engage in political participation through regional institutions as compared to state-level institutions...Second, do citizens conceive of their obligations to one another at the scale of regional or state-wide community?”²⁹ The project proposed three independent variables –identity, institutional, and economic – that were likely to have an impact on the degree to which citizens identified and pursued collective goals at regional scales.

Their first hypothesis posited that identity (national or regional) “will influence how citizens participate across electoral levels or conceive social solidarity across territorial scales”³⁰, which requires us to first inquire whether identities themselves are multi-levelled. The project’s findings in this regard, using a bi-polar identity scale, was that Scotland, Catalonia, Wales, and Galicia were the regions with the most “regional” (or sub-state “national”) identities, when one adds together the respondents that identified with an exclusive or predominantly regional identity. At the other end of the scale, Vienna, Alsace, Lower Saxony, Île de France and Castilla-La Mancha showed a pattern in which state identities effectively outweighed regional identities.³¹ Interestingly, their most notable finding is that in all regions there are dual attachments to region and state. Even in Scotland, the “most regional” case, seventy-eight point seven percent (78.7%) of respondents claim some measure of British identity. The most “state-wide” case was Lower Saxony, but even there seven point three (70.3%) of respondents had a degree of regional identity. Scotland, Catalonia, Wales, and Brittany had the strongest relative attachment to the region. Their findings imply that stronger relative attachment to region will lead to greater propensity to favor political participation and to express solidarity at the regional scale. Yet, with the exception of Catalonia, “at least 40% of respondents everywhere had a strong attachment to the state as a whole. Territorial identities clearly appear to be multi-levelled.”³²

Their second hypothesis is that institutional authority will have an impact on how citizens approach political participation and social solidarity at the regional level, as compared to the state-wide level. The question that is formulated is whether the self-rule and shared rule dimensions of “institutional authority have differential effects on how citizens approach political participation and social solidarity, with a strong shared-rule dimension conceivably fostering “state-wideness.”³³ Scotland,

²⁸ *Id.* at 38.

²⁹ *Id.* at 12.

³⁰ *Id.* at 15.

³¹ *Id.*

³² *Id.* at 16.

³³ *Id.* at 17.

Catalonia, Galicia, and Wales were the top four regions expressing the opinion that regional decisions are very important, “suggesting that subjective measures of the importance of regional decisions may be shaped by the strength of regional identity. There is also a familiar ring in the pattern of attributing importance to *both* regional and (especially) state-level decisions; there is relatively little cross-regional variation around the latter... But the view that regional institutions should have more power is everywhere in our survey a majority view, and one held by supermajorities of three-quarters or more respondents in all but three regions (Castilla-La Mancha, Île de France, and Bavaria)”.³⁴

In sum, the CANS data points to a number of factors that could nudge citizens to pursue “collective goals at regional scales: Where there are strong regional identities; where there is a strong demand for more powerful regional institutions; and where there is a clear sense that the region is doing well economically relative to others.”³⁵ The data give us an indication of how multilevel citizenship works in practice (at least in Europe): it suggests that “citizens understand their own collective identities and the institutional opportunities they have for pursuing collective goals as being both regional *and* state-wide.”³⁶ In Austria, France, Germany, Spain, and the United Kingdom, multilevel citizenship in these terms may be both regional and state-wide. The CANS data has shown us a portrait of how multilevel citizenship works in practice: it may be that citizens’ understanding of their citizenship may be more multi-levelled and multi-hued than is commonly believed.

C. Asymmetric Citizenship in Practice: Civic Differentiation in the U.S. Territories

Asymmetric citizenship refers to forms of civic differentiation in a particular territory of a given state that are inherently unequal, inferior, or fragmentary vis-à-vis the rights and privileges that are enjoyed by the rest of the citizens in the same state. Asymmetric citizenship is *de jure* civic differentiation: within one region of a state there is a type of citizenship that is different from the full-fledged, symmetric citizenship that is offered to the majority of citizens of the state in question. If we look at the history of citizenship in the nineteenth and twentieth centuries, we will find examples of asymmetric citizenship, particularly in the types of citizenship regimes established by empires in some of their territories or by former empires in the way they have treated their former territories in their citizenship policies. The history of differentiated citizenship in the imperial domains in the last 140 years or so is vast and fascinating, and a full account of it is beyond the scope of this

³⁴ *Id.* at 18.

