Elevating the Perspectives of U.S. Territorial Peoples: Why the *Insular Cases* Should Be Taught in Law School

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I. INTRODUCTION

"[W]e are spectators of our history without being able to do anything. . . .

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We have no voice. That hurts a lot."[1] For over a century, residents of the United States' "unincorporated" territories have grappled with their role as "spectators" to sweeping federal congressional power over their lands and lives. From voting to citizenship, from public benefits to rights to trial by jury, territorial peoples' experiences diverge sharply from those living in the states.[2] The doctrine of the *Insular Cases*—a key part of this colonial history—provides the constitutional justification for this disparity.[3] Pursuant to the *Insular Cases*, Congress freely chooses which portions of the Constitution apply in the unincorporated territories, limited only by vaguely defined "fundamental" rights.[4] Today, largely viewed by courts through a formalist, ahistorical lens, and devoid of racial reality,[5] the *Insular Cases* still shape the colonial experience of millions of territorial peoples in the United States. And in the context of increasingly violent storms and humanitarian crises in Puerto Rico and the U.S. Virgin Islands,[6] alongside the looming threat of nuclear war in Guam,[7] these colonial burdens intensify.

Puerto Rico's debt crisis is visible evidence of this lasting colonial relationship. For a few short blips in the summer 2016 news cycle, Americans learned that a new federal fiscal control board would take over Puerto Rico's power to negotiate with creditors, decide which projects would be funded, approve budgets, and veto debt issuances, among other changes—without regard

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[1] Mireya Navarro, *A Sad Homecoming to Puerto Rico's Economic Crisis*, N.Y. TIMES (July 21, 2016), https://lens.blogs.nytimes.com/2016/07/21/a-sad-homecoming-to-puerto-ricos-economic-crisis (quoting Puerto Rican resident Erika P. Rodríguez).

[2] *See infra* Part II.

[3] *See* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 462–63 (2002); Juan Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 77 REV. JURÍDICA U. P.R. 1, 6–7 (2008); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The* Insular Cases *(1901–1922)*, 65 REV. JURÍDICA U. P.R. 225, 228 (1996).

[4] *See* Downes v. Bidwell, 182 U.S. 244, 290–91 (1901); s*ee infra* Part II.

[5] *See* Boumediene v. Bush, 553 U.S. 723, 759 (2008) (describing the relevance of the *Insular Cases* without acknowledging their application to or impact on today's territorial "possessions" or peoples); Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1866 (2016) (briefly citing to one of the *Insular Cases* in passing but failing to articulate its historical context); Igartúa-de la Rosa v. United States, 417 F.3d 145, 147 (1st Cir. 2005) (en banc) (citing the *Insular Cases* for the sanitized statement that "Puerto Rico became associated with the United States as an unincorporated territory").

[6] *See* John Nichols, *Hurricane-Ravaged Puerto Rico and the Virgin Islands Are Part of the US Too*, NATION (Sept. 11, 2017), https://www.thenation.com/article/hurricane-ravaged-puerto-rico-and-the-virgin-islands-are-part-of-the-us-too; Steven Cohen, *How Hurricane Maria Could Change Puerto Rico's Political Future*, NEW REPUBLIC (Oct. 3, 2017), https://newrepublic.com/article/145133/hurricane-maria-change-puerto-ricos-political-future.

[7] *See* Julian Aguon, *When You Live in a Colony, You Are Easy Meat: Guam in the Crosshairs of Warmongering*, IN THESE TIMES (Aug. 21, 2017), http://inthesetimes.com/article/20439/Guam-United-States-North-Korea-Donald-Trump-Colonization; Joseph Hincks, *Guam Before the Storm: Life on the Island Caught Between Trump and Kim*, TIME (Aug. 17, 2017), http://time.com/4894953/guam-north-korea-trump-missiles.

to the wishes of Puerto Rico's leaders or people.[8] Now, in 2017, the media tells us that we "can't ignore" Puerto Rico's "bankruptcy"[9] because it may impact Americans' retirement investments, interfere with states' ability to borrow, throw the U.S. bond market into turmoil, or intensify Puerto Rican migration to the continental United States.[10] But the underlying reasons for this "blatant colonialism"[11] or new "colonial takeover"[12] of Puerto Rico's fiscal decision-making power are likely lost on the American public. In essence, because Puerto Rico is not a state, it cannot access Chapter 9 bankruptcy protections. At the same time, because it is a "State," it has no right to devise its own mechanism for restructuring its soaring debt.[13]

Other controversies rooted in the *Insular Cases* fly even further under the radar. Guam is deploying the *Insular Cases* to stave off a reverse discrimination lawsuit by a white resident alleging that the territory unlawfully prohibited him from registering for a political status plebiscite reserved for "Native Inhabitants of Guam."[14] The government of American Samoa and American Samoans living in the continental United States recently sparred over whether birthright U.S. citizenship under the Citizenship Clause is a "fundamental" right for territorial residents.[15] In 2016, the U.S. Supreme Court proclaimed that while Puerto Rico "has a distinctive, indeed exceptional, status as a self-governing

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[8] Gillian B. White, *Puerto Rico's Problems Go Way Beyond Its Debt*, ATLANTIC (July 1, 2016), http://www.theatlantic.com/business/archive/2016/07/puerto-rico-promesa-debt/489797.

[9] *See* Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 30 Stat. 549 (2016) (codified in scattered sections of 48 U.S.C.). On May 3, 2017, the federal fiscal oversight board filed for bankruptcy-like protection for Puerto Rico under Title III of PROMESA. Press Release, Financial Oversight and Management Board for Puerto Rico, Oversight Board Certifies Title III Filings (May 3, 2017), https://juntasuperivision.pr.gov/wp-content/uploads/wpfd/49/590a09096cd13.pdf.

[10] Nathan Bomey, *Why You Can't Ignore Puerto Rico's Bankruptcy*, USA TODAY (May 4, 2017, 4:36 PM), https://www.usatoday.com/story/money/2017/05/04/puerto-rico-bankruptcy/101284402; Jaime Farrant, *4 Reasons Why Puerto Rico's 'Bankruptcy' Process Matters to U.S. Residents*, NBC NEWS (June 5, 2017, 7:39 AM), http://www.nbcnews.com/news/latino/4-reasons-why-puerto-rico-s-bankruptcy-process-matters-u-n766991.

[11] Sylvan Lane & Rafael Bernal, *Hispanic Lawmakers Face Painful Decision on Puerto Rico*, HILL (May 30, 2016, 12:11 PM), http://thehill.com/policy/finance/281542-hispanic-lawmakers-face-painful-decision-on-puerto-rico (quoting U.S. Senator Bob Menendez).

[12] *A Colonial Takeover: Proposed Puerto Rican Debt Bill to Give "Dictatorial Powers" to Unelected Board*, DEMOCRACY NOW! (May 27, 2016), https://www.democracynow.org/2016/5/27/a_colonial_takeover_proposed_puerto_rican.

[13] *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1942 (2016) (explaining that Puerto Rico is excluded from the definition of "State" for purposes of defining who may be a debtor under Chapter 9, but that it remains a "State" for purposes of the chapter's preemption provision, which bars it from devising its own municipal bankruptcy scheme to restructure its debt).

[14] Defendant's Motion for Summary Judgment at 1, Davis v. Guam, No. 1:11-cv-00035 (D. Guam Oct. 30, 2015).

[15] Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015); *see* Complaint at 33, Fitisemanu v. U.S., No. 1:18-cv-00036-EJF (D. Utah Mar. 27, 2018) (contending that American Samoans are entitled to birthright citizenship under the Citizenship Clause).

Commonwealth,"[16] it lacks "inherent sovereignty" and is thus barred from prosecuting an individual already charged federally for the same criminal act.[17] U.S. citizens from three territories argued in federal court that Congress and the states unlawfully withhold the right to vote in U.S. presidential elections from U.S. citizens who move to Puerto Rico, Guam, and the U.S. Virgin Islands, but not to those who move to the Northern Mariana Islands or American Samoa.[18]

Aside from court observers, some academics and lawyers, and the communities themselves, these cases largely go unnoticed. So, too, have the *Insular Cases*, a series of cases decided from 1901 to 1922[19] that explicitly or implicitly dictate the results in the above court challenges. Indeed, on the first day of teaching my Pacific Island Legal Systems class, I asked students if they had heard of the *Insular Cases* and only two raised their hands.[20] These students had all taken constitutional law, some had extensively studied anti-subordination and racial justice, and others were well-versed in Native Hawaiian self-governance issues, but the *Insular Cases* were absent from their studies. Because the *Insular Cases* are largely not taught in law school and do not appear in most mainstream casebooks, there is a yawning gap in the discourse about the self-determination of and social justice for peoples of the U.S. territories.

For over a century, the *Insular Cases* have tightly circumscribed rights in the territories. The U.S. Supreme Court has held that Congress may provide fewer benefits to residents of the territories as long as there is a rational basis to do so,[21] and appellate courts have held that the inability of territorial residents to vote in U.S. presidential elections does not offend the Constitution.[22] As seen in cases impacting Puerto Ricans[23] and American Samoans,[24] as well as in cases

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[16] Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1874 (2016).

[17] *Id.* at 1871–72.

[18] Brief of Appellants at 13–15, 25–26, Segovia v. United States, 880 F.3d 284 (7th Cir. June 30, 2017) (No. 16-4240); Segovia v. United States, EQUALLY AMERICAN, http://www.equalrightsnow.org/Segovia (last visited Sept. 19, 2018).

[19] *See* sources cited *infra* note 62.

[20] I co-taught Pacific Island Legal Systems in Spring 2016 with Chamorro human rights scholar and activist Julian Aguon.

[21] Harris v. Rosario, 446 U.S. 651, 651–52 (1980).

[22] *See, e.g.*, Igartúa-de la Rosa v. United States, 417 F.3d 145 (1st Cir. 2005) (en banc); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984).

[23] Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016) (holding that the Double Jeopardy Clause prevents Puerto Rico from successively prosecuting a person for a crime already prosecuted under analogous federal law because Puerto Rico's power to prosecute comes from the same source as the federal government's); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016) (explaining that Puerto Rico is excluded from the definition of "State" for purposes of defining who may be a debtor under Chapter 9, but that it remains a "State" for purposes of the chapter's preemption provision, which bars it from devising its own municipal bankruptcy scheme to restructure its debt).

[24] Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (holding that the Citizenship Clause of the Fourteenth Amendment does not extend birthright citizenship to individuals born in American Samoa).

affecting Indigenous Chamorus of Guam[25] and the voting rights of U.S. citizens residing in the territories,[26] the *Insular Cases* continue to have immense—yet largely unacknowledged—impact on territorial peoples' self-determination.

This Article contends that the *Insular Cases*, and possibly their contemporary incarnations, should be taught in law school because they are valuable for revealing the perspective of those most affected by them. Legal scholar Mari Matsuda's seminal article, *Looking to the Bottom*, urged us to adopt the perspective of those most oppressed as an essential starting point for transforming legal discourse on justice.[27] In doing so, she and others laid the foundation for the emergence of Critical Race Theory and for grappling with the ways that racial subordination shapes many dimensions of life and law in the United States.[28] Matsuda's theory also informs the ways in which law professors can incorporate the *Insular Cases* into their classes. For example, one could teach the *Insular Cases* in a constitutional law course to more fully explore the development of our "American Nation"[29]; or in Race and the Law, to illustrate one aspect of the diverse Latinx[30] or Pacific Islander experience[31]; or in specialized seminars to teach the development of jurisprudence governing the U.S. territories. Matsuda's call to look to the bottom, guided by principles of self-determination, serves as a conceptual framework for doing so.

Indeed, looking to those at the bottom in the context of colonized peoples makes most powerful sense when that idea is linked to the significant

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[25] Davis v. Guam, 785 F.3d 1311 (9th Cir. 2015) (holding that a non-native Guam inhabitant had standing to pursue a claim that a plebiscite vote registration restriction to "Native Inhabitants of Guam" is a proxy for race in violation of the Fifth, Fourteenth, and Fifteenth Amendments, and that the claim was ripe). This Article uses both "Chamoru" and "Chamorro" to describe the Indigenous people of Guam.

[26] Complaint, Segovia v. Bd. of Election Comm'rs for Chi., 201 F. Supp. 3d 924 (N.D. Ill. 2016) (No. 15 C 10196) (arguing that a law allowing absentee voting for the President of the United States by individuals residing in the Northern Mariana Islands, American Samoa, or a foreign country, but not by individuals residing in Guam, Puerto Rico, or the U.S. Virgin Islands violates the Fifth and Fourteenth Amendments).

[27] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987).

[28] Eric K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 UCLA ASIAN PAC. AM. L.J. 71, 71–72 (2013).

[29] *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 444 (6th ed. 2015) (presenting *Insular Cases* material in a section called "Creating an 'American' Nation").

[30] "Latinx" is a term that seeks to move beyond the masculinized "Latino" and the traditional gender binary "Latin@" to acknowledge the spectrum of gender and sexual identities. *See* María R. Scharrón-del Río & Alan A. Aja, *The Case FOR 'Latinx': Why Intersectionality Is Not a Choice*, LATINO REBELS (Dec. 5, 2015, 11:58 AM), http://www.latinorebels.com/2015/12/05/the-case-for-latinx-why-intersectionality-is-not-a-choice.

[31] *See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 347–67 (3d ed. 2015); RICHARD DELGADO ET AL., LATINOS AND THE LAW: CASES AND MATERIALS 52–64 (2008).

international human rights norm of self-determination.[32] In other words, we can grasp a key facet of the meaning of self-determination for colonized peoples by examining their responses to the *Insular Cases*, which have harshly shaped their political and social existence. Paying close attention to the proactive justice claims of those harmed by injustice[33] means examining their present-day usages of or resistance to the "teachings" of the *Insular Cases*.

Territorial peoples are engaging the *Insular Cases* in disparate ways. On the one hand, the cases have sharply constrained territorial peoples' rights, as revealed by the U.S. Supreme Court's sweeping denial of Puerto Rico's inherent sovereignty.[34] On the other, however, the cases highlight the ways in which territorial peoples are asserting claims to self-determination by employing the very framework that was put in place to limit their participation in the polity.[35] For example, Guam is strategically embracing the *Insular Cases* framework to argue that, unlike in the states, Congress can allow Guam to limit registration for a political status plebiscite to the "Native Inhabitants of Guam," even if based on ancestry.[36] Thus, learning about the *Insular Cases*—their past impacts and present deployment—will open law students' eyes to the significant nexus between the cases' doctrine and the self-determination of those colonized. Indeed, the principle of self-determination, a central tenet of reparative justice, is vital to colonized peoples' efforts worldwide to repair the damage of historical injustice.

Self-determination entails repairing the harms suffered by those who have experienced systemic oppression according to their self-shaped notions of reparation.[37] This type of repair, or "reparative justice," focuses on mending breaches in the polity by healing persisting wounds of harmed individuals and communities.[38] Its goal is to ascertain and respond to groups' self-determined ideas of injury and remedy in order to "build[] new relationships as focal points for fostering an interest-convergence among the victims of injustice . . . and society itself."[39] As such, "[b]ecause the wounds are the material and psychological harms of injustice, the prescriptions for healing those wounds

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[32] *See infra* notes 221–26 and accompanying text.

[33] *See* Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT'L L. 257, 267–68 (2009); Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 4–11 (2007).

[34] Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016).

[35] *See infra* Section V.A.3.

[36] *See infra* Section V.A.3.

[37] *See* Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203, 245 (2015).

[38] Yamamoto et al., *supra* note 33, at 16.

[39] *Id.* at 4.

must be informed by justice,"[40] shaped by both those harmed and the larger society. The *Insular Cases* are, therefore, a way to deepen students' understanding of self-determination as more than just a concept that derives from United Nations instruments. Instead, it is a concept that speaks to repairing harms according to the colonized group's sense of what is needed.

Some legal scholars, including constitutional law scholar Sanford Levinson, have compellingly claimed that the *Insular Cases* should be part of the constitutional law canon because knowledge of the cases would help to create individuals who are well-informed about periods in constitutional development, as well as provide academics with fresh and compelling constitutional questions with which to grapple.[41] In 2000, Levinson published his groundbreaking piece, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, "to encourage the welcoming of *Downes* and linked materials into the various canons of American constitutional inquiry."[42] But, whether or not the cases become part of an elusive "canon," the *Insular Cases* should be taught now because, over a century after the cases were decided, territorial peoples' attempts to gain a measure of self-determination under U.S. rule remain virtually invisible.

Part II examines the leading *Insular Cases* and the doctrine of territorial incorporation, and then briefly highlights the ongoing impacts of the *Insular Cases* on U.S. territorial peoples. Part III traces Levinson's canonical arguments, as well as other scholars' interpretations of the import of the *Insular Cases*. This Part also explores why the canon approach is meaningful but elusive, and tends not to acknowledge those at the bottom. Part IV sketches Matsuda's "looking to the bottom" conceptual framework, and explores her theory as it relates to the larger principles of self-determination and reparative justice. Part V contends that teaching the *Insular Cases* is valuable because they illuminate the perspective of those most affected and reveal jurisprudential insights about the principle of self-determination. This Part analyzes five modern-day cases to illustrate the *Insular Cases*' lasting impacts on territorial peoples' self-determination efforts, and to underscore the importance of teaching the *Insular Cases* from the bottom. Finally, this Part briefly proposes some ways in which law professors might incorporate the *Insular Cases* into their classes from the perspective of those most impacted. Part VI concludes.

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[40] *Id.* at 39.

[41] Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 250 (2000); *see infra* notes 178–98 and accompanying text.

[42] Levinson, *supra* note 41, at 266.

II. THE *INSULAR CASES* IN SOCIO-HISTORICAL CONTEXT

Today's stark limits on territorial peoples' self-determination are rooted in the strategic U.S. embrace of "empire" following the Spanish-American War.[43] The Territorial Clause of the U.S. Constitution, which empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[44] gave the United States authority to exercise power over its late-nineteenth century colonial conquests.[45] The Clause today governs five unincorporated territories of the United States—Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands—with a collective population of around four million people.[46] This makes the United States "the largest overseas territorial power in the world."[47]

Prior to the United States' 1898 territorial "acquisitions," the settled policy governing U.S. territorial expansion led to the eventual admission of new territories as states.[48] The Northwest Ordinance of 1787, which covered the territory northwest of the original thirteen states, was viewed as "the governing statute for the newly acquired territories by the courts or was followed as the model in other governing legislation."[49] The Spanish-American War and the resulting takeover of Puerto Rico, the Philippines, Guam, and Cuba triggered a change in the settled model.[50] Rather than directing the territories toward eventual statehood, the Treaty of Paris, which concluded the war, left the determination of the "civil rights and political status of the native inhabitants" to Congress.[51] This meant that the peoples of the territories were not to "enter into and form a part of the American family,"[52] and were promised no civil or

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[43] *See* Román & Simmons, *supra* note 3, at 449.

[44] U.S. CONST. art. IV, § 3, cl. 2.

[45] *See* Rivera Ramos, *supra* note 3, at 246–47.

[46] Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the Flag . . . But Doesn't Quite Catch Up with It": From* Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181, 197 (2010) (citing ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 3 (1980)).

[47] LEIBOWITZ, *supra* note 46, at 3.

[48] *Id.* at 6.

[49] *Id.*

[50] Malavet, *supra* note 46, at 204.

[51] Treaty of Paris, U.S.-Spain, art. 9, Dec. 10, 1898, 30 Stat. 1759. "According to the Treaty, while Spanish subjects residing in Puerto Rico retained their property rights and could choose to retain Spanish citizenship, the 'civil rights and political status of the native inhabitants . . . [were to] be determined by the Congress.'" Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 372–73 (2011) (citing Treaty of Paris, U.S.-Spain, art. 9, Dec. 10, 1898, 30 Stat. 1759).

[52] Downes v. Bidwell, 182 U.S. 244, 339 (1901) (White, J., concurring); *see* José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 411 (1978) (observing that this was

political rights under U.S. rule.

The United States' conquest of "distant lands" inhabited by "alien" and "semi-civilized" peoples unleashed intense popular debates over the proper way to rule them.[53] The territories were viewed as "far off, not contiguous to the continent, densely populated, unamenable to colonization by settlement on the part of Anglo-Americans, and, above all, inhabited by alien peoples untrained in the arts of representative government."[54] One judge, for example, warned against bestowing constitutional guarantees upon the "ignorant" and "half-civilized" peoples of Puerto Rico and the Philippines:

> Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities . . . would, of course, be a serious obstacle to the maintenance there of an efficient government.[55]

Decision-makers proclaimed that the United States should not "incorporate the alien races, and civilized, semi-civilized, barbarous, and savage peoples of these islands into our body politic as States of our Union."[56] A report by the Committee on the Pacific Islands and Puerto Rico warned against the inclusion of "people of wholly different character . . . and incapable of exercising the rights and privileges guaranteed by the Constitution."[57] If a territory is inhabited by such people, it argued, Congress should "withhold from [them] the operation of the Constitution and the laws of the United States, and, continu[e] to hold the territory as a mere possession of the United States."[58] The Foraker Act of 1900,[59] which established a civil government for Puerto Rico, was therefore

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the first time in which a U.S. treaty acquiring territory did not promise citizenship or eventual statehood).

[53] Román & Simmons, *supra* note 3, at 457.

[54] Rivera Ramos, *supra* note 3, at 237–38.

[55] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899); *see* José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 455 (1986) (book review) (observing that arguments by anti-imperialists, like Baldwin, were "political expression[s] of contempt for the peoples of the new territories").

[56] Cabranes, *supra* note 52, at 432 (quoting 33 CONG. REC. 3622 (1900)).

[57] Román & Simmons, *supra* note 3, at 455.

[58] *Id.* This debate over the legitimacy of the "American empire" was waged in the context of the 1900 election, in which William McKinley, an imperialist, won in a landslide over William Jennings Bryan, an anti-imperialist. *See* Pedro A. Malavet, *"The Constitution Follows the Flag . . . But Doesn't Quite Catch Up with It": The Story of* Downes v. Bidwell, *in* RACE LAW STORIES 111, 124 (Rachel F. Moran & Devon W. Carbado eds., 2008).

[59] Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900).

"premised on the view that the United States could constitutionally acquire territories, free of constitutional restrictions, and govern them indefinitely as dependencies without steering them towards statehood."[60]

Thus, the settled view of eventual statehood for territories was upended, and the United States expanded its empire and global reach "without the necessity of fully accepting the people of color that inhabited the newly acquired territories."[61] As discussed below, the *Insular Cases*,[62] a series of U.S. Supreme Court decisions defining the status of the new U.S. territories, provided constitutional legitimacy for this American colonialism.[63]

A. Downes v. Bidwell *and the Doctrine of Territorial Incorporation*

The *Insular Cases* further entrenched the notion that Congress had nearly unfettered authority over U.S. insular possessions.[64] In wrestling with persisting questions about the status of the territories and the rights of their inhabitants, the justices' approaches were distinctly shaped by the academic and popular debates of the time. Did the Constitution apply in full force to the territories, thereby conferring full-fledged citizenship on their inhabitants?[65] Did Congress, like the European colonizers before them, have absolute power over the territories

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[60] Rivera Ramos, *supra* note 3, at 239.

[61] Román & Simmons, *supra* note 3, at 453.

[62] Efrén Rivera Ramos groups the *Insular Cases* into two main categories: the 1901 cases and those that followed through 1922. The nine 1901 cases include: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Crossman v. United States, 182 U.S. 221 (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); Huus v. New York, 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901); and Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901). The later cases include: Hawaii v. Mankichi, 190 U.S. 197 (1903); González v. Williams, 192 U.S. 1 (1904); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Trono v. United States, 199 U.S. 521 (1905); Grafton v. United States, 206 U.S. 333 (1907); Kent v. Porto Rico, 207 U.S. 113 (1907); Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. United States, 221 U.S. 325 (1911); Ochoa v. Hernández, 230 U.S. 139 (1913); Ocampo v. United States, 234 U.S. 91 (1914); and Balzac v. Porto Rico, 258 U.S. 298 (1922). EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 74–76 (2001).

[63] Torruella, *supra* note 3, at 6 ("The de facto colonial status had to be validated by a legal regime that would de jure allow the United States to govern the new lands and their people with a free hand, untethered by the constitutional constraints that normally restrained the governmental structures of the continental United States.").

[64] Román & Simmons, *supra* note 3, at 457–59.

[65] Two U.S. Supreme Court decisions supported this proposition. *See* Loughborough v. Blake, 18 U.S. 317, 319 (1820) (noting that the Constitution applies to all of the "American empire," and therefore states and territories are subject equally to the Constitution); Dred Scott v. Sandford, 60 U.S. 393, 446 (1856) (proclaiming that Congress lacked power under the Territorial Clause to prohibit slavery in Missouri Territory because Congress could not maintain and govern territories in a permanent colonial state).

without constitutional constraints?[66] Or, did Congress have sweeping power over the territories, with some constitutional limitations?[67] According to this final theory, the constitutional provisions that apply to a territory (and therefore serve to limit Congress's and the executive's power) depend on that territory's relationship to the United States. This final approach came to be the dominant framework in the *Insular Cases*.

The U.S. Supreme Court heard the first nine *Insular Cases* in its 1900 Term, and issued decisions on May 27, 1901.[68] The *Insular Cases* were at the center of constitutional debate in their day—they were heard over a ten-day period, and the resulting decisions filled up "hundreds of pages over two volumes of the U.S. Reports."[69] Called "the most hotly contested and long continued duel in the life of the Supreme Court,"[70] the cases "reportedly stimulated stronger feelings among the justices of the Supreme Court than any case since *Scott v. Sandford* (the *Dred Scott* case)."[71]

Most of the first *Insular Cases* involved disputes over the imposition of tariffs on agricultural goods shipped from Puerto Rico to the continental United States.[72] In *De Lima v. Bidwell*, for example, De Lima sought to recover duties levied under protest for importation of sugar from Puerto Rico after that territory was "ceded" to the United States, but before the Foraker Act was passed in 1900.[73] The Court held that the cession of Puerto Rico to the United States transformed Puerto Rico from "foreign" to "domestic"; thus, duties were illegal.[74] In *Dooley v. United States*, the Court ruled that duties levied on products sent from the continental United States to Puerto Rico before ratification of the Treaty of Paris were legal, but those levied on goods shipped after the Treaty's ratification were illegal because Puerto Rico was no longer foreign.[75] These and other cases set the stage for the main case of *Downes v. Bidwell*.

In *Downes v. Bidwell*, the most important of the *Insular Cases*, the U.S.

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[66] *See* Torruella, *supra* note 3, at 10–11.

[67] *See id.* at 11.

[68] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 244 (1901).

[69] Malavet, *supra* note 58, at 126.

[70] Cabranes, *supra* note 52, at 436 (quoting John W. Davis, *Edward Douglass White*, 7 A.B.A. J. 377, 378 (1921)).

[71] *Id.*

[72] *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

[73] *De Lima*, 182 U.S. at 2.

[74] *Id.* at 200. In Goetze v. United States, the Court summarily reversed an administrative decision to impose a duty on products shipped from Puerto Rico and Hawai'i to the continental United States because those territories were domestic, not foreign. Goetze v. United States, 182 U.S. 221, 221–22 (1901).

[75] *Dooley*, 182 U.S. at 233–34.

Supreme Court held that the Foraker Act's express imposition of duties on goods shipped between Puerto Rico and the continental United States did not violate the Uniformity Clause and was thus constitutional. [76] Directly contradicting the earlier cases, the Court sanctioned the imposition of duties on goods shipped from Puerto Rico.[77] Five justices filed separate opinions, and no opinion garnered a majority. According to Justice Brown, who delivered the judgment of the Court, the issue was not only whether the Foraker Act violated the Uniformity Clause of the Constitution, but also whether the Uniformity Clause, of its own force, "extend[ed] . . . to . . . newly acquired territories."[78] For him, the Clause did not apply to Puerto Rico because "the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."[79]

Justice Brown, like other decision-makers of his day, warned of the consequences for U.S. sovereignty if the United States incorporated racially distinct peoples. For him, peoples of different "race[s], habits, laws and customs" from "outlying and distant possessions" threatened the very heart of white Anglo-Saxon dominance. [80] He warned of the "extremely serious" consequences if the offspring of the colonies' inhabitants, "whether savages or civilized," would become "entitled to all the rights, privileges and immunities of citizens."[81] He thus concluded that nothing forbade Congress from exercising wide-ranging political power over those possessions "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought."[82]

Justice White's concurring opinion, which later became the controlling "doctrine of territorial incorporation," fashioned a new category of territory—the "unincorporated" territory. According to Justice White, whether particular provisions of the Constitution apply in a territory depends on "the situation of

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[76] *See Downes*, 182 U.S. at 287.

[77] *Id.*

[78] *Id.* at 249.

[79] *Id.* at 287. The U.S. government misspelled Puerto Rico as "Porto Rico" for nearly thirty-five years—from 1898 to 1932. *See* Cabranes, *supra* note 52, at 392. The misspelling was changed by joint resolution on May 17, 1932. S.J. Res. 36, 72d Cong. (1932) (enacted).

[80] *Downes*, 182 U.S. at 282 (noting that this "may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians").

[81] *Id.* at 279.

[82] *Id.* at 287; *see* Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 140, 157 (Christina Duffy Burnett & Burke Marshall eds., 2001) (observing that Justice Brown invoked the Court's "ideology of conquest" by relying heavily on *Johnson v. M'Intosh*, which employed the "doctrine of discovery" to justify the forcible conquest of Native Americans); *Downes*, 182 U.S. at 281 (proclaiming that "[w]hen the conquest is complete, . . . the conquered inhabitants can be blended with the conquerors, *or safely governed as a distinct people*" (alteration in original) (quoting Johnson v. M'Intosh, 21 U.S. 543, 589 (1823))).

the territory and its relations to the United States."[83] Therefore, the question whether the Foraker Act's tax on Puerto Rican goods was proper depended on a determination whether Puerto Rico was "incorporated into the United States."[84] Because Congress did not intend to incorporate Puerto Rico through the Treaty of Paris, the Foraker Act, or by other means, Justice White determined that it was an unincorporated territory.[85]

According to Justice White's reading of international law and the U.S. Constitution, sovereign nations held the inherent right to acquire territory and, concomitantly, by "the terms stipulated in the treaty of cession or *on such as its new master shall impose*,"[86] to decide the nature of the relationship between that nation and its territory. He maintained that the United States specifically intended to incorporate all of the previously acquired territories, and that such intention was—and must be—made by Congress either expressly or implicitly.[87] One prior indicator of congressional intent to incorporate was whether the territory's people were given U.S. citizenship; but as the U.S. Supreme Court later decided in *Balzac v. Porto Rico*, the granting of citizenship to a territory's inhabitants does not evince Congress' intent to incorporate a territory.[88] Therefore, Puerto Rico was not immediately incorporated after its acquisition. For Justice White, a decision to immediately incorporate had grave consequences: it implicated "bring[ing] all the alien people residing in acquired territory into the United States, and thus divid[ing] with them the rights which peculiarly belong to the citizens of the United States."[89]

Thus, perplexingly, Puerto Rico was both foreign and domestic at the same time. Justice White explained:

> [W]hile in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.[90]

Pursuant to its plenary power under the Territorial Clause, Congress therefore could determine which portions of the Constitution apply, limited only by

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[83] *Downes*, 182 U.S. at 293 (White, J., concurring).