³⁵ *Id.* at 22.

³⁶ *Id.*

article. Suffice it to say that examples could be drawn from the history of French colonialism in its treatment of the inhabitants of Algeria from the 1840s until 1962³⁷ and in the various ways the British offered forms of asymmetric citizenship to some of the inhabitants of its vast Empire, in particular as the Empire transitioned to the British Commonwealth³⁸ or the way Spain's late nineteenth colonial strategy included offering a form of citizenship in 1897 to some of its remaining colonials.³⁹ Forms of quasi-asymmetric "citizenship" (or juridical-political status) among some of the conquered peoples of imperial powers is a recurring feature of classic empires such as the Roman, the Austro-Hungarian, or the Ottoman empires.⁴⁰ Even liberal democratic states in the twentieth century, in their treatment of some of the citizens in their territories acquired by imperial conquest, have instituted forms of asymmetric citizenship. The United States is the quintessential example of the latter, and we shall now discuss this major case, which remains topical to date.

As Rogers Smith has noted, the USA now exerts its direct sovereignty over more land outside its core federation than any other state on Earth. Currently, this includes the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the territories of Guam, US Samoa, and the U.S. Virgin Islands (Saint Thomas, Saint John, and Saint Croix), and a number of small Pacific Islands.⁴¹ The populations in these extra-federation territories are small, but Puerto Rico has more residents than twenty-two of the current U.S. states.⁴²

Pursuant to the *Insular Cases*, all of these territories are "unincorporated territories", which is a legal status denoting Congress' general unwillingness to convert them into units of the federation.⁴³ Yet, Congress granted U.S. citizenship for the inhabitants of all these territories, except US Samoa. Still, the rights and privileges of these territories vary from those of the citizens of the fifty states. Guam is still a territory governed by Congress' 1950 Organic Act for Guam, which granted U.S. citizenship on its residents. At the height of the civil rights era, Congress authorized popular elections for the governors of Guam and the Virgin Islands, and it

³⁷ TODD SHEPARD, *THE INVENTION OF DECOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE* (2006); PATRICK WEIL, *HOW TO BE FRENCH: NATIONALITY IN THE MAKING SINCE 1789* (2008); IAN LUSTICK, *UNSETTLED STATES, DISPUTED LANDS* (1993).

³⁸ RANDALL HANSEN, *CITIZENSHIP AND IMMIGRATION IN POST-WAR BRITAIN* (2004). See the British Commonwealth Immigrants Act of 1962. *Id.* at 123.

³⁹ MALAVÉ BURGOS & EDA MILAGROS, *GÉNESIS Y PRÁXIS DE LA CARTA AUTONÓMICA DE 1897 EN PUERTO RICO* (1997); JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997).

⁴⁰ KAREN BARKEY, *EMPIRE OF DIFFERENCE: THE OTTOMANS IN COMPARATIVE PERSPECTIVE* (2009); JANE BURBANK, & FREDERICK COOPER, *EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE* (2010).

⁴¹ Smith, *supra* note 4.

⁴² *Id.*

⁴³ EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* (2001).

provided both with non-voting delegates to Congress in 1972.⁴⁴ Yet, in the late 1980s, Congress refused to grant greater self-government comparable to its neighbor, the Commonwealth of the Northern Mariana Islands. A segment of the political spectrum in Guam has also sought to have their citizenship status altered “from congressionally based to constitutionally based by a declaration that their status derives from the citizenship clause in Section one of the Fourteenth Amendment, a position that the U.S. has resisted.”⁴⁵ The U.S. Virgin Islands were acquired from Denmark in 1917 and are governed by a congressional Revised Organic Act of 1954, which amended a 1936 Act that created a Senate that comprises the islands’ unicameral legislature. Like Guam, residents there are U.S. citizens and in the early 1970s gained authority to elect their governor and have a non-voting representative in Congress. In 2010, Virgin Islanders approved a constitution for Congress’ approval but Congress sent it back for amendments, because it inadequately recognized U.S. sovereignty and seemed to unduly advantage persons of local birth and ancestry.⁴⁶ In 1944, the U.S. invaded the Marianas in 1944, then under Japanese domination. In 1947, the U.S. formally acquired the fifteen Northern Mariana Islands. In 1976, the U.S. entered into a Covenant that created the “Commonwealth of the Northern Mariana Islands in political union with the United States, in part because it regarded them, like neighboring Guam, as key to its Pacific strategic interests...”⁴⁷ In 1986, the Commonwealth adopted its own constitution, its trusteeship status was terminated, most of its residents became U.S. citizens, and gained a non-voting representative in Congress. In 2008, Congress imposed on the CNMI immigration laws by way of the Consolidated Natural Resources Act.