[84] *Id.*

[85] *Id.* at 341.

[86] *Id.* at 302 (alteration in original) (quoting Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 542 (1828)).

[87] *Id.* at 319–23; *e.g.*, *id.* at 335.

[88] *See* Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922).

[89] *Downes*, 182 U.S. at 324 (White, J., concurring) (invoking the ideology of discovery to illustrate the United States' right to withhold citizenship from "those absolutely unfit to receive it").

[90] *Id.* at 341–42.

"restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."[91]

In dissent, Chief Justice Fuller rejected indefinite and unlimited congressional control over the territories.[92] Fuller maintained that regarding the imposition of taxes, the Constitution requires "geographical uniformity"[93] in both states and territories. He repudiated the idea that Congress had the power to keep acquired territory "like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[94] For Fuller, the majority's theory would empower the United States to conquer distant countries and govern them "by different rules" in an "exercise of unrestricted power."[95] Similarly, in dissent, Justice Harlan contended that the Constitution applied to all "who are subject to the authority of the United States."[96] He also flatly rejected Congress' ability to act outside of the Constitution to "engraft upon our republican institutions a colonial system such as exists under monarchical governments."[97]

As Judge José Cabranes later recognized, although the specific legal issue involved the legality of customs duties, the U.S. Supreme Court in *Downes* affirmed Congress' power to distinguish between unincorporated and incorporated territories, which "gave judicial approval to the birth of 'the American Empire.'"[98] Indeed, the first nine *Insular Cases* "ushered us into a second age of expansion" that did not admit territories through statehood, but held "colonies subject to almost absolute congressional authority."[99] Judge Torruella similarly asserted that "the Supreme Court placed its imprimatur on a colonial relationship in which Congress could exercise virtually unchecked power over the unincorporated territories ad infinitum."[100]

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[91] *Id.* at 291.

[92] *Id.* at 372–73 (Fuller, C.J., dissenting).

[93] *Id.* at 352.

[94] *Id.* at 372.

[95] *Downes*, 182 U.S. at 373 (Fuller, C.J., dissenting) (maintaining that the majority's theory would permit the imposition of "a system of domination" over the territories).

[96] *Id.* at 378 (Harlan, J., dissenting).

[97] *Id.* at 380; *see id.* at 386 (rejecting the paradoxical outcome that Puerto Rico could be both foreign and domestic at the same time). In 1904, the U.S. Supreme Court adopted the so-called doctrine of territorial incorporation in *Dorr v. United States*. *See* Dorr v. United States, 195 U.S. 138, 143, 149 (1904) (holding that the constitutional right to trial by jury did not extend to the Philippines unless Congress provided such a right, and proclaiming that "[u]ntil Congress shall see fit to incorporate territory ceded by treaty into the United States, . . . the territory is to be governed under the power existing in Congress to make laws for such territories").

[98] Cabranes, *supra* note 52, at 436.

[99] Malavet, *supra* note 58, at 136.

[100] Juan R. Torruella, *¿Hacia Dónde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1509 (1998) (book review).

B. Balzac v. Porto Rico *and the Aftermath of the* Insular Cases

Nearly twenty years after *Downes*, the U.S. Supreme Court rejected the notion that the granting of U.S. citizenship operated to incorporate an unincorporated territory.[101] Jesus Balzac, an editor of a Puerto Rican newspaper, was charged with misdemeanor libel for comments published about Puerto Rico's governor.[102] Balzac argued that he was entitled to a trial by jury under the Sixth Amendment to the U.S. Constitution, even though Puerto Rico's code of criminal procedure provided for jury trials only in felony cases.[103] The U.S. Supreme Court held that residents of unincorporated territories do not have a Sixth Amendment right to a jury trial.[104]

Significantly, the Court ruled that the Jones Act, which had conferred U.S. citizenship on Puerto Rico's inhabitants in 1917, did not operate to "incorporate[] Porto Rico into the United States."[105] The U.S. Supreme Court proclaimed that residents of Puerto Rico could not demand a trial by jury because "[i]t is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it."[106]

Unlike Alaska, which was "sparsely settled" and amenable to settlement by white American citizens, the Court again viewed the Philippines and Puerto Rico as "distant ocean communities of a different origin and language from those of our continental people."[107] As such, the Court did not believe a jury right should be imposed on these "ancient communities" with little knowledge of popular government.[108] The peoples of the unincorporated territories are therefore entitled only to "guaranties of certain fundamental personal rights declared in the Constitution."[109] These fundamental rights are not those deemed "fundamentally important in a colloquial sense" or those that are "necessary to [the] []American regime of ordered liberty."[110] Instead, fundamental rights in the

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[101] Balzac v. Porto Rico, 258 U.S. 298, 312–14 (1922) ("[T]he real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.").

[102] *Id.* at 300.

[103] *Id.*

[104] *Id.* at 310.

[105] *Id.* at 313.

[106] *Id.* at 309.

[107] *Balzac*, 258 U.S. at 309, 311.

[108] *Id.* at 310 (declaring that Filipinos and Puerto Ricans would have difficulty adopting Anglo-Saxon institutions of popular government).

[109] *Id.* at 312.

[110] Tuaua v. United States, 788 F.3d 300, 308 (D.C. Cir. 2015) (alteration in original) (citing Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1990) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968))). In other words, fundamental rights for territorial peoples do not include those

territorial context are those "which are the basis of all free government, which cannot be with impunity transcended."[111]

Therefore, to determine whether a constitutional guarantee applies to a territory, the Court asks whether extending such provision would be "impracticable and anomalous."[112] In other words, when determining whether a constitutional guarantee has "extraterritorial effect," the Court considers the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[113] Courts have employed this framework to decide whether to extend an array of constitutional protections to the unincorporated territories with mixed results.[114]

Most recently, in *Boumediene v. Bush*, the U.S. Supreme Court reaffirmed the *Insular Cases* and employed the "impracticable and anomalous" test to hold that "enemy combatants" confined at Guantánamo Bay Naval Station have a constitutional right to habeas corpus review of their detention.[115] Finding that applying the constitutional right to habeas in Guantánamo would not be impracticable and anomalous, the Court held that the Suspension Clause of the Constitution "has full effect at Guantanamo Bay."[116] Scholars have analyzed the propriety of the Court's reliance on the *Insular Cases* and the "impracticable and anomalous" test in *Boumediene*.[117] Legal scholar Gerald Neuman contends that

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"artificial or remedial rights which are peculiar to our own system of jurisprudence." Downes v. Bidwell, 182 U.S. 244, 282 (1901).

[111] Dorr v. United States, 195 U.S. 138, 147 (1904); *Downes*, 182 U.S. at 283 (deciding that, regardless of the status of the territories, their people are "entitled under the principles of the Constitution to be protected in life, liberty, and property . . . even when aliens, not possessed of the political rights of citizens of the United States"); *see Wabol*, 958 F.2d at 1460 (noting that a fundamental right in the territorial context need not be "necessary to an Anglo-American regime of ordered liberty" (quoting *Duncan*, 391 U.S. at 149 n.14)).

[112] Boumediene v. Bush, 553 U.S. 723, 759 (2008) (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

[113] *Id.* (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring)). The "impracticable and anomalous" methodology was initially articulated in Justice Harlan's concurring opinion in *Reid*, and further developed in Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*. United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring) (quoting language from *Reid*); *see* Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS. J. 171, 187 (2012).

[114] *See, e.g.*, King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (analyzing whether the implementation of a jury system would be practicable); *Wabol*, 958 F.2d at 1462 (ruling that it would be anomalous to apply the Equal Protection Clause to strike down ancestral land ownership restrictions in the Northern Marianas); *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring) (applying the "impracticable and anomalous" test in the Fourth Amendment context).

[115] *Boumediene*, 553 U.S. at 771.

[116] *Id.*

[117] *See, e.g.*, Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over*

Boumediene presented "a sanitized account of the motivations for the Insular Cases doctrine, underplaying the racial element in U.S. colonialism," and ignored modern-day effects.[118] Indeed, according to Pedro Malavet, "[t]he Court reasserted a rule of plenary power over territorial citizens while barely acknowledging those citizens' existence . . . ."[119]

C. Ongoing Impacts of the Doctrine of Territorial Incorporation

Although unacknowledged by the U.S. Supreme Court, the *Insular Cases* have long-lasting detrimental impacts on the peoples of the U.S. territories. Scholars assert that the *Insular Cases* reflect a discourse of exclusion and frame territorial peoples as perpetual "foreigners," "outsiders," and "others," thereby facilitating their marginalization.[120] For example, legal scholar Efrén Rivera Ramos maintains that the *Insular Cases* reflect "a discourse that stresses the separateness between the conquering people and the conquered."[121] For Rivera Ramos, the "doctrine of incorporation" fosters the prevailing practice of constructing "the 'other' as a 'separate,' but subordinated, identity" to justify unequal treatment.[122]

Rivera Ramos similarly recognizes that by describing Puerto Ricans as an inferior racial group incapable of self-governance, instead of as a people with a history and aspirations, the Supreme Court "defined Puerto Ricans not as a nation, but as inhabitants of an island that had become a possession of the United States."[123] As legal scholar Juan Perea contends, "[p]lacing the political fate and identity of Puerto Ricans in the discretion of Congress guaranteed that racism would play a major role in shaping that fate."[124] That racism and denial of humanity legitimates today's continued control and exclusion.

In concrete terms, that exclusion impacts the everyday lives of the peoples of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands in far-reaching ways—from the political to the economic, and the social to the cultural.[125] Residents of the territories lack

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Foreign Affairs, 81 TEX. L. REV. 1, 240–47 (2002); Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101 (2011).

[118] Neuman, *supra* note 117, at 270.

[119] Malavet, *supra* note 46, at 255.

[120] *See* Serrano, *supra* note 51, at 426–28.

[121] Rivera Ramos, *supra* note 3, at 290.

[122] *Id.* at 291.

[123] *Id.* at 305.

[124] Perea, *supra* note 82, at 159.

[125] *See generally* EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006) (analyzing the historic and present-day impacts of U.S. colonialism on the peoples of both the unincorporated territories and the island groups of the South Pacific, including the Federated States of Micronesia, the Marshall Islands, and the Republic of Palau).

political power on the national stage—they cannot vote in U.S. presidential elections[126] and have no voting representatives in Congress.[127] Territorial residents are statutory U.S. citizens (except for American Samoans, who are U.S. nationals), and, as some scholars have argued, this citizenship is second-class because Congress can revoke it at any time.[128]

In the socio-economic sphere, territorial residents are also disadvantaged. For example, the U.S. Supreme Court has held that if there is a rational basis for doing so, federal programs can provide less aid to territorial residents.[129] Similarly, the Court held that it is constitutional for the Social Security Administration to discontinue Supplemental Security Income benefit payments to aged, blind, and disabled persons who move to the territories.[130]

The *Insular Cases* framework also threatens customary rights and cultural practices in the territories. For example, an individual challenged Indigenous ancestry-based restrictions on certain acquisitions of land in the Northern Mariana Islands, which were designed to further the self-determination of Indigenous Chamorros and Carolinians.[131] Courts have permitted these restrictions by holding that the relevant provisions of the U.S. Constitution (such as the Equal Protection Clause) do not apply in that territory.[132] American Samoa's ancestry-based restriction on the alienation of land also has been challenged, but the High Court of American Samoa held that the restriction survived strict scrutiny.[133]

For many in the territories, the inability to decide their own political fate is deeply subordinating. These harms "are not isolated abstract ideas but are found in people's 'lived experiences,' grounded in their 'every day lives.'"[134] Drawing on the work of Joe R. Feagin and Melvin P. Sikes on racism against African Americans, legal scholar Eric Yamamoto observes that these harms of injustice

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[126] Igartúa-de la Rosa v. United States, 417 F.3d 145, 148, 151 (1st Cir. 2005) (holding that Puerto Rican residents have no constitutional or international law right to vote in U.S. presidential elections).

[127] *See Member FAQs*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/member_info/memberfaq.aspx (last visited Sept. 19, 2018) (stating with regard to Delegates and the Resident Commissioner that "unlike Members, they may not vote while the House is conducting business as the Committee of the Whole or vote on the final passage of legislation when the House is meeting").

[128] *See, e.g.*, Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 13–14 (1998) (citing Rogers v. Bellei, 401 U.S. 815 (1971)).

[129] Harris v. Rosario, 446 U.S. 651, 651–52 (1980).

[130] Califano v. Gautier Torres, 435 U.S. 1, 2, 4 (1978).

[131] Wabol v. Villacrusis, 958 F.2d 1450, 1451–53 (9th Cir. 1990).

[132] *Id.* at 1462.

[133] Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (1980) (holding that due process and equal protection guarantees do apply in American Samoa, that the preservation of American Samoa's culture was a compelling state interest, and that the restriction was narrowly tailored).

[134] Yamamoto et al., *supra* note 33, at 40.

"have a cumulative impact on particular individuals, their families, and their communities."[135] They are, over time, "stored not only in individual memories but also in family stories and group recollections," and "shape both 'one's way of living . . . and one's life perspective.'"[136] Legal scholar Julian Aguon poignantly describes how many Indigenous Chamorus of Guam feel "a sense of resignation" and defeat, and "have given up on the hope that [self-determination] will ever happen, so there's kind of like a 'learned helplessness.'"[137] Individuals and communities thus experience the psychic harm of having their histories and selves continually defined by others—of being "spectators of [their] history without being able to do anything."[138]

III. THE *INSULAR CASES* IN THE LAW SCHOOL CURRICULUM: AN OVERVIEW

That subordination is linked, in part, to the *Insular Cases*, but most law students are wholly unfamiliar with the cases or their continuing effects. This Part describes the general absence of the *Insular Cases* from law school casebooks and courses. It then explores other scholars' arguments for including the *Insular Cases* in the law school curriculum, focusing particularly on Sanford Levinson's call to include *Downes v. Bidwell* in the constitutional law canon. Finally, it suggests that the *Insular Cases* should be taught from the perspective of those "at the bottom" because of the cases' lasting impacts on those most affected.

A. The General Absence of the Insular Cases *from Law School Casebooks and Courses*

Despite the *Insular Cases*' persisting harms, most law school courses make little to no mention of them.[139] A review of recent casebooks underscores the general lack of meaningful coverage of the *Insular Cases*.[140] For example, of the

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[135] *Id.* (quoting JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE 16 (1994)).

[136] *Id.* (alteration in original) (quoting FEAGIN & SIKES, *supra* note 135, at 16, 171).

[137] Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113, 142 (2008) (alteration in original) (quoting Patricia Taimanglo, An Exploratory Study of Community Trauma and Culturally Responsive Counseling with Chamorro Clients 141 (May 1998) (unpublished Ph.D. dissertation, University of Massachusetts, Amherst)).

[138] Navarro, *supra* note 1 (quoting Puerto Rican resident Erika P. Rodríguez).

[139] *See* Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching A Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 57 n.13 (1997) (quoting Justice Rehnquist's remark that "[e]ven the most astute law student of today would probably be completely unfamiliar with these cases; indeed, even when I went to law school more than 30 years ago, they rated only a footnote in a constitutional law case book" and Judge José A. Cabranes's assertion that "Justice Rehnquist's observation was equally true when I went to law school more than 20 years ago—only then I (who searched diligently) had difficulty finding that footnote").

[140] *See* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS AND QUESTIONS (12th ed. 2015); JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS (14th ed.

constitutional law casebooks reviewed, only *Processes of Constitutional Decisionmaking: Cases and Materials* contains extensive coverage of *Downes v. Bidwell*.[141] The book devotes ten pages to excerpts of the *Downes* opinions, and situates *Downes* in larger discussions of expansionism, incorporation, political status, race, and culture.[142] The accompanying discussion questions also raise issues of citizenship, voting, and the future of Puerto Rico's political status.[143]

Other constitutional law casebooks make only passing mention of the *Insular Cases*. For example, *Constitutional Law* queries whether the U.S. government was "bound by the Constitution when it exercise[d] jurisdiction outside of the United States," and briefly places *Downes* in the context of U.S. expansionism.[144] *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century*[145] and *The Constitution of the United States*[146] also provide short references to the *Insular Cases*.

Casebooks in other areas of law offer limited mention of the *Insular Cases*. For example, *U.S. National Security Law* excerpts *Dorr v. United States* to illustrate the extraterritorial application of the Constitution as an introduction to the investigation of national security threats abroad.[147] *Conflict of Laws* devotes one page to the various opinions of the *Insular Cases* and the territorial incorporation doctrine to demonstrate how U.S. colonialism impacted the scope of the Constitution.[148] A few casebooks fleetingly discuss one or more of the *Insular Cases*, or offer a simple citation with little explanation.[149] As Sanford

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2013); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (5th ed. 2014); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (11th ed. 2015); ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTIONAL STRUCTURE (2012); GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH (2d ed. 2011).

[141] BREST ET AL., *supra* note 29, at 445–55.

[142] *Id.* at 444–57. The section is part of a chapter entitled "From Reconstruction to the New Deal: 1866–1934." *Id.* at 347.

[143] *Id.* at 455–57.

[144] KATHLEEN SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 421 (19th ed. 2016). This brief note falls within the "Separation of Powers" chapter, in a section called "Congressional War and Treaty Powers, and the Implied Power over Foreign Affairs." *Id.* at 303, 413.

[145] *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 143 (5th ed. 2013).

[146] *See* MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 1354 (3d ed. 2017).

[147] THOMAS M. FRANCK ET AL., U.S. NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS 1121–25 (4th ed. 2012).

[148] KERMIT ROOSEVELT, CONFLICT OF LAWS 241–42 (2d ed. 2015); *see* CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 433–34 (2d ed. 2015) (using the *Insular Cases* doctrine to illustrate the complexity of the extraterritorial application of the Constitution).

[149] *See, e.g.*, THOMAS J. SCHOENBAUM, THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 113–14 (2016); STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 133 (6th ed. 2015); LOUIS HENKIN ET AL., HUMAN RIGHTS 305 (2d ed. 2009); HERMA HILL KAY ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 1000 (10th ed. 2018);

Levinson indicates, although the *Insular Cases* are "central documents in the history of American racism," the cases do not appear at all in Derrick Bell's seminal treatise on race and law, *Race, Racism, and American Law*,[150] nor in F. Michael Higginbotham's *Race Law: Cases, Commentary, and Questions*.[151]

In contrast, two Critical Race Theory casebooks do include significant treatment of the *Insular Cases*. *Race and Races: Cases and Resources for a Diverse America* offers extensive coverage of key *Insular Cases* and their impact on the status of Puerto Rico.[152] Similarly, *Latinos and the Law: Cases and Materials* includes extensive discussion of the cases in the text, as well as in the notes and questions.[153]

The absence of extensive coverage of the *Insular Cases* from most casebooks mirrors their general absence from legal scholarship, except in a few specialized settings. As legal scholar Christina Duffy Burnett contends, the debate on the status of the Constitution in the territories is for the most part "a marginal debate about marginal places" that rages primarily in the affected territories.[154] Legal scholar Pedro Malavet similarly recognizes that "the Insular Cases are but legal footnotes in U.S. legal scholarship, outside of Critical Race Theory generally and Lat-Crit Theory in particular."[155] Although it now appears that more law faculty are including at least a mention of the *Insular Cases* in

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ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 119 (3d ed. 2015).

[150] Levinson, *supra* note 41, at 245; *see* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (6th ed. 2008). The *Insular Cases* are still omitted from the most recent edition of this casebook.

[151] *See* F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS (3d ed. 2010); *see also* RALPH RICHARD BANKS ET AL., RACIAL JUSTICE AND LAW: CASES AND MATERIALS 933–38 (2016) (omitting the *Insular Cases*, but discussing the interplay of voting rights, political status, race, American imperialism, and democratic principles in the notes and questions); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS (8th ed. 2013) (omitting the *Insular Cases* entirely). A review of a number of Legal History syllabi also reveals the omission of the *Insular Cases*. *See, e.g.*, Karen Tani, *The U.S. Legal History Survey Revisited: I*, LEGAL HISTORY BLOG (May 1, 2013, 12:30 AM), http://legalhistoryblog.blogspot.com/2013/05/the-us-legal-history-survey-revisited-i.html#more; *Legal History on the Web*, TRIANGLE LEGAL HISTORY SEMINAR, https://law.duke.edu/legal_history/portal/syllabi.html (last visited Sept. 19, 2018); Syllabus, Anders Walker, American Legal History (Spring 2012), https://ssrn.com/abstract=2137814.

[152] PEREA ET AL., *supra* note 31, at 349–67 (including excerpts from *Downes v. Bidwell*, the Treaty of Paris, and *Balzac v. Porto Rico*, as well as sections on the Puerto Rico commonwealth, Puerto Rican citizenship, and Puerto Ricans' current political status); *see id.* at 355, 360 (providing notes and questions about the ideology of expansion and voting rights).

[153] DELGADO ET AL., *supra* note 31, at 52–64 (discussing the Foraker Act and excerpts of *Downes v. Bidwell* and *Balzac v. Porto Rico*).

[154] Duffy Burnett, *supra* note 117, at 1040–41.

[155] Malavet, *supra* note 46, at 250–51. *But see* T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15 (1994) (exploring the modern-day implications of the *Insular Cases* on Puerto Rico's political status); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (analyzing the *Insular Cases* as part of a larger exploration of the constitutional foundations of immigration law).

casebooks and courses,[156] the cases are indeed far from being installed into the constitutional law canon.

The faculty at my law school do not, as of this writing, incorporate the *Insular Cases* into their courses.[157] Most faculty members remarked that the reason for not teaching *Downes*, for example, was because it did not appear in the relevant casebooks. My class, Pacific Island Legal Systems, appears to be the only course at our law school that currently examines the *Insular Cases*.[158] The *Insular Cases*' present-day impacts on the status of Guam, American Samoa, and the Northern Mariana Islands are prominent in our syllabus.[159]

B. Existing Arguments for Including the Insular Cases *in the Law School Curriculum*

Legal scholars whose work centers on the status of the territories powerfully describe the import of the *Insular Cases*. For many, the *Insular Cases* are vital to understanding U.S. expansionism because the cases forced the United States to grapple with whether it "could emulate the European nations and conquer and possess colonial territories."[160] Following the Spanish-American War, U.S. decision-makers sought to govern the new territories and their peoples "with a free hand, untethered by the constitutional constraints that normally restrained the governmental structures of the continental United States."[161] At that time, the debate over the U.S. takeover and control of new territories was of paramount importance because the United States was constructing its identity as a powerful—yet facially respectable—nation within the international community.[162]

Thus, many emphasize the *Insular Cases*' importance in shaping the United States as a nation. Legal scholar Ediberto Román asserts, for example, that the

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[156] *See supra* notes 141–49, 152–53 and accompanying text.

[157] *See, e.g.*, Interview with Eric Yamamoto, Professor of Law, William S. Richardson Sch. of Law, in Honolulu, Hawai'i (Aug. 25, 2016); E-mail from Charles E. Colman, Assistant Professor of Law, William S. Richardson Sch. of Law, to Susan Serrano (June 8, 2017, 5:57 PM HST) (on file with author) (indicating that if he teaches Conflicts of Law again he will likely include "issues of the sort raised by the Insular Cases").

[158] Our colleague, the late Jon Van Dyke, taught and wrote extensively about U.S. territories in the Pacific. *See* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992).

[159] *See infra* note 482 and accompanying text.

[160] Levinson, *supra* note 41, at 246; *see* José A. Cabranes, *Some Common Ground*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 82, at 39, 43 ("It is fair to say that [the territorial incorporation doctrine] was devised in order to make colonialism possible."); Rivera Ramos, *supra* note 3, at 284–91 (outlining the "ideology of expansion" discourse in the *Insular Cases*); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1221 (1996) (describing "[t]he colonialism authorized in the Insular Cases").

[161] Torruella, *supra* note 3, at 6; *see* STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 105–27 (1995); LEIBOWITZ, *supra* note 46, at 19–26.

[162] RIVERA RAMOS, *supra* note 62, at 104.

Insular Cases solidified the United States' "position as 'the colonizer who refuses'"[163]: the colonizer who directly conquers other lands "while at the same time denouncing imperialism elsewhere and remaining comfortable with its conscience."[164] As many contend, to enable the United States to compete with Europe's colonial expansion, the *Insular Cases* treated the unincorporated territories as essentially "extraconstitutional" areas never destined for statehood.[165] This gave Congress nearly unrestricted power to govern the territories and their peoples indefinitely.

In contrast, Christina Duffy Burnett views the *Insular Cases* as creating the constitutional doctrine of "deannexation."[166] She contends that "the epochal significance of the cases lies in their careful creation of a new kind of U.S. territory: a domestic territory that could be governed temporarily, and then later, if necessary, be relinquished."[167] On the heels of the Civil War, when the United States was preoccupied with the indivisibility of the nation, the *Insular Cases* allowed for experimentation with U.S. imperial expansion without permanent consequences. Rather than being forever bound to its unincorporated territories, the United States could surrender them.[168] For Duffy Burnett, this is the cases' most significant contribution to constitutional law regarding U.S. territorial expansion.[169]

As discussed above, the inherent racism legitimized in *Downes v. Bidwell* is significant. For example, Efrén Rivera Ramos underscores "[t]he obvious racism" and "the ideologies of Manifest Destiny and Social Darwinism" underlying the Court's view that territorial peoples "were not fit to become full-fledged members of the American polity."[170] Pedro Malavet similarly claims that *Downes* concerned the U.S. government's power to exclude peoples who were "racialized as something 'other' than 'Americans.'"[171] Juan Perea contends

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[163] Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1147 (1997) (quoting ALBERT MEMMI, THE COLONIZER AND THE COLONIZED 19 (1965)).

[164] *Id.* at 1148; *see* Rivera Ramos, *supra* note 3, at 228 (explaining how the *Insular Cases* and "the doctrine they established became an important constituent element of the colonial project: a significant dimension of Puerto Rican reality as conditioned by the colonial experience"); Christina Duffy Burnett, *"They Say I Am Not an American . . .": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 667 (2008) (contending that one of the *Insular Cases*, *González v. Williams*, sheds light on the U.S. empire and that "turn-of-the-twentieth-century imperialism helped shape a modern American nation").

[165] See *supra* notes 98–100 and accompanying text.

[166] Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005).

[167] *Id.* at 797.

[168] *See id.* at 803.

[169] *See id.* at 801.

[170] Rivera Ramos, *supra* note 3, at 290.

[171] Malavet, *supra* note 46, at 246. Sanford Levinson contends that the *Insular Cases* should be placed in the context of the history of American racism or "'ascriptivism,' the view that to be a 'true

that the *Downes* Court invoked its "ideology of conquest" to sanction control over those viewed as "savages."[172] As mentioned, Justice Brown warned in *Downes* of the grave consequences if the offspring of the colonies' inhabitants were entitled to the rights of American citizens.[173]

Judge Torruella maintains that the *Insular Cases* established "a regime of de facto political apartheid."[174] For him, "the *Insular Cases* are on par with the Court's infamous decision in *Plessy v. Ferguson* in licencing the downgrading of the rights of discrete minorities within the political hegemony of the United States."[175] For these and other reasons, scholars contend that the cases should be included in the law school curriculum, and that their omission from contemporary legal education perpetuates a "sanitized history of the status quo"[176] and "a skewed understanding of legal history and constitutional law."[177]

Most notably, Levinson posited that the constitutional law canon should be expanded to include the *Insular Cases* and the "saga of American expansionism" [178] for pedagogical, cultural literacy, and academic theory reasons.[179] If the purpose of the canon is pedagogical, students should learn about cases that are likely to prepare them to be practicing lawyers.[180] This means learning about cases that may structure their own law practice, or about doctrines that are current, lively, and likely to be useful to adjudicators.[181] This also means exposing students to cases that serve as models for the arts of lawyering and legal reasoning.[182] If cultural literacy is the goal, then educated lawyers should be familiar with certain cases and episodes of constitutional

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American,' one had to share certain racial, religious, or ethnic characteristics." Levinson, *supra* note 41, at 257.

[172] Perea, *supra* note 82, at 157 (contending that the U.S. Supreme Court viewed "racially different" others as a threat to the heart of white Anglo-Saxon dominance).

[173] Downes v. Bidwell, 182 U.S. 244, 279 (1901).

[174] Torruella, *supra* note 3, at 3.

[175] Igartúa-de la Rosa v. United States, 417 F.3d 145, 162 (2005) (Torruella, J., dissenting).

[176] Francisco Valdes, *"We Are Now of the View": Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407, 1458 (2005).

[177] *Id.* at 1457 n.110.

[178] Levinson, *supra* note 41, at 265. Generally speaking, a canon is understood as "a set of foundational texts that exemplify, guide, and constitute a discipline." Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 825–26 (2004); *see* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 253 (1998) (describing the constitutional canon); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 968 (1998) (asserting that "[t]he study of canons and canonicity is the key to the secrets of a culture and its characteristic modes of thought").

[179] Levinson, *supra* note 41, at 265–66.

[180] *Id.* at 242.

[181] *Id.*

[182] *Id.*

development in order to participate in serious discussions about them.[183] For academic theory purposes, legal academics should confront key cases and episodes in U.S. constitutional history in order to be taken seriously by the community of constitutional scholars.[184]

Levinson contends that *Downes v. Bidwell* should be included in each of these canons.[185] Although most students will not encounter litigation over the constitutional status of the territories, he submits that *Downes* furthers the pedagogical canon because it is an excellent example of legal rhetoric and reasoning.[186] The justices' debates in *Downes* are "carried on at a high level of professional ability, and students can certainly learn a lot about legal rhetoric from the close study of the various opinions."[187] *Downes* points to fundamental questions not answered in the constitutional text, such as: What actually constitutes the United States? How is that determined? Where does the notion of unincorporated territories originate? What are the implications of distinguishing between states and territories?[188]

Levinson submits that learning about *Downes* would help to construct a better cultural literacy canon by ensuring that lawyers and citizens "are well informed about key episodes in American constitutional development."[189] For him, "the epic story of American expansionism that pervades our entire 19th-century history"[190]—and *Downes*'s place in it—is a key narrative missing from the canon's dominant historical storylines of federalism, economic regulation, civil rights, and civil liberties.[191]

The *Insular Cases* furthered U.S. decision-makers' purposeful choice at the close of the nineteenth century to transform the United States into an imperialist power.[192] For Levinson, *Downes* also "contains within it a capsule history of some other crucial chapters in the expansionist saga,"[193] including the Louisiana Purchase and Chief Justice Taney's opinion in *Scott v. Sandford*, declaring that Congress did not have plenary power over U.S. territories.[194] Levinson also suggests that *Downes* should be placed in the context of American racism

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[183] *Id.* at 243.

[184] *Id.*

[185] Levinson, *supra* note 41, at 248.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 248–49.

[189] *Id.* at 250.

[190] *Id.* at 252.

[191] Levinson, *supra* note 41, at 251–52.

[192] *See supra* notes 56–63 and accompanying text.

[193] Levinson, *supra* note 41, at 252.