In all the U.S. territories, what is most politically remarkable is how the United States “continues to assert its legal authority to engage in substantial administrative supervision and to legislate over many if not all territorial matters, including decisions on the scope of the U.S. government’s own authority. It does so ultimately on the basis of Congress’ Article IV, section three powers to ‘make all needful rules and regulations respecting the territory or other property belonging to the United States.’ These include powers to treat the citizens of territories differently from state citizens...and U.S. statutes and judicial rulings often do so...”⁴⁸

Apart from the CNMI, Guam, US Samoa, and the USVI, the most interesting U.S. territory is Puerto Rico because of its size, cultural and linguistic traits, and population (about three point six million on the island and going down quickly after Hurricane Maria, and another five point four million plus on the mainland many of

⁴⁴ Smith, *supra* note 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

which are circulators).⁴⁹ The citizenship regime established since 1898 (and 1917) for the residents of Puerto Rico is the most important contemporary exemplar of asymmetric citizenship in the United States. The asymmetry in their citizenship has three components: first, there is asymmetry in their rights of political participation. Second, there is asymmetry in their social and economic rights (including fiscal rights and privileges). Third, there is asymmetry in the nature of the political status they have on the island, when compared to the constituent units of the federation. The U.S. citizenship of Puerto Ricans was set by federal statute in 1917, and thus it is not Fourteenth Amendment birthright citizenship.

Regarding rights of political participation, their capacity to influence the political process at the federal level through the normal channels of congressional and presidential politics is limited, given that they have no Congresspersons representing them (except for one non-voting representative) and cannot vote in U.S. presidential elections. In the politics of sub-state regions/nations, there is a tradeoff between capacity (to influence the center) and autonomy⁵⁰ and the asymmetric citizenship imposed on Puerto Ricans since 1917 is an extreme case of this. Moreover, it is true, that since 1952 there has been a certain willingness on the part of autonomists in Puerto Rico to accept near zero formal political influence on the center in exchange for the perception (real or imagined) of greater regional autonomy.

There is a federal district court on the island: it is in the U.S. First Circuit and its judges are selected by the usual process for federal judges. Curiously, the federal court in Puerto Rico behaves in a symmetric fashion, just like any other federal court in the federation. Thus, for example, Spanish is not an official language of the court. Judges address the court in English, court documents must be in English and if a witness or lawyer speaks in Spanish, this must be translated by an official interpreter into English.

Regarding social and economic rights (including fiscal rights and privileges), the asymmetric citizenship of Puerto Ricans exhibits a remarkable degree of differentiation. “Congress routinely treats Puerto Rico and the other territories worse than it does states. Consider Medicaid, which provides health insurance for the poor. The one billion in annual Medicaid funding that Puerto Rico receives

⁴⁹ DUFFY BURNETT & BURKE MARSHALL, *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* (Duffy Burnett & Burke Marshall eds., 2006); Puerto Ricans are circulators: there is a heavy bidirectional flow of people between the U.S. continent and the Island. Estimates of the extent of circulation vary widely, but what is clear is that more and more Puerto Ricans are remapping the borders of their identity by moving frequently between the Caribbean and North America. JORGE DUANY, *THE PUERTO RICAN NATION ON THE MOVE: IDENTITIES ON THE ISLAND AND IN THE UNITED STATES* 33 (2002).

⁵⁰ Eve Hepburn, *The New Politics of Autonomy: Territorial Strategies and the Uses of European Integration by Political Parties in Scotland, Bavaria, and Sardinia, 1979-2005* (2007) (Ph.D. Dissertation, European University Institute, Florence).

from Washington is about twenty percent of the five billion received by similar-size Oregon. Puerto Rico is also treated unequally under Medicare, even though my constituents pay the same federal payroll taxes that fund much of this program. The Affordable Care Act – Obamacare – has been the subject of partisan debate, but the law’s rarely mentioned defect is that the territories are barred from most of its new programs and protections... Puerto Rico is excluded from the Supplemental Security Income program that aids the most vulnerable Americans. It does not participate in the federal nutrition program, instead receiving a block grant that shortchanges it by \$450 million a year. Puerto Rico is partly excluded from the child tax credit and fully from the earned-income tax credit, which encourages low-income individuals to seek employment. Unlike a state, Puerto Rico cannot authorize its public enterprises to seek relief under Chapter nine of the federal bankruptcy code, which impedes its recovery.”⁵¹

There is a well-worn argument that perhaps asymmetric citizenship in Puerto Rico is justified because Congress does not require Puerto Rico residents to pay federal income taxes on local earnings, but this is not entirely correct. First of all, residents of Puerto Rico do pay federal income taxes in certain circumstances. Federal civil servants in Puerto Rico do pay federal taxes. In addition, one must pay federal income taxes whenever one’s source of income originates in the federation or if one’s source of income is in a foreign country. Beyond these special cases, the fact is that “nearly half of all stateside households do not earn enough to owe income taxes, but are still treated equally.”⁵² This situation in fact creates another form of (negative) asymmetry: “because of federal tax credits, a working-class family of four in the States is likely to have greater take-home pay than an identical family in Puerto Rico.”⁵³

The asymmetric citizenship of the residents of Puerto Rico is inherent in the nature of the political status they have on the island, when compared to the constituent units of the federation. Hence, the unincorporated territory political status means that U.S. laws apply to its residents without their consent. U.S. laws can override the provisions of the ELA constitution. The President of the U.S and

⁵¹ Pedro Pierluisi, *Statehood is the Only Alternative for What Ails Puerto Rico*, N.Y. TIMES, (July 10, 2015), <https://www.nytimes.com/2015/07/11/opinion/statehood-is-the-only-antidote-for-what-ails-puerto-rico.html>. The current political, economic, social, and fiscal crisis of the *Estado Libre Asociado* (ELA) is rooted precisely in the asymmetric citizenship of the residents of PR, and the political/economic strictures of the unincorporated territory status. Puerto Rico is a subordinated sub-state region, subject to the arbitrariness of the federal government. “Unequal treatment at the federal level, combined with mismanagement at the local level, has a debilitating effect on the island’s economy. To compensate for the lack of federal support, the Puerto Rico government has borrowed heavily.” *Id.* In the last five years, there has been a steady out-migration from PR to the federation, where Puerto Ricans “are entitled to vote for their national leaders and to equal treatment under federal law.” *Id.*

⁵² *Id.*

⁵³ *Id.*

the Executive branch can negotiate treaties, etc. that affect PR in important ways without its consent. Moreover, “through the unilateral grant by Congress of diversity jurisdiction, United States courts decide cases involving strictly local matters of law. There is no equality or comparability of rights between United States citizens residing in Puerto Rico and those domiciled in the States. Congress assumes that it can unilaterally exercise plenary powers over Puerto Rico under the territorial clause of the U.S. Constitution. The U.S. government contends that sovereignty over Puerto Rico resides solely in the United States and not in the people of Puerto Rico.”⁵⁴

Two recent constitutional developments further dramatize how the asymmetric citizenship of the residents of Puerto Rico is inherent in the nature of the political status they have on the island, when compared to the constituent units of the federation. The first is the recent U.S. Supreme Court case of *Commonwealth of Puerto Rico v. Sánchez Valle*.⁵⁵ This is the most important Supreme Court decision on Puerto Rico’s political status since *Boumediene et al. v. Bush*.⁵⁶ Prior to *Boumediene*, a number of cases seemed to distance themselves (even if timidly) from the traditional doctrine of the *Insular Cases*. For example, in *Harris v. Rosario*⁵⁷, Justice Marshall expressed in his dissent that the holding of the *Insular Cases* was questionable, and in *Torres v. Puerto Rico*,⁵⁸ Justice Brennan in his concurrence also questioned the validity of these “old cases” such as *Downes* and *Balzac*. However, in the 2008 case of *Boumediene* the majority opinion stated that the “Court designed in the *Insular Cases* a doctrine that permitted us to use power frugally and where most needed. This doctrine of more than a century informs our analysis in the current case.”⁵⁹

That brings us to *Sánchez Valle*. Ostensibly a case about criminal procedure, it is the most definitive and authoritative statement on the nature of the ELA in recent times. The Court held that the Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws. Ordinarily, a person cannot be prosecuted twice for the same offense. But, under the dual-sovereignty doctrine, the Double Jeopardy Clause does not bar successive prosecutions if they are brought by separate sovereigns.⁶⁰ Yet the “sovereignty” in this context does not have its common meaning. Rather, the test hinges on a single criterion: the “ultimate source” of the power undergirding the respective prosecutions.⁶¹ If the two entities derive their power to punish from

⁵⁴ TRIAS MONGE, *supra* note 39, at 162.