[194] *Id.* at 252–56.

alongside *Plessy v. Ferguson*, *Elk v. Wilkins*, and anti-Asian immigration legislation because territorial peoples' otherness was fundamental to the case's outcome.[195] He concludes that *Downes*, perhaps more than most cases, offers essential insight into "the interplay of general American political ideologies and the development of constitutional doctrine."[196]

Finally, *Downes*'s inclusion in the academic theory canon would be effective "in directing constitutional scholars toward important questions that have tended to be ignored within contemporary scholarship."[197] For Levinson, the *Insular Cases* help constitutional scholars to explain mechanisms of constitutional change, particularly because the cases resulted from a "constitutional moment" in which the U.S. Supreme Court forged a constitutional path that mirrored the 1900 election of imperialist William McKinley.[198]

Levinson convincingly argues that *Downes* should become a part of the constitutional law canon, but the canon can be elusive. What is or should be part of the canon?[199] Who decides which are the most important or instructive texts in a particular field? Editors of casebooks—whose objectives and agendas may differ significantly—provide perhaps the most crucial gatekeeping function: they decide which "cases and materials" to include or exclude, and thereby impact which texts law students study.[200] What becomes canonical depends on what one believes is important, but also what one thinks others believe is important.[201] Different audiences or "interpretive communities" may have

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[195] *Id.* at 257–59 (noting that Justice Brown also authored *Plessy v. Ferguson*, and that *Downes* and *Plessy* "arise out of a common intellectual milieu").

[196] *Id.* at 263.

[197] *Id.* at 250.

[198] *Id.* at 264–65 (describing the term "constitutional moment," coined by Bruce Ackerman, as a phenomenon where "an aroused American public, confronting issues of great import, make a conscious decision to strike out on transformative constitutional paths").

[199] *See, e.g.*, Primus, *supra* note 178, at 245, 247 (contending that cases "that are important but normatively disapproved" should more appropriately be considered "as the 'anti-canon,'" and noting that "[t]he use of a dissenting opinion as if it were a canonical authority indicates that the constitutional canon must be open to revision").

[200] Balkin & Levinson, *supra* note 178, at 973; *see* Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2661 (1997) (book review) ("[C]asebooks can play a critical role in the evolution of a field, the creation of a disciplinary rule of recognition, and the concomitant development of a canon.").

[201] Balkin & Levinson, *supra* note 178, at 979.

divergent canons and methods of defining them.[202] And canons, for various reasons, change over time.[203]

Perhaps more importantly, most discussions of what should constitute the canon focus very little on the importance of "looking to the bottom," or adopting the perspective of those most oppressed. Legal scholar Mari Matsuda implores law faculties to commit to seeing issues from the viewpoint of the least privileged.[204] In the context of U.S. territorial peoples, looking to the bottom means, among other things, considering the meaning of self-determination for those colonized by examining their varied responses to the *Insular Cases*. Attentiveness to the proactive claims of those harmed by injustice is an integral step toward repairing those wrongs.

Historical cases and materials should be included in the canon to show that the law sometimes sanctions injustice and has lasting negative effects on individuals and groups. J.M. Balkin and Sanford Levinson contend that some cases in the canon are included "to help us learn from America's past misdeeds and mistakes and to understand how these have irrevocably shaped the world in which we live today."[205] Indeed, "law professors routinely include cases and materials that are not only badly reasoned, but also unjust, because they are insensitive to the poor and oppressed, because they justify violations of civil liberties, or because they are racist or sexist," to reveal to students the racism and sexism of that canonical text.[206] Some scholars posit that the *Insular Cases* are not taught in constitutional law for precisely this reason—they reveal the "brutal" or "dark" side of constitutional decision-making.

As Balkin and Levinson suggest, the effects of the *Insular Cases*' doctrine "are still with us today."[207] Adopting the viewpoint of the least privileged reveals that the cases have unrecognized, but real, impacts on the self-determination of those colonized. Thus, whether or not *Downes* or the other *Insular Cases* become a part of an elusive canon, the cases can and ought to be incorporated into the law school curriculum now. It is also important, however,

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[202] *Id.* at 980; Primus, *supra* note 178, at 252 (noting that "people are likely to answer differently based not only on their theoretical approach to canonicity but also on their substantive views on the merits of [a] decision, which in turn may be influenced by their political opinions"); *see* Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000) (describing some of the complexities of developing a canon).

[203] *See* David Fontana, *A Case for the Twenty-First Century Constitutional Canon:* Schneiderman v. United States, 35 CONN. L. REV. 35, 40 (2002) ("[T]he canon will not necessarily include the same materials throughout different periods of time. As society and law change, so should the canon.").

[204] Matsuda, *supra* note 27, at 324–25; *see* Janine Young Kim, *Resistance and Transformation: Re-Reading Mari Matsuda in the Postracial Era*, 18 ASIAN PAC. AM. L.J. 35, 37 (2013) ("By turning to . . . the lived reality of injustice and discrimination, mainstream legal scholars would be able to develop theories that are richer, truer, and more relevant than before.").

[205] Balkin & Levinson, *supra* note 178, at 978.

[206] *Id.* at 982–83.

[207] *Id.* at 1017.

to not only determine *why* the *Insular Cases* should be incorporated into the canon, but also *how* these cases should be taught, as Matsuda's "looking to the bottom" theory suggests.

IV. LOOKING TO THE PERSPECTIVES OF THOSE ON THE BOTTOM: SELF-DETERMINATION AND REPARATIVE JUSTICE

In her groundbreaking article, *Looking to the Bottom*, Mari Matsuda urged us to adopt the perspective of those most oppressed as an essential starting point for transforming legal discourse on justice.[208] "[I]n doing so, she and others laid the foundation for the emergence of Critical Race Theory and for grappling with the ways that race shaped and continues to shape many dimensions of American life and law."[209] Matsuda calls on us to view "notions of rights and wrong, justice and injustice," not from an abstract academic philosopher's standpoint, "but from the position of groups who have suffered through history."[210] In doing so, "identifiable normative priorities emerge," and concepts of law are generated that are "radically different from those generated at the top."[211] This is because the oppressed have "the real interest and the most information," and "can speak most eloquently of a better [world]."[212] By urging us to look to the experiences, history, and intellectual tradition of people of color, Matsuda not only "gave voice to those who had been silenced or ignored," but also "helped to expand the field of inquiry in standard legal scholarship."[213] She therefore influenced generations of critical race theorists whose scholarship and discourse look to the experiences of the least privileged to contextualize and give meaning to legal theory.

Indeed, Matsuda counseled "us to look to the bottom so that the academic's search for a neat and complete theory is tempered by understanding how those at the bottom live with duality, ambiguity, and inconsistency."[214] For critical race theorists, this duality laid a foundation for understanding oppressed groups' limited but compelling legal and political challenges to existing social arrangements.[215] As Matsuda asserts, this duality gives subordinated people strength—"[a]pplying the double consciousness consept [sic] to rights rhetoric allows us to see that the victim of racism can have a mainstream consciousness . . . as well as a victim's consciousness."[216] For her, "[t]hese two viewpoints can

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[208] *See* Matsuda, *supra* note 27.

[209] Yamamoto & Serrano, *supra* note 28, at 71–72.

[210] Matsuda, *supra* note 27, at 325.

[211] *Id.* at 325–26.

[212] *Id.* at 346.

[213] Young Kim, *supra* note 204, at 36.

[214] *Id.* at 42.

[215] *See* Eric K. Yamamoto, Why Law Still Matters: The Dynamics and Political Value of Justice Litigation 7 (2015) (unpublished manuscript) (on file with author).

[216] Matsuda, *supra* note 27, at 333–34.

combine powerfully to create a radical constitutionalism that is true to the radical roots of this country."[217]

Critical race theorists, therefore, maintain that oppressed groups can have a profound cynicism about law and legal process while acknowledging the historical and social role that rights have played in both liberating (even if imperfectly) and elevating the psyche of subordinated groups.[218] Rather than a mere "false consciousness," critical race theorists contend that marginalized groups possess a "critical consciousness": the subordinated can both "understand subordination and . . . derive means of liberation from it."[219] Critical race theorists thus recognize that the dual consciousness of those at the bottom "accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy."[220]

In the context of colonized peoples, looking to the bottom is most powerful when it is linked to the international human rights norm of self-determination. The self-determination principle, enshrined in the United Nations Charter, mandates the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[221] Additional U.N. instruments more fully define the right, including the 1966 Human Rights Covenants, which provide that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[222] "[S]elf-determination is generally accepted as a . . . peremptory norm from which no deviation is allowed."[223] When a people's right to self-determination is wrongfully and illegally abrogated, decolonization—"includ[ing] the right to

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[217] *Id.* at 334. Matsuda asserts that Frederick Douglass also engaged in this type of "radical constitutionalism" when he broke from the Garrisonian abolitionists and embraced the Constitution as a tool to fight against slavery. *Id.*

[218] Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 632 (2003).

[219] Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1778 (1990); *see* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 312 (1987).

[220] Matsuda, *supra* note 27, at 341; *see* Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864–65 (1990).

[221] U.N. Charter art. 1, ¶ 2.

[222] International Covenant on Civil and Political Rights art. 1, ¶ 1, Mar. 23, 1976, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Jan. 3, 1976, 993 U.N.T.S. 3, 5; *see* Julian Aguon, *On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 ASIAN PAC. AM. L.J. 47, 51 (2011) ("[U]nder international law, self-determination remains a comprehensive, unparsed, and inalienable right of all peoples to freely choose their political status."); RIVERA RAMOS, *supra* note 62, at 119 (noting that self-determination "implies the legal or moral right of a people or group . . . to determine its status and associations with other peoples or groups and to fashion the organizing principles of its social existence").

[223] Aguon, *supra* note 222, at 51.

form an independent sovereign state of one's own"—is a remedy.[224] In particular, Guam, American Samoa, and the U.S. Virgin Islands remain non-self-governing territories that have yet to achieve full self-government.[225] The United States, as the administering power, is required to submit periodic reports to the U.N. Secretary-General regarding the steps it has taken to move those territories toward self-government.[226]

Many scholars contend, however, that for the peoples of the U.S. territories, the doctrine of territorial incorporation thwarts self-determination efforts. According to Efrén Rivera Ramos, "[t]he conceptual scheme of the Insular Cases is entirely incompatible with any notion of self-determination."[227] For him, the Court's *Insular Cases* discourse presupposes Congress's near plenary power "to determine the political condition and the civil and political rights of the people of the acquired territory."[228] *Downes*'s fundamental principle "that it is the prerogative of the conqueror to decide the destiny of the conquered"[229] legitimized the power relationship that today undermines U.S. territorial peoples' self-determination capacity.[230] Constitutional law scholar Gerald Neuman similarly maintains that "[t]he Insular Cases doctrine was emphatically not designed for the purpose of accommodating the self-determination of the people of the territories—it was designed to facilitate ruling over them."[231] According to Neuman, "[t]he doctrine's flexibility allows it to be used to modify constitutional structures in response to local customs and preferences,"[232] such as by allowing territorial provisions that restrict ownership of land to Indigenous residents, though those modifications serve to deny the full applicability of constitutional principles in the unincorporated territories.[233]

On the other hand, legal scholar Christina Duffy Burnett asserts that the *Insular Cases* doctrine stands for the proposition of "deannexation" and

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[224] *Id.* at 52; *see* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 75 (1995).

[225] *See* U.N. Charter art. 73; *Non-Self-Governing Territories*, UNITED NATIONS, http://www.un.org/en/decolonization/nonselfgovterritories.shtml (last visited Sept. 19, 2018).

[226] U.N. Charter art. 73e; U.N. Secretary-General, *Information from Non-Self-Governing Territories Transmitted Under Article 73e of the Charter of the United Nations*, ¶ 1, U.N. Doc. A/71/68 (Feb. 1, 2016) (providing that reports must be prepared for the U.N. Secretary-General annually and must include "information relating to the economic, social and educational conditions in the Territories").

[227] Rivera Ramos, *supra* note 3, at 298.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 230.

[231] Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 13 (2004).

[232] *Id.*

[233] *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (1980).

therefore provides a method "to implement the values of self-determination."[234] By creating the "unincorporated" category, the United States sought to reserve the right to extricate itself from those territories if necessary.[235] Until the *Insular Cases* were decided, she argues, it was not clear after the Civil War that the United States could retreat from its territories.[236] Just as the United States can pull out of the relationship, the territories can do so if they are being denied key rights and representation.[237] In a forthcoming piece, Indigenous Chamoru legal scholar Julian Aguon further explores the territories' ability, based on the *Insular Cases* and international law principles, to throw off the colonial yoke.[238]

Meaningful decolonization thus entails repairing the damage suffered by those who have experienced systemic oppression according to their self-shaped notions of reparation.[239] This type of repair, or "reparative justice," focuses on mending breaches in the polity by healing the persisting wounds of communities harmed.[240] Its goal is to ascertain and respond to groups' self-determined ideas of injury and remedy in order to "build[] new relationships as focal points for fostering an interest-convergence among the victims of injustice . . . and society itself."[241] As legal scholar Eric Yamamoto asserts, "[b]ecause the wounds are the material and psychological harms of injustice, the prescriptions for healing those wounds must be informed by justice,"[242] shaped by both those harmed and the larger society. Similarly, legal scholar Martha Minow contends that reparative justice for victims of mass violence should embody the notion of restorative justice "to repair the harms and to institute future changes to correct the injustice." [243] For Indigenous legal scholar Rebecca Tsosie, "self-determination provides the baseline requirement for an effective theory of reparative justice."[244]

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[234] Mary Wood, 'Insular Cases' *Made Puerto Rican Status Unclear, Panel Says*, U. VA. SCH. L. (Apr. 2, 2007), http://www.law.virginia.edu/html/news/2007_spr/insular.htm (quoting Christina Duffy Burnett).

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] E-mail from Julian Aguon to Susan Serrano (Feb. 27, 2018, 1:09 AM HST) (on file with author).

[239] Tsosie, *supra* note 37, at 245.

[240] Yamamoto et al., *supra* note 33, at 16.

[241] *Id.* at 4.

[242] *Id.* at 39.

[243] Tsosie, *supra* note 37, at 249 (citing MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91–117 (1998)).

[244] *Id.* at 253; D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 172 (2011) (noting that "a restorative justice approach informed by principles of self-determination . . . [is] particularly apt in light of the ravages of colonization").

Reparative justice, informed by principles of self-determination, thus requires us to pay close attention to the proactive justice claims of those harmed by the injustice. Legal scholar Carlton Waterhouse maintains that effective reparative justice efforts should focus on victims' material needs and well-being, and offer those victims a central role in the design and implementation of schemes to repair harms to their self-determination.[245] This kind of "[d]eference to victims respects their rights to personhood and self-determination."[246] In the context of looking to the bottom for U.S. territorial peoples, the damage to their self-determination should similarly be repaired according to the colonized peoples' sense of what is needed.

Thus, reparative justice for U.S. territorial peoples may entail repairing long-standing imbalances of power and agency, and redressing multiple political, economic, cultural, and social harms. For example, Pedro Malavet employs a "repair" paradigm to envision ways to construct "local political power for Puerto Ricans, and to create a viable Puerto Rican economy that supports real equal opportunity . . . , thus repairing the legacy of political, economic, and psychological colonization by the United States."[247] Similarly, Ediberto Román suggests that a transformative reparations effort for the people of the U.S. territories should first focus on exposure and acknowledgment of the wrongs committed and "should use the commonalities of wrongs to coalesce and form formidable political efforts" in a continuing effort to support territorial peoples' human rights.[248]

For Indigenous inhabitants of the territories, the preservation of their deep connections to land (and where applicable, the return of land) is also central to their self-determination.[249] As Indigenous legal scholar Rebecca Tsosie notes, reparative justice for Indigenous peoples "ought to engage Native normative frameworks of justice because, for Native peoples, reparative justice is a process that is 'simultaneously emotional and spiritual, political and social.'"[250] As she observes, however, no single theory of reparative justice "can fit all cultures, all

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[245] Waterhouse, *supra* note 33, at 267–68.

[246] Matsuda, *supra* note 27, at 387, 397 (contending that redress should always look "to victims for guidance").

[247] Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 391 (2002).