⁵⁵ 136 S. Ct. 1863 (2016).

⁵⁶ 553 U.S. 723 (2008).

⁵⁷ 446 U.S. 651 (1980).

⁵⁸ 442 U.S. 465, 475-6 (1979).

⁵⁹ *Boumediene*, 553 U.S. at 759.

⁶⁰ *United States v. Lanza*, 260 U.S. 377, 382 (1922).

⁶¹ *United States v. Wheeler*, 435 U.S. 313, 320 (1978).

independent sources, then they may bring successive prosecutions. Conversely, if those entities derive their power from the same ultimate source, then they may not.

Under that approach, the States are separate sovereigns from the Federal Government and from one another. Because States rely on “authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment,” state prosecutions have their roots in an “inherent sovereignty” unconnected to the U.S. Congress.⁶² For similar reasons, Indian tribes also count as separate sovereigns. A tribe’s power to punish pre-existed the Union, and so a tribal prosecution, like a State’s, is “attributable in no way to any delegation...of federal authority.”⁶³ Conversely, a municipality cannot count as a sovereign distinct from a State, because it receives its power, in the first instance, from the State.⁶⁴

With respect to the U.S. territories, the Court concluded in the early twentieth century that they are not sovereigns distinct from the United States.⁶⁵ The Court reasoned that the “territorial and federal laws were creations emanating from the same sovereignty,”⁶⁶ and so federal and territorial prosecutors do not derive their powers from independent sources of authority. The Court recognized that when the ELA was born in 1950-1952 by virtue of Public Law 600, Congress “relinquished its control over the Commonwealth’s local affairs, granting Puerto Rico a measure of autonomy comparable to that possessed by the States.”⁶⁷ Also, “Puerto Rico, like a state is an autonomous political entity, is sovereign over matters not ruled by the Federal Constitution.”⁶⁸ The court emphasized the purely local nature of the self-rule powers accorded to Puerto Rico in 1950-52. The Puerto Ricans drew up their own Constitution in 1950-52, but “back of the Puerto Rican people and their Constitution, the “ultimate” source of prosecutorial power remains the U.S. government, just as back of a city’s charter lies a state government.”⁶⁹ That makes Congress the original source of power for Puerto Rico’s prosecutors – as it is for the federal government.

In sum, the Puerto Rico government and the United States’ federal government are not separate sovereigns. Puerto Rico is a subordinate autonomy that enjoys a sphere of self-government only for purely local matters, and is not a separate sovereign, as are the constituent units of the USA federation. U.S. states have an “inherent sovereignty” unconnected to, and indeed pre-existing, the U.S. Congress. They are

⁶² *Health v. Alabama*, 474 U.S. 82, 89 (1985).

⁶³ *Wheeler*, 435 U.S. at 328.

⁶⁴ *Waller v. Florida*, 397 U.S. 387, 395 (1970).

⁶⁵ *Grafton v. United States*, 206 U.S. 333 (1907).

⁶⁶ *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937).

⁶⁷ *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976).

⁶⁸ *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

⁶⁹ *Wheeler*, 435 U.S. at 320.

separate sovereigns from the federal government and from each other. However, Puerto Rico's authority to govern itself is ultimately derived from the federal government. This holding, therefore, is a veritable reassertion of the subordinate nature of the ELA, absolutely subject to the Territorial Clause of the U.S. Constitution.

Importantly, the Obama Administration, through its Solicitor General Donald Verrilli, filed an amicus brief in this case in December 2015 that supported the positions taken in the majority opinion in *Sanchez Valle*. In that brief, the Solicitor General argued that "Congress may treat Puerto Rico differently from States by virtue of Congress' power under the Territory Clause."⁷⁰ Puerto Rico has some control over its purely local affairs as a U.S. territory, but is not a sovereign under the U.S. Constitution. In fact, it does not have an independent and separate existence from the U.S. federal government.⁷¹

Second, Puerto Rico's current economic and fiscal crisis has deep historical-structural causes. The federal government has responded with a statute known as (after its acronym) PROMESA, which became law on June 30, 2016.

This statute establishes a Fiscal Control Board with broad powers of budgetary and financial control over Puerto Rico. It creates procedures for adjusting debts accumulated by the Puerto Rico government and its instrumentalities. It would expedite approvals of key energy projects and other "critical projects" in Puerto Rico. Section 101 of the statute specifies that the Fiscal Control Board has been established pursuant to the Territorial Clause granting Congress plenary authority over its territories. Section 104 specifies that the Board can hold hearings, issue subpoenas, obtain information, enter into contracts, enforce Puerto Rico labor laws, initiate civil actions to carry out its responsibilities, etc. Title II specifies the enormous powers of the Board to set fiscal plans and budgets. Essentially, under PROMESA the Puerto Rico government no longer has any authority over economic and fiscal plans, or the government's budget. That will all be set by the Fiscal Control Board.

The Board's seven members have been designated (none of which represent the interests of the Puerto Rican people), and the Board is now fully operational. Many have said that it is no longer the Puerto Rican people who are in charge of their own affairs through their government. Instead, the major decisions affecting the people's welfare in the next few years will be taken by an unelected and unaccountable Fiscal Control Board.

In the last forty years, "Spain, Belgium, the United Kingdom, and even France, have moved toward systems that accommodate minorities through autonomy, whether through pluralist federation, devolution within union states or federacies."⁷²

⁷⁰ Brief for Respondents, at 28.

⁷¹ *Id.* at 26.

⁷² JOHN MCGARRY ET AL., INTEGRATION OR ACCOMMODATION? THE ENDURING DEBATE IN CONFLICT REGULATION, *in* CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 67 (Sujit C houdhry ed., 2008).

Regions with nationally-differentiated communities have been increasingly oriented towards seeking an autonomous special status or towards gaining greater power as a constituent unit of a fully formed federation. There are different varieties of territorial pluralism, and we need to understand which of these varieties tend to institute regimes of asymmetric citizenship.

Most cases of multilevel citizenship occur in regionalized or federalized states. More specifically, many cases of multilevel citizenship tend to occur in sub-state regions that enjoy a degree of political autonomy. Yet, some of these cases also exhibit asymmetric citizenship while others do not. Thus, in what sorts of autonomy arrangements do we see asymmetric citizenship established?⁷³ Indeed, the asymmetric citizenship of the residents of Puerto Rico is inherent in the nature of the political status they have on the island, when compared to the constituent units of the federation. Puerto Rico's autonomy has very few (or none) elements of federalism, similar to other autonomies such as Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and the Isles of Man, Jersey, Guernsey.

III. Nested Differentiated Citizenship: Asymmetric Citizenship within Multilevel Citizenship

If we take the civic differentiation in the U.S. territories (Puerto Rico in particular) as an example of asymmetric citizenship, it could be argued that, with respect to its citizenship regime, asymmetry is nested within a degree of multilevelledness. Although scholars have not produced a data set comparable to the CANS project reviewed above, I have gathered some data in Puerto Rico that will help us compare one of the components of the CANS dataset. We may recall that the CANS project's first hypothesis regarding "multi-levelled citizens" in sub-state regions in Europe was that the sense of attachment to a particular territorial community such as region or state will influence how citizens participate across electoral levels or conceive of social solidarity across territorial scales.⁷⁴ This requires us to examine first of all the degree to which identities themselves are multi-level. Jeffery et al. remarked that their most notable finding is that in all regions there are dual attachments to region and state. As mentioned above, they noted that even in Scotland, the "most regional" case, seventy-eight point seven percent (78.7%) of respondents claim some measure of British identity, etc.

We have seen that the citizenship of the residents of Puerto Rico is a powerful exemplar of asymmetry, but is it also a form of multilevel citizenship?

⁷³ The discussion in this paragraph is based on my previous research. See Jaime Lluich, *Autonomism and Federalism*, 42 PUBLIUS: THE JOURNAL OF FEDERALISM 1, 134-161 (2012).

⁷⁴ JEFFERY, *supra* note 18, at 15.

I conducted field research in Puerto Rico some years ago that may help us answer this question.⁷⁵ This involved open-ended surveys administered to the militants of the principal political parties there. One of the elements in the questionnaire was a question posing a bi-polar identity scale.