[248] Ediberto Román, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369, 383–84 (2002).

[249] Tsosie, *supra* note 37, at 236 (noting that "[r]epatriation of land is central to Indigenous self-determination, and is fundamentally linked to the political and cultural sovereignty of Indigenous peoples").

[250] *Id.* at 253 (quoting Rebecca Tsosie, *Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES 43, 43 (Jon Miller & Rahul Kumar eds., 2007)).

nations, and all peoples."[251] Instead, "the theory will differ depending on the particular historical context and cultural framework that applies."[252]

Thus, we can grasp some of the meanings of self-determination for those colonized by examining their responses to the legal apparatus, the *Insular Cases*, that has harshly shaped their political and social existence—responses that are both defensive against further encroachment on self-government efforts and proactively assertive as the foundation for repairing decades of social and political damage. Because reparative justice requires paying close attention to proactive justice claims of those harmed by the injustice,[253] for colonized peoples, this means examining their present-day usages of or resistance to the "teachings" of the *Insular Cases*.

This examination is important because the way in which a group's history is framed, and whether it is examined at all, is vital to shaping a group's narrative, and "can 'determine the power of justice claims or opposition to them.'"[254] As such, the near total omission of the *Insular Cases* and their impacts from law school courses fosters continued invisibility and discounts territorial peoples' attempts to craft and employ strategies to remedy their loss of self-determination.

V. THE *INSULAR CASES* IN THE LAW SCHOOL CURRICULUM: REVEALING THE SELF-DETERMINATION PERSPECTIVES OF THOSE MOST AFFECTED

Studying the *Insular Cases* from the bottom, guided by reparative justice principles, helps us to understand how those cases still tightly circumscribe U.S. territorial peoples' sovereignty. For the peoples of the territories, the meaning of self-determination is complicated by the "democratic deficit"[255] that subjects territorial residents to federal laws but deprives them of meaningful participation in national political processes. Territorial peoples thus at once seek forms of self-governance separate from U.S. control and also pursue civil and political rights within the U.S. paradigm.

A. Five Modern-Day Cases: The Insular Cases*' Lasting Impacts on Territorial Peoples' Self-Determination Efforts*

Five present-day cases, each in different ways implicating the *Insular Cases*, further reveal territorial peoples' multifaceted self-determination efforts. Two cases lay bare Puerto Rico's colonial relationship with the United States in

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[251] *Id.*

[252] *Id.* at 253–54.

[253] Waterhouse, *supra* note 33, at 267–68.

[254] Serrano, *supra* note 51, at 359 (quoting Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of* Rice v. Cayetano, *in* RACE LAW STORIES, *supra* note 58, at 541, 558).

[255] Igartúa-de la Rosa v. United States, 417 F.3d 145, 168 (1st Cir. 2005); *see* Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 39 (2000).

both constitutional and statutory contexts. Another underscores American Samoans' dispute over U.S. citizenship as a source of needed rights on the one hand or an encroachment on tradition and custom on the other. Yet another shines light on Indigenous Chamorus' strategic employment of the *Insular Cases* to preserve a measure of self-determination. Finally, another exposes the incongruity of disallowing some territorial residents who formerly lived in one of the states from voting in U.S. presidential elections, while allowing individuals overseas who formerly lived in one of the states to do so. Each of these efforts confronts head-on the lasting legacy of the *Insular Cases*.

1. The Puerto Rico cases

During its October 2015 term, the U.S. Supreme Court decided two cases exposing the long-lasting effects of U.S. colonization in Puerto Rico. In *Puerto Rico v. Sánchez Valle*, the Court determined that, for purposes of the Double Jeopardy Clause, Puerto Rico and the United States are not separate sovereigns.[256] In *Puerto Rico v. Franklin California Tax-Free Trust*, the Court ruled that Puerto Rico's municipalities cannot file for Chapter 9 bankruptcy, but, at the same time, Puerto Rico cannot enact its own municipal bankruptcy law.[257] This Section briefly describes both cases and their impacts.

a. Puerto Rico v. Sánchez Valle

For some, *Puerto Rico v. Sánchez Valle* "is the most important case on the constitutional relationship between Puerto Rico and the United States since the establishment of the Commonwealth in 1952."[258] In 2008, defendants Luis Sánchez Valle and Jaime Gómez Vázquez were separately indicted for selling a firearm without a permit in violation of the Puerto Rico Arms Act of 2000.[259] While those charges were pending, federal grand juries indicted the two men, based on the same transactions, for violations of similar U.S. gun trafficking statutes.[260] Both defendants pleaded guilty to the federal charges and moved to dismiss the Commonwealth of Puerto Rico charges, arguing that the Puerto Rico charges violated the constitutional protection against double jeopardy.[261] The trial courts dismissed the charges, but the Puerto Rico Court of Appeals reversed.[262] The Supreme Court of Puerto Rico then reversed the appellate court, holding that their prosecutions on the Puerto Rico charges violated the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.[263]

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[256] Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1876–77 (2016).

[257] Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1942 (2016).

[258] Petition for Writ of Certiorari at 1, *Sánchez Valle*, 136 S. Ct. 1863 (No. 15-108).

[259] *Sánchez Valle*, 136 S. Ct. at 1869.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

The U.S. Supreme Court agreed and held that Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause.[264] In so holding, the Court determined that "sovereignty" in the double jeopardy context "does not bear its ordinary meaning."[265] For the Court, "[t]he degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis."[266] Equally unimportant is an entity's "ability to enact and enforce its own criminal laws"[267] or whether it "possesses the usual attributes, or acts in the common manner, of a sovereign entity."[268] Instead, the Court looks only to the "ultimate source" or "deepest wellsprings" of the entity's self-governing power.[269]

According to the Court, states and Indian tribes are separate sovereigns from the federal government because the source of their power is "primeval"—it pre-existed the formation of the Union.[270] In contrast, "the oldest roots of Puerto Rico's power to prosecute lie in federal soil."[271] The Court traced the history of Puerto Rico's relationship with the United States, starting in 1898 when Spain "ceded" Puerto Rico to the United States, through the next century when the two "forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule."[272]

In 1952, Puerto Rico adopted its own constitution and became the Commonwealth of Puerto Rico, a new and "exceptional" self-governing entity.[273] At the same time, the U.S. Supreme Court recognized Puerto Rico as holding "a measure of autonomy comparable to that possessed by the States."[274] However, for the Court, these intervening indicators of Puerto Rico's self-governance "do[] not break the chain."[275] Therefore, in tracing Puerto Rico's prosecutorial power "all the way back, [the Court] arrive[d] at the doorstep of the U.S. Capitol."[276]

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[264] *Id.* at 1876–77.

[265] *Sánchez Valle*, 136 S. Ct. at 1870.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.* at 1871.

[270] *Id.* at 1875.

[271] *Sánchez Valle*, 136 S. Ct. at 1868.

[272] *Id.*

[273] *Id.* at 1874.

[274] *Id.* (quoting Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976)).

[275] *Id.* at 1876.

[276] *Id.*

Nowhere in the opinion did the Court mention the concept of the "unincorporated" territory or refer to Puerto Rico as a U.S. colony.[277] Nor did it analyze the *Insular Cases* themselves,[278] save a passing reference to *Grafton v. United States*,[279] in which the U.S. Supreme Court held that the Philippines—then a U.S. territory—had no power to prosecute a defendant for murder after a federal court had acquitted him.[280] In a seemingly incongruent fashion, the Court rejected the applicability of *Grafton* because "[f]ollowing 1952, Puerto Rico became a new kind of political entity, . . . governed in accordance with, and exercising self-rule through, a popularly ratified constitution."[281] Nonetheless, for the Court, the result "ends up the same": the source of Puerto Rico's power is the U.S. Congress.[282]

In dissent, Justice Breyer, joined by Justice Sotomayor, rejected the conclusion that Congress is the ultimate source of Puerto Rico's prosecutorial power. He questioned the majority's attempt to seek the "furthest-back" power source.[283] "We do not trace Puerto Rico's source of power back to Spain or to Rome or to Justinian," he wrote, "nor do we trace the Federal Government's source of power back to the English Parliament or to William the Conqueror or to King Arthur."[284]

He thus urged the Court to consider "the broader context of Puerto Rico's history."[285] For him, "congressional activity and other historic circumstances can combine to establish a *new* source of power."[286] He noted in particular that, in response to the adoption of Puerto Rico's constitution, the United States in 1953 reported to the United Nations that Puerto Rico was no longer a non-self-governing territory.[287] The United States' memorandum to the United Nations declared that Puerto Rico had reached "the full measure of self-government"[288]

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[277] Andrés González Berdecía, *Puerto Rico Before the Supreme Court of the United States: Constitutional Colonialism in Action*, 7 COLUM. J. RACE & L. 80, 112 (2016).

[278] *Id.*

[279] *Sánchez Valle*, 136 S. Ct. at 1873.

[280] Grafton v. United States, 206 U.S. 333, 355 (1907).

[281] *Sánchez Valle*, 136 S. Ct. at 1874.

[282] *Id.*

[283] *Id.* at 1878 (Breyer, J., dissenting).

[284] *Id.*

[285] *Id.* at 1880.

[286] *Id.* He also contended that the Court should look to "the practices, actions, statements, and attitudes" of Congress and Puerto Rico to decide whether Puerto Rico achieved sufficient sovereignty for double jeopardy purposes. *Sánchez Valle*, 136 S. Ct. at 1884 (Breyer, J., dissenting); *see* Mark Joseph Stern, *The Supreme Court Deals a Blow to Puerto Rican Sovereignty*, SLATE (June 9, 2016, 2:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/06/the_supreme_court_s_blow_to_puerto_rican_sovereignty.html.

[287] *Sánchez Valle*, 136 S. Ct. at 1882 (Breyer, J., dissenting).

[288] *Id.*

and that "Congress has agreed that Puerto Rico shall have, under [its] Constitution, freedom from control or interference by the Congress in respect to internal government and administration."[289] The United Nations thereby removed Puerto Rico from the list of non-self-governing territories, and the U.N. General Assembly determined that "the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity."[290] Thus, for Justice Breyer, the "history of statutes, language, organic acts, traditions, statements, and other actions, taken by all three branches of the Federal Government and by Puerto Rico" indicated "that the 'source' of Puerto Rico's criminal law ceased to be the U.S. Congress and became Puerto Rico itself, its people, and its constitution."[291]

For some, *Sánchez Valle* drastically altered the long-held belief that Puerto Ricans had a collective right to self-government.[292] For others, the outcome validated what they had consistently argued—Puerto Rico's Commonwealth status did not alter its political identity as a colony.[293] On the one hand, looking to the bottom reveals valuable protection for criminal defendants in Puerto Rico against multiple prosecutions for the same misconduct,[294] but, on the other, it unmasks Puerto Rico's glaring lack of "wide-ranging self-rule,"[295] rooted in part in the *Insular Cases*. As discussed below, Puerto Ricans increasingly call on the United States to repair the enduring imbalance of power between the island and its overseer,[296] but many disagree on the precise method to restore their self-determination.[297] *Sánchez Valle*, along with *Puerto Rico v. Franklin California*

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[289] *Id.* (alteration in original).

[290] *Id.* at 1883.

[291] *Id.* at 1884; *see* Charles R. Venator-Santiago, *Cold War Civil Rights: The Puerto Rican Dimension*, 42 CAL. W. INT'L L.J. 423, 432 (2012) (using Derrick Bell's "interest convergence" theory to assert that the United States allowed Puerto Rico to draft a local constitution, among other things, "to provide credibility to the United States in its struggle with the Communist Bloc, and to win the hearts of third world countries in the United Nations").

[292] *See, e.g.*, Brief for Petitioners at 35, *Sánchez Valle*, 136 S. Ct. 1863 (No. 15-108).

[293] *See* Vann R. Newkirk II, *Puerto Rico's Dream, Denied*, ATLANTIC (June 14, 2016), https://www.theatlantic.com/politics/archive/2016/06/puerto-rico-guam-supreme-court-status/486887. For more on the political status context underlying the *Sánchez Valle* case, see González Berdecía, *supra* note 277, at 91–93 (describing the Puerto Rico Supreme Court's change in approach to Puerto Rico's status after the pro-statehood party filled six seats on that court).

[294] *Sánchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring).

[295] *See id.* at 1876.

[296] *See, e.g.*, Nick Brown, *Puerto Rico Governor Cites 'Sharp Contrast' with Island's Overseers*, REUTERS (Jan. 20, 2017, 4:50 PM), http://www.reuters.com/article/us-puertorico-debt-oversight board-idUSKBN1542X3.

[297] *See, e.g.*, González Berdecía, *supra* note 277, at 144–45; Cristian Farias, *Puerto Rico Is Up in Arms Because the Obama Administration Basically Just Called It a Colony*, HUFFINGTON POST (Dec. 30, 2015, 3:02 PM), http://www.huffingtonpost.com/entry/puerto-rico-sovereignty-supreme-court_us_56816a76e4b0b958f659eee5; Cristian Farias, *Supreme Court Deals Blow to Puerto Rican Government—And Gives Hope to Puerto Rico*, HUFFINGTON POST (June 9, 2016, 2:59 PM),

Tax-Free Trust, described below, shines light on the colonial experience of millions of Puerto Rico's people under U.S. rule. As attorney Andrés González Berdecía contends, the two cases "illustrate[] perfectly why Puerto Rico remains a 21st century colony of the United States."[298]

b. Puerto Rico v. Franklin California Tax-Free Trust

In *Puerto Rico v. Franklin California Tax-Free Trust*, the U.S. Supreme Court again sharply delineated the limits of Puerto Rico's self-governing power. Mired in over seventy billion dollars in public debt, Puerto Rico enacted the Puerto Rico Corporation Debt Enforcement and Recovery Act, which sought to enable Puerto Rico's public utilities to restructure their debt.[299] Investors brought separate suits against Puerto Rico and government officials, challenging the validity of the Act.

In a case involving Puerto Rico's ability to respond to the most severe fiscal crisis in its history,[300] the U.S. Supreme Court held that Chapter 9 of the federal Bankruptcy Code preempted Puerto Rico's Recovery Act.[301] Writing for the majority, Justice Thomas explained that Puerto Rico is not a "State," pursuant to the 1984 amendments to the Bankruptcy Code, "for the purpose of defining who may be a debtor under chapter 9," and therefore it cannot authorize its municipalities to file for Chapter 9 relief.[302] At the same time, it "remains a 'State' for other purposes related to Chapter 9, including that chapter's pre-emption provision," so its Recovery Act is preempted by federal law.[303] Thus, because Puerto Rico is not a "State," its municipalities cannot file for bankruptcy under Chapter 9, but because it is a "State," Chapter 9's preemption provision "bars [it] from enacting its own municipal bankruptcy scheme . . . ."[304]

The majority viewed the case as one of simple statutory construction: "The plain text of the Bankruptcy Code begins and ends our analysis."[305] Any mention of the *Insular Cases* was conspicuously absent. However, the Court

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http://www.huffingtonpost.com/entry/supreme-court-puerto-rico_us_57597cc5e4b00f97fba768e2; Rafael Bernal, *Puerto Rico's Representative Makes Renewed Push for Statehood*, HILL (Jan. 6, 2017, 9:03 PM), http://thehill.com/latino/313150-puerto-ricos-representative-makes-renewed-push-for-statehood.

[298] González Berdecía, *supra* note 277, at 128.

[299] Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1943 (2016).

[300] Petition for Writ of Certiorari at 1, *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (No. 15-233).

[301] *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1949.

[302] *Id.* at 1942. On March 21, 1984, Senator Strom Thurmond inexplicably proposed an amendment to Section 101 of Title 11, which Congress passed. It read: "'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title." Franklin Cal. Tax-Free Tr. v. Puerto Rico, 805 F.3d 322, 349 (1st Cir. 2015) (Torruella, J., concurring).