Tables 1-3 below present the results of the quantifiable portions of the questionnaire responses received from the militants of the three political parties in Puerto Rico. The questionnaire answers summarized below refer only to Part I of the questionnaire, on Nation and Identity.⁷⁶

Obviously this is not a data set on the scale of the CANS project. But it is a portrait of how independentists, autonomists, and federalists think. I will concentrate on autonomists and federalists, which represent about ninety-five percent (95%) of the political spectrum on the Island.

Federalists exhibit dual attachments to region (or sub-state nation) and state (the USA), with the great majority of them identifying as both Puerto Ricans and Americans, or more Americans than Puerto Ricans. In fact, the majority of them wrote that Puerto Rico was not a nation. Yet, the majority also identified Puerto Rico as their country (“patria”), and the majority wrote that the USA was either their nation or the state to which they belonged as citizens. Autonomists show a strong sense of Puerto Rican nationhood, yet many seem to exhibit dual attachments to region and state, as in the case of the European regions examined by the CANS project, with sixty-three percent (63%) identifying the USA as the “state to which I belong as a U.S. citizen.”

⁷⁵ In the last few decades, the three political parties on the Island have been the *Partido Independentista Puertorriqueño* (PIP), *Partido Popular Democrático* (PPD), and the *Partido Nuevo Progresista* (PNP). The PIP is an independentist nationalist party with a social democratic lineage, while the PPD is a centrist to center-right autonomist national party that lately has developed a minority sovereigntist wing. The PNP is a right-wing federalist party (advocates becoming the fifty-first unit of the U.S. federation) that oscillates between semi-national positions and anti-national ones, from the perspective of Puerto Rican society. These parties together represent ninety-nine (99%) of the political opinions on the Island, given that aside from some very small extraparliamentary political groupings on the left, there are no other sizeable political associations. These three parties have their Congresses every year or two, usually in the summer, and I have been able to attend the Congresses of the PPD and the PNP in 2006-2008. There I distributed a questionnaire among the militants of these parties, originally designed to further my research on varieties of nationalism in minority nations’ national movements and majority-nation nationalism, and as a continuation of the research I have done on Québec-Canada and Catalonia-Spain. The PIP did not give me permission to attend their 2007 Congress, and instead they distributed my questionnaire by email to some of their militants, and in August, 2008 I attended the Congress of another independentist organization, the *Movimiento Independentista Nacional Hostosiano* (MINH). Although the questions were designed as a continuation of my research on sub-state national movements, some of the questions are useful for exploring the depth and breadth of these militants’ national identities. In total, I have received 273 answered questionnaires. Numerous interviews with upper echelon political leaders have been conducted.

⁷⁶ Moreover, it was open-ended and therefore there were certain responses that could not fit into a table, but will be presented in the discussion herein.

These militants' responses represent ninety-nine percent (99%) of all Puerto Ricans' views on constitutional politics, since 1952 to date. It would seem that many residents of Puerto Rico exhibit dual attachments to the region (or sub-state nation) and the state (the USA). In this sense at least, the residents of Puerto Rico are multi-levelled citizens, in addition to asymmetric citizens belonging to the broad federal political system that we call the United States. The asymmetry in their citizenship is nested within its multi-levelledness.

Table 1. Regional and state attachments among independentists in Puerto Rico. Responses from PIP and MINH militants (N=27).

Puerto Rico is a Nation?	National Identification	What is the United States?	What is Puerto Rico?	Puerto Rico is Cultural ⁷⁷ or Political ⁷⁸ nation?
Yes-99%	Only Puerto Rican- 93%	My <i>Patria</i> - 0% ("country")	My <i>Patria</i> - 85% ("country")	Political- 7%
No- 0%	More Puerto Rican than United States identity- 0%	My Nation- 0%	My Nation- 14%	Political and Cultural- 74%
Other-1% Colony	Other- 7% Caribbean, Latin American	The State to which I belong as a U.S. citizen-7%	A region of the USA without a national personality-0%	Only Cultural- 19%
		The colonizing state that conquered PR in 1898- 81.4%	Other- 1% Colony	
		Other- 12% Imperial state, Intervener		

⁷⁷ Defined as one presenting the distinctive traits of a people, like customs, language, or culture.

Table 2. Regional and state attachments among autonomists in Puerto Rico. Responses from PPD militants (N=197).