[303] *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1942.

[304] *Id.*

[305] *Id.* at 1946.

could not have reached such a straightforward result unquestionably affirming Congress's plenary power over Puerto Rico without reliance—however implicitly—on the *Insular Cases* doctrine.

In dissent, Justice Sotomayor, joined by Justice Ginsburg, criticized the majority for failing to read the statute in the context of the overall statutory scheme.[306] For Justice Sotomayor, "[t]he structure of the Code and the language and purpose of [the preemption provision] demonstrate that Puerto Rico's municipal debt restructuring law should not be read to be prohibited by Chapter 9."[307] Instead, she wrote that the preemption provision "by its terms presupposes that Chapter 9 applies only to States who have the power to authorize their municipalities to invoke its protection."[308] Therefore, "[b]ecause Puerto Rico's municipalities cannot pass through the [provision governing who may be a debtor] gateway to Chapter 9, nothing in the operation of a Chapter 9 case affects Puerto Rico's control over its municipalities."[309]

Justice Sotomayor also criticized the majority for ignoring the real-world impacts on the Puerto Rican people and for "reject[ing] contextual analysis in favor of a syllogism."[310] She contended that "[p]re-emption cases may seem like abstract discussions of the appropriate balance between state and federal power[, b]ut they have real-world consequences."[311] She warned that preemption would imperil public services like electricity, drinking water, roads, and public transportation.[312] She then acknowledged that Puerto Rico would be "powerless" to avert this "looming 'humanitarian crisis.'"[313] For these reasons, she stated that "[s]tatutes should not easily be read as removing the power of a government to protect its citizens."[314]

Justice Sotomayor's call to heed "real-world consequences" elevated the perspective of those most affected: Puerto Rico's people. For her, the majority's decision left Puerto Rico's government powerless to exercise a measure of self-governance to assist its people in a humanitarian crisis. That humanitarian crisis was triggered in part when the U.S. government phased out tax incentives for U.S. corporations operating in Puerto Rico, causing a recession.[315] Severe

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[306] *Id.* at 1953 (Sotomayor, J., dissenting).

[307] *Id.* at 1949.

[308] *Id.* at 1952.

[309] *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1952 (Sotomayor, J., dissenting).

[310] *Id.* at 1953.

[311] *Id.* at 1954.

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] ANNE O. KRUEGER ET AL., PUERTO RICO—A WAY FORWARD 4–14 (2015), www.bgfpr.com/documents/PuertoRicoAWayForward.pdf. Much of Puerto Rico's debt began accumulating in 1993 after the U.S. government removed tax incentives for large U.S. corporations

government cuts to education and healthcare directly affected families who relied on government services.[316] Public schools were closed, public workers' benefits were cut, "the sales tax was increased to 11.5%,"[317] and the Department of Health suffered $135 million in budget cuts from 2011 to 2015.[318]

Soon after *Franklin California Tax-Free Trust* was decided, Congress passed and President Obama signed the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"—ironically, "promise" in Spanish), which gave sweeping power to a seven-member financial oversight board to take over negotiations with Puerto Rico's creditors.[319] Among other things, the board has the power to decide which projects are funded, to approve budgets, and to veto debt issuances, without regard to Puerto Rico's constitution or the decisions of Puerto Rico's government.[320] The oversight board's seven members are appointed by the President of the United States,[321] and Puerto Rico's Governor (or designee) is only an ex officio member.[322]

Many commentators argue that Puerto Rico's inability to restructure its own debt and the concomitant enactment of PROMESA are manifestations of U.S. colonialism that negatively impact those already at the bottom.[323] PROMESA requires "the reduction of the federal minimum wage from $7.25 to $4.25 an hour for workers 25 years old and younger," unchangeable by Puerto Rico's

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with operations in Puerto Rico. *See* Deborah S. DiPiero, Note, *Puerto Rico's Need for Corporate Incentives Following the 1996 Amendment to Section 936*, 15 B.U. INT'L L.J. 549, 550 (1997). Puerto Rico's economy fell into recession, but the government continued to issue municipal bonds to enable it to function. *See* González Berdecía, *supra* note 277277, at 115–16; Juan González, *Puerto Rico's $123 Billion Bankruptcy Is the Cost of U.S. Colonialism*, INTERCEPT (May 9, 2017, 8:23 AM), https://theintercept.com/2017/05/09/puerto-ricos-123-billion-bankruptcy-is-the-cost-of-u-s-colonialism (reporting that Puerto Rico's fiscal woes stem from predatory and illegal bond deals made between Wall Street firms and Puerto Rico's political leaders).

[316] For anecdotal stories about how the budget cuts affected individuals' lives, see Mary Williams Walsh, *A Surreal Life on the Precipice in Puerto Rico*, N.Y. TIMES (Aug. 6, 2016), http://www.nytimes.com/2016/08/07/business/dealbook/life-in-the-miasma-of-puerto-ricos-debt.html, and Catherine Morris, *The Future of Puerto Rican Education*, ATLANTIC (Oct. 1, 2015), http://www.theatlantic.com/education/archive/2015/10/puerto-rico-economy-education-declines/408277.

[317] DEMOCRATIC STAFF OF HOUSE COMM. ON NAT. RES., BRUISED AND BITTEN: HOW MAJOR SPENDING CUTS IN PUERTO RICO HAVE LEFT THE ISLAND VULNERABLE TO ZIKA 2 (2016), http://democrats-naturalresources.house.gov/imo/media/doc/Zika%20Report_Puerto%20Rico.pdf.

[318] *Id.* at 8.

[319] Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, §§ 2141–52, 130 Stat. 549 (2016).

[320] Representative Raúl Grijalva called the bill's lack of Puerto Rican oversight "another infringement on the sovereignty of the people of Puerto Rico." Vann R. Newkirk II, *Puerto Rico Belongs to Congress*, ATLANTIC (June 10, 2016), http://www.theatlantic.com/politics/archive/2016/06/puerto-rico-news-ruling-promesa/486392.

[321] *About Us*, FIN. OVERSIGHT & MGMT. BOARD FOR P.R., https://oversightboard.pr.gov/fombteam (last visited Sept. 19, 2018).

[322] *Id.*; Gillian B. White, *Puerto Rico's Problems Go Way Beyond Its Debt*, ATLANTIC (July 1, 2016), http://www.theatlantic.com/business/archive/2016/07/puerto-rico-promesa-debt/489797.

[323] *E.g.*, González, *supra* note 315.

Governor without the oversight board's approval.[324] In January 2017, the oversight board ordered Puerto Rico's Governor "to present a plan that would generate $4.5 billion a year in revenue or savings through 2019" and include drastic cuts to healthcare and higher education.[325] The board recommended the closure of 300 public schools and teacher furloughs, and, as of May 2017, 178 schools were slated for closure and thousands of teachers' contracts were not renewed.[326] It also recommended a $450 million cut over four years to Puerto Rico's public university, though Puerto Rico's Governor has proposed a lesser, though still dire, cut of $241 million, as $450 million "would be a 'dramatic negative' that would be 'difficult for the university to absorb.'"[327] In addition, $850 million in Affordable Care Act funds are slated for elimination in 2018.[328] Puerto Rico's Governor acknowledged that "[t]here has to be sacrifice everywhere," but underscored that low-income individuals without healthcare and parents of public schoolchildren would be the hardest hit.[329] This is particularly alarming in light of Puerto Rico's twelve percent unemployment and forty-five percent poverty rates,[330] the catastrophic impacts of Hurricane Maria,[331] and ongoing massive emigration to the continental United States.[332]

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[324] Juan C. Dávila, *PROMESA: Puerto Rico's "Restructure" at $4.25 an Hour*, HUFFINGTON POST (Dec. 6, 2017), http://www.huffingtonpost.com/juan-c-davila/promesa-puerto-ricos-rest_b_10615610.html.

[325] Jim Wyss, *Will Puerto Rico Become the Newest Star on the American Flag?*, MIAMI HERALD (Feb. 23, 2017, 12:28 PM), http://www.miamiherald.com/news/nation-world/world/americas/article128782174.html.

[326] Frances Robles, *Puerto Rico's Debt Crisis Claims Another Casualty: Its Schools*, N.Y. TIMES (May 10, 2017), https://www.nytimes.com/2017/05/10/us/puerto-rico-debt-schools-close.html?_r=0; Corey Mitchell, *Puerto Rico Shutters Scores of Schools Amid Financial Crisis*, EDUC. WK. (May 30, 2017), http://www.edweek.org/ew/articles/2017/05/31/puerto-rico-shutters-scores-of-schools-amid.html (noting that the school closures would impact 30,000 students).

[327] Nick Brown, *Puerto Rico Governor Aims to Pare Cuts at Public University*, REUTERS (Mar. 20, 2017, 2:00 PM), https://www.reuters.com/article/us-puertorico-debt-upr/puerto-rico-governor-aims-to-pare-cuts-at-public-university-idUSKBN16R29O (quoting Moody's Investors Service).

[328] Statement of Oversight Board in Connection with PROMESA Title III Petition at 2, *In re* Commonwealth of Puerto Rico, No. 3:17-cv-01578 (D.P.R. May 3, 2017).

[329] Frances Robles, *Puerto Ricans Face 'Sacrifice Everywhere' on an Insolvent Island*, N.Y. TIMES (May 6, 2017), https://www.nytimes.com/2017/05/06/us/puerto-rico-insolvency-business-owners-anxiety.html (quoting Puerto Rico's Governor Ricardo A. Rosselló) (reporting that up to 400,000 people would lose their health plans and that many public services would be unavailable).

[330] DEMOCRATIC STAFF OF HOUSE COMM. ON NAT. RES., *supra* note 317, at 2.

[331] Frances Robles et al., *In Battered Puerto Rico, Governor Warns of a Humanitarian Crisis*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/us/puerto-rico-maria-fema-disaster-.html?_r=0.

[332] Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RES. CTR. (Oct. 14, 2015), http://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s.

Puerto Rico is now in the midst of a massive bankruptcy-like restructuring process pursuant to PROMESA.[333] As creditors battle over what is due, observers point to the colonial conditions laid bare by Puerto Rico's economic crisis.[334] One commentator observed that PROMESA "continues to treat Puerto Rico and its debt as an anomaly—neither state, nor municipality, which leaves it in a nebulous space . . . ."[335] Many Puerto Ricans worry that their futures are in the hands of a faraway oversight board and federal judge,[336] who may not "take into account basic essentials of safety, health and education."[337] Others criticize the across-the-board cuts to salaries, hours, pensions, education, and services, as well as the looming choices Puerto Ricans will have to make between basic necessities like housing and healthcare.[338]

In light of Puerto Rico's re-illuminated colonial status, Puerto Ricans have called for meaningful repair of the long-standing harms of injustice. Although all focus on redressing multiple political, economic, and social harms stemming from U.S. colonization, each group has a different approach. For example, some have renewed their calls for statehood.[339] Puerto Rico's Governor Ricardo Rosselló, a statehood supporter, approved a non-binding referendum allowing voters to choose between statehood or independence/free association.[340] Connecting Puerto Rico's financial crisis with its colonial status, Governor

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[333] *See* Title III Petition for Covered Territory or Covered Instrumentality, *In re* Commonwealth of Puerto Rico, No. 3:17-cv-01578 (D.P.R. May 3, 2017). On May 3, 2017, the federal fiscal oversight board filed for bankruptcy-like protection for Puerto Rico under Title III of PROMESA, in what is being called the largest municipal bankruptcy case in U.S. history. Mary Williams Walsh, *Puerto Rico Declares a Form of Bankruptcy*, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/business/dealbook/puerto-rico-debt.html?_r=0 (noting that Puerto Rico holds $74 billion in bond debt and $49 billion in pension obligations).

[334] *E.g.*, González, *supra* note 315; *see* Press Release, Senator Bob Menendez, Menendez Speaks in Opposition to House Puerto Rico Bill (May 24, 2016), https://www.menendez.senate.gov/news-and-events/press/menendez-speaks-in-opposition-to-house-puerto-rico-bill (calling PROMESA "blatant neocolonialism" because it strips Puerto Rico of control over its future).

[335] White, *supra* note 322.

[336] Pursuant to PROMESA, U.S. Supreme Court Chief Justice Roberts appointed Judge Laura Taylor Swain of the Southern District of New York to oversee Puerto Rico's case. Matthew Goldstein, *Judge in Puerto Rico's Debt Lawsuit Handled Major Financial Cases*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/business/dealbook/judge-puerto-rico-case.html?_r=0.

[337] Robles, *supra* note 326 (quoting teachers' union leader Emilio Nieves Torres).

[338] Robles, *supra* note 329; *see* Statement of Oversight Board in Connection with PROMESA Title III Petition at 1–4, *In re* Commonwealth of Puerto Rico, No. 3:17-cv-01578 (D.P.R. May 3, 2017) (describing impacts on the health, safety, and welfare of the Puerto Rican people in connection with PROMESA).

[339] *See, e.g.*, Bernal, *supra* note 297; Vann R. Newkirk II, *Testing Territorial Limits*, ATLANTIC (Mar. 30, 2016), https://www.theatlantic.com/politics/archive/2016/03/territorial-limits/475935. The specific positions and arguments of the New Progressive Party (who favor statehood), the Popular Democratic Party (who favor Commonwealth status), and the Puerto Rican Independence Party (who favor independence) are beyond the scope of this Article.

[340] *'Colonialism Not an Option': Puerto Rico to Hold Independence Vote*, TELESUR (Feb. 4, 2017), http://wp.telesurtv.net/english/news/Puerto-Rico-Launches-New-Push-For-Statehood-20170204-0011.html.

Rosselló argued, "If we compare ourselves with the other 50 states, the fundamental difference is our lack of rights, our lack of participation, and our lack of resources to move our jurisdiction forward. . . . Our colonial condition creates a situation of incredible inequality."[341]

At the same time, others continue to push for independence.[342] For example, María de Lourdes Santiago, a senator from the Puerto Rican Independence Party, warned that "[s]even unelected people are going to be controlling our lives," much like "a dictatorship," and called for "a legitimate process of decolonization."[343] Others who had embraced Puerto Rico's Commonwealth status underscore Puerto Rico's lack of meaningful self-rule.[344] In 2016, Puerto Rico's then-Governor Alejandro García Padilla, a Commonwealth supporter, told the U.N. Special Committee on Decolonization that the United States must fulfill the promises it made to the United Nations in 1953, when it requested that Puerto Rico be removed from the list of non-self-governing territories.[345] He argued that the U.S. Supreme Court's *Franklin California Tax-Free Trust* decision directly contradicted the United States' stance that Puerto Rico was not a colony[346]: "Starting from the right of self-determination of the Puerto Rican people, . . . equality and respect must exist in the relationship between Puerto Rico and the United States based on the will of both peoples, and not one over the other."[347] The committee "call[ed] on the Government of the United States to assume its responsibility to expedite a process that would allow the people of

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[341] Wyss, *supra* note 325 ("The United States is always demanding democracy in other parts of the world, . . . but it seems to me it doesn't have the moral standing to demand democracy in Venezuela or Cuba if it won't extend [democracy] to 3.5 million of its own citizens." (alteration in original) (quoting Governor Rosselló)).

[342] Mary Williams Walsh, *Puerto Rico's Financial Woes Revive Calls for Independence*, N.Y. TIMES (Aug. 16, 2016), http://www.nytimes.com/2016/08/17/business/puerto-rico-rafael-cancel-miranda.html?_r=0.

[343] *Id.* A White House spokesperson acknowledged that "the people of Puerto Rico want the issue of status to be resolved," and reiterated President Obama's "commit[ment] to the principle of self-determination for the people of Puerto Rico." *Id.*

[344] *See Governor Deposes Before UN Special Committee on Decolonization*, CARIBBEAN BUS. (June 20, 2016), http://caribbeanbusiness.com/governor-to-depose-before-un-special-committee-on-decolonization.