Puerto Rico is a Nation?	National Identification	What is the United States?	What is Puerto Rico?	Puerto Rico is Cultural or Political nation?
Yes-99%	Only Puerto Rican-58%	My <i>Patria</i> -1% (“country”)	My <i>Patria</i> - 45% (“country”)	Political-22%
No- 0%	More Puerto Rican than United States identity- 33%	My Nation-1%	My Nation- 54%	Political and Cultural-54%
Other-1% Colony	Equally Puerto Rican and U.S.A. identity-9%	The State to which I belong as a U.S. citizen-63%	A region of the USA without a national personality-1%	Only Cultural-24%
	Other- 1% PR with US citizenship	The colonizing state that conquered PR in 1898- 28%	Other- 1% Colony	
		Other- 7% Partner, Good Neighbor, Nothing		

⁷⁸ Defined as one presenting a political will combined with a national consciousness.

Table 3. Regional and state attachments among federalists in Puerto Rico. Responses from PNP militants (N=49).

Puerto Rico is a Nation?	National Identification	What is the United States?⁷⁹	What is Puerto Rico?	Puerto Rico is Cultural or Political nation?
Yes-45%	Only Puerto Rican- 6%	My <i>Patria</i> - 16% (“country”)	My <i>Patria</i> - 63% (“country”)	Political- 2%
No-55%	More Puerto Rican than United States identity- 6%	My Nation- 38.7%	My Nation- 22%	Political and Cultural- 25%
Other-0%	Equally Puerto Rican and United States identity- 71%	The State to which I belong as a U.S. citizen-49%	A region of the USA without a national personality-16%	Only Cultural- 28%
	More United States than Puerto Rican identity- 14%	The colonizing state that conquered PR in 1898- 14%	Other- 2% Colony, An Island	Other- 8% None
	Other- 3% PR, but US citizen	Other-0%		No answer- 37%

IV. Conclusion: Multilevel Citizenship and Asymmetric Citizenship in Multilevel Systems

The umbrella term “differentiated citizenship” encompasses a variety of forms of civic differentiation, all of which challenge the traditional conception of citizenship as unitary, symmetric, and statist. The political and constitutional history of regional and federal states, and the evolving supranational citizenship of the EU, show that citizenship needs to be reconceptualized as a form of vertical differentiation: it is a *multilevelled* phenomenon, existing over, under, around, and through states. On the other hand, this article has shown that there is a second important category of differentiated citizenship. *Asymmetric* citizenship is a type of differentiation that within the same state and its peripheral regions establishes differentiated categories of citizenship, some of which are fragmentary, unequal, ad hoc, or subordinated, and thus essentially creating horizontal categories of state membership, or group-differentiated citizenship regimes. Asymmetric citizenship

⁷⁹ These add up to more than 100% because the respondents sometimes chose more than one alternative, out of five presented.

is much less acknowledged in the literature in constitutional law and in political science, and the use of the phrase in itself is a novel contribution.

Data from the CANS project has shown us how multilevel citizenship works in practice. In many European sub-state regions, residents seem to understand their own collective identities and the institutional opportunities they have for pursuing collective aims in both regional *and* state-wide terms. Asymmetric citizenship often originates in the types of citizenship regimes established by empires in some of their territories or by former empires in the way they have treated their former territories in their citizenship policies. But in the twentieth century, some liberal democracies have established forms of asymmetric citizenship in their treatment of the residents in their territories acquired by imperial conquest. The territories of the USA are good exemplars of the latter, with Puerto Rico being the most paradigmatic case. The asymmetry in the citizenship of residents of an autonomy like Puerto Rico has three components: first, there is asymmetry in their rights of political participation. Second, there is asymmetry in their social and economic rights (including fiscal rights and privileges). Third, there is asymmetry in the nature of the political status they have on the Island, when compared to the constituent units of the federation. Data from one of these territories (Puerto Rico) shows that their asymmetric citizenship is nested within a multi-levelled citizenship.

Lastly, we have examined the territorial basis of civic differentiation. The asymmetric citizenship of the residents of Puerto Rico (and other similar autonomies) is inherent in the nature of the political status of their territory. There are different varieties of territorial pluralism, and not all of them institute regimes of asymmetric citizenship. Most cases of multilevel citizenship occur in autonomies in regionalized or federalized states. However, cases that exhibit asymmetric citizenship arise primarily in autonomies with few (or none) federalist elements.