[345] *Id.*

[346] Emile Schepers, *U.N. Decolonization Committee Lambasts U.S. on Puerto Rico*, PEOPLE'S WORLD (June 24, 2016, 12:06 PM), http://peoplesworld.org/u-n-decolonization-committee-lambasts-u-s-on-puerto-rico; *see* Williams Walsh, *supra* note 342.

[347] *Puerto Rican Governor Asks UN to Support Self-Determination*, TELESUR (June 21, 2016), https://www.telesurenglish.net/news/Puerto-Rican-Governor-Asks-UN-to-Support-Self-Determination-20160621-0021.html. Governor García Padilla asked the committee to "put the case of Puerto Rico to the General Assembly of the United Nations Organization and to the Human Rights Council." *Id.*

Puerto Rico to exercise fully their right to self-determination and independence."[348]

While the political status debate is waged in Puerto Rico and Washington, D.C., Puerto Ricans continue to protest PROMESA as an extension of U.S. colonialism and decry the harsh impacts on those most in need.[349] At bottom, their calls underscore their efforts to secure a measure of self-governance and "their determination to have control of their own destiny."[350]

2. *Tuaua v. United States*

Tuaua v. United States explicitly employs the *Insular Cases* framework to resolve a clash between a small group of American Samoans on the U.S. continent who desire U.S. citizenship and American Samoans in American Samoa who do not.[351] In *Tuaua*, the plaintiffs were American Samoans living on the U.S. continent, who are non-citizen nationals and ineligible for civil service jobs.[352] They filed suit arguing that those born in American Samoa are citizens under the Fourteenth Amendment's Citizenship Clause.[353] In 2015, the District of Columbia Circuit Court of Appeals held that in light of the *Insular Cases* and American Samoa's own wishes, American Samoans are not entitled to birthright citizenship.[354] In 2016, the U.S. Supreme Court declined to hear the case.[355]

Acknowledging that the *Insular Cases* "may now be deemed politically incorrect," the D.C. Circuit Court of Appeals, in an opinion written by Judge Brown, noted that the *Cases*' "framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories."[356] The court, therefore, applied the *Insular Cases*' framework to determine whether the right to birthright citizenship is "fundamental" for

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[348] Press Release, Special Comm. on Decolonization, Special Committee on Decolonization Approves Text Calling Upon United States Government to Expedite Self-Determination Process for Puerto Rico, U.N. Press Release GA/COL/3296 (June 20, 2016), http://www.un.org/press/en/2016/gacol3296.doc.htm.

[349] Luna Olavarría Gallegos, *Puerto Rican Activists Shut Down the First Scheduled PROMESA Conference in San Juan*, REMEZCLA (Aug. 31, 2016, 7:50 PM), http://remezcla.com/culture/promesa-conference-protest-san-juan (noting that Puerto Ricans from all political persuasions and walks of life took to the streets to protest PROMESA); *see* González, *supra* note 315 (arguing that the *Franklin California Tax-Free Trust* decision and the PROMESA oversight board removed Puerto Rico's "mask of self-governance" and that the U.S. government must "finally decide whether to completely annex Puerto Rico as the 51st state or acknowledge that it still remains a distinct nation, with the right to its own sovereignty and independence").

[350] Olavarría Gallegos, *supra* note 349 (quoting protestor Eli Jacobs-Fantauzzi).

[351] Tuaua v. United States, 788 F.3d 300, 301–02 (D.C. Cir. 2015).

[352] Tuaua v. United States, 951 F. Supp. 2d 88, 91 (D.D.C. 2013).

[353] *Tuaua*, 788 F.3d at 301.

[354] *Id.* at 302.

[355] Tuaua v. United States, 136 S. Ct. 2461 (2016).

[356] *Tuaua*, 788 F.3d at 307.

persons born in the U.S. territories.[357] According to the court, "fundamental" has a distinct meaning in the territorial context: It applies "only to the narrow category of rights and 'principles which are the basis of *all* free government.'"[358] In contrast, "non-fundamental" rights are "those artificial, procedural, or remedial rights that . . . are nonetheless idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence."[359]

The court declared that it was "unconvinced a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a '*sine qua non* for "free government"' or otherwise fundamental under the Insular Cases' constricted understanding of the term."[360] The court explained that it must ask "which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[361] In other words, it must query "whether the circumstances are such that recognition of the right to birthright citizenship would prove 'impracticable and anomalous,' as applied to contemporary American Samoa."[362]

The court determined that "the American Samoan people have not formed a collective consensus in favor of United States citizenship. In part this reluctance stems from unique kinship practices and social structures inherent to the traditional Samoan way of life, including those related to the Samoan system of communal land ownership."[363] The court pointed to *aiga*, or extended families, who "communally own virtually all Samoan land," and *matais*, or chiefs, who "have authority over which family members work what family land and where the nuclear families within the extended family will live."[364] The government of

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[357] *Id.* at 307–09.

[358] *Id.* at 308 (alteration in original) (quoting Dorr v. United States, 195 U.S. 138, 147 (1904)).

[359] *Id.*

[360] *Id.* (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 386 n.72 (D.C. Cir. 1987)).

[361] *Id.* at 309 (quoting Reid v. Covert, 354 U.S. 1, 75 (1957)).

[362] *Tuaua*, 788 F.3d at 309 (quoting *Reid*, 354 U.S. at 74).

[363] *Id.* Fa'a Samoa is "the Samoan way" or the "essence of being Samoan." Uilisone Falemanu Tua, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246, 267 (2009). It involves "a 'unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned . . . .'" *Id.* (quoting Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. 2, 3 (2000)).

[364] *Tuaua*, 788 F.3d at 309 (quoting King v. Morton, 520 F.2d 1140, 1159 (D.C. Cir. 1975)); *see* Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 78–81 (2013) (explaining that fa'a Samoa is comprised of "three pillars": (1) *aiga*, which is an extended familial system; (2) communally held land, which accounts for over ninety percent of American Samoa's land; and (3) *matai*, which is the hierarchy of chiefs that oversee the *aiga* and the communal land). *See generally* Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L.J. 220 (1980) (summarizing the transformation of culture in American Samoa).

American Samoa was "concern[ed] that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life."[365] Specifically, it feared that "the extension of citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa's traditional, racially-based land alienation rules."[366] The court thus believed "it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives."[367]

Calling the United States' imposition of citizenship on American Samoa "an exercise of paternalism—if not overt cultural imperialism,"[368] the court refused to "forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity—on a distinct and unincorporated territory of people, in the absence of evidence that a majority of the territory's inhabitants endorse such a tie and where the territory's democratically elected representatives actively oppose such a compact."[369] Citing the U.N. Charter, the court determined that it could "envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will."[370]

On the one hand, it is easy to understand how the denial of U.S. citizenship to American Samoans contributes to their marginalization. American Samoans are unable to obtain civil service jobs and certain military positions, must pay for and navigate the naturalization process if they desire U.S. citizenship, are disadvantaged in sponsoring foreign-national family members for immigration visas, are denied the right to vote in national, state, and local elections, cannot serve on juries, and experience a feeling of otherness and exclusion.[371]

Indeed, many civil rights attorneys and scholars viewed the denial of birthright U.S. citizenship as a stark violation of American Samoans' constitutional rights.[372] Many amicus curiae briefs supporting Tuaua's writ of

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[365] *Tuaua*, 788 F.3d at 310.

[366] *Id.*

[367] *Id.*

[368] *Id.* at 312.

[369] *Id.* at 311; *see* Mark Joseph Stern, *The Supreme Court Needs to Settle Birthright Citizenship*, SLATE (June 6, 2016, 4:39 PM), https://slate.com/news-and-politics/2016/06/the-supreme-court-needs-to-settle-birthright-citizenship.html (comparing the paternalism in *Tuaua* and the *Insular Cases*).

[370] *Tuaua*, 788 F.3d at 311.

[371] Brief of League of United Latin American Citizens et al. as Amici Curiae in Support of Petitioners at 19–24, Tuaua v. United States, 136 S. Ct. 2461 (2016) (No. 15-981) [hereinafter Brief of League of United Latin American Citizens et al.].

[372] *See, e.g.*, David G. Savage, *Supreme Court Rejects Citizenship for American Samoans*, L.A. TIMES (June 13, 2016, 12:55 PM), http://www.latimes.com/nation/la-na-court-samoans-20160613-snap-story.html; Pema Levy, *A Federal Appeals Court Just Denied Birthright Citizenship to*

certiorari to the U.S. Supreme Court reflect this view. For example, a brief by citizenship scholars contends "that the United States government cannot assert authority over its territories and demand allegiance from individuals born on United States soil without also recognizing that, by definition and common-law tradition, those individuals are entitled to the rights and privileges enjoyed by all citizens of the United States."[373] The brief of the League of United Latin American Citizens, Asian Americans Advancing Justice, and the National Asian Pacific American Bar Association similarly argues that American Samoans are wrongfully being "denied U.S. citizenship based on racial and cultural stereotypes."[374] Other commentators frame the issue as one simply of "the insult of second-class status and the injury of uncertainty [with respect to citizenship]," and describe the American Samoan government's concerns as "more emotionally than legally compelling."[375]

On the other hand, however, looking to the bottom reveals that many American Samoans—as an exercise of their right to self-determination—rightly do not desire U.S. citizenship. As reflected in the brief of the government of American Samoa and Congressman Eni F.H. Faleomavaega, American Samoans are concerned that U.S. citizenship will invite further scrutiny of their way of

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American Samoans Using Racist Caselaw, MOTHER JONES (June 5, 2015, 7:55 PM), http://www.motherjones.com/mojo/2015/06/appeals-court-denies-birthright-citizenship-american-samoans.

[373] Brief of Citizenship Scholars as Amici Curiae in Support of Petitioners at 17, *Tuaua*, 136 S. Ct. 2461 (No. 15-981); *see Citizenship Plaintiffs Say 14th Amendment All that Matters*, SAMOA NEWS (Apr. 30, 2014, 4:31 PM), http://www.samoanews.com/citizenship-plaintiffs-say-14th-amendment-all-matters; Gene Demby, *How Birthright Citizenship for American Samoans Could Threaten 'The Samoan Way,'* NPR (Feb. 24, 2015, 2:52 PM), http://www.npr.org/sections/codeswitch/2015/02/24/388716342/how-birthright-citizenship-for-american-samoans-could-destroy-the-samoan-way (quoting plaintiff Leneuoti Tuaua as saying that "[i]f we are equal in times of war to serve in the U.S. Armed Forces, we should be equal to others born in the United States when it comes to citizenship").

[374] Brief of League of United Latin American Citizens et al., *supra* note 371, at 24; *see* Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Petitioners at 15–16, *Tuaua*, 136 S. Ct. 2461 (No. 15-981) (arguing that the *Insular Cases* should not apply because "the antiquated notions of racial inferiority and imperial expansionism on which those cases are based have no place in modern constitutional analysis"); Lyle Denniston, *Constitution Check: Are the* Insular Cases *Still Binding, After a Century?*, NAT'L CONST. CTR. (June 17, 2016), http://blog.constitutioncenter.org/2016/06/constitution-check-are-the-insular-cases-still-binding-after-a-century (reporting on modern-day criticisms of the *Insular Cases*).

[375] Christina Duffy Ponsa, *Are American Samoans American?*, N.Y. TIMES (June 8, 2016), http://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html?_r=0; *see Citizenship Is an Individual Right Says Alailima*, SAMOA NEWS (July 13, 2012, 6:58 PM), http://www.samoanews.com/citizenship-individual-right-says-alailima (contending that the right to U.S. citizenship is an individual right that does not implicate questions related to the preservation of Samoan land or culture); Complaint, *supra* note 15 (arguing that the Citizenship Clause confers upon American Samoans birthright citizenship). Residents of the U.S. Virgin Islands closely followed the *Tuaua* litigation because of its potential impact on their citizenship rights. *See* Ernice Gilbert, *Citizenship Is Not a Fundamental Right of Virgin Islanders, Obama Administration Says*, V.I. CONSORTIUM (Aug. 18, 2014), http://viconsortium.com/virgin-islands-2/citizenship-is-not-a-fundamental-right-of-virgin-islanders-obama-administration-says.

life and encroachment on local government.[376] For example, the brief argues that judicial imposition of birthright citizenship "would have unintended negative consequences for" American Samoa's culture and tradition, which Congress has protected for over a century.[377] It contends particularly that fa'a Samoa "would likely face heightened scrutiny under the United States Constitution . . . ," and the communal land system that "is protected by Samoan law restricting the sale of community land to anyone with less than fifty percent racial Samoan ancestry" could be threatened.[378]

The brief also maintains that "[t]he imposition of birthright citizenship would upset a political process that ensures self-determination for the people of unincorporated territories."[379] It argues that the *Insular Cases* allow American Samoa and Congress together "to maintain a deliberate distance between the territory and the law of the United States" to protect American Samoa's cultural autonomy.[380] It also argues that if this framework is upended by a novel extension of the Citizenship Clause to American Samoa, "new challenges to aspects of the *fa'a Samoa* will be subject to new analysis consistent with newly articulated constitutional principles."[381]

Arguing for the retention of the *Insular Cases* and against U.S. citizenship may seem counterintuitive, but not surprising in light of the deep connections American Samoans have to their Indigenous traditions and culture. "The communal land and matai systems are such pillars of the cultural system that there is a widespread fear that any change to the political structure may affect their durability."[382] Many believe that "[o]nce the system of land ownership is put in jeopardy, 'the whole fiber, the whole pattern of the Samoan way of life will be forever destroyed.'"[383] To that end, American Samoans "have potentially given up many rights and benefits for which they would otherwise be eligible" in order to maintain their ability to practice their culture and traditions as they see fit.[384]

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[376] Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 1, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272) [hereinafter Brief for Intervenors].

[377] *Id.* at 23.

[378] *Id.* at 26.

[379] *Id.* at 32.

[380] *Id.*

[381] *Id.* at 30; *see Eni Says Citizenship Question Should Be Decided by the People, Not the Courts*, SAMOA NEWS (Nov. 19, 2012, 4:03 PM), http://www.samoanews.com/eni-says-citizenship-question-should-be-decided-people-not-courts ("If the majority of American Samoans want to become birthright citizens, I will work with Congress to grant citizenship to people born in American Samoa." (quoting Congressman Faleomavaega Eni)).

[382] Morrison, *supra* note 364, at 81.

[383] *Id.* (quoting Haleck v. Lee, 4 Am. Samoa 519, 551 (1964)). "[A] threat to the matai hierarchy would undermine the very social fabric of the nation, which would in turn dissolve the aiga." *Id.*

[384] *Id.*

It is also not surprising in view of the gradual dismantling of Indigenous sovereignty in the territories. For example, in the *Davis v. Commonwealth Election Commission* case, the Ninth Circuit Court of Appeals upheld the district court's decision to strike down a Commonwealth of the Northern Mariana Islands law restricting voting in certain elections to "persons of Northern Marianas descent."[385] The law specified that only those of Northern Marianas descent could vote on proposed constitutional amendments that govern restrictions on the alienation of land to Indigenous Chamorros and Carolinians.[386] Such voting limitations were put in place to protect the Northern Mariana Islands' ancestry-based land-alienation provisions.[387]

Although the Ninth Circuit previously upheld the Northern Mariana Islands' ancestry-based land-alienation laws by recognizing that "[t]he Bill of Rights was not intended . . . to operate as a genocide pact for diverse native cultures,"[388] the Ninth Circuit's decision in *Davis* reveals that threats to Indigenous practices in the territories persist. American Samoa and its people thus seek to preserve their profound connections to their land as a crucial component of their self-determination. For them, this means maintaining the status quo—as is their self-determined right—in order to avoid further scrutiny and gradual encroachment on their Indigenous ways of life.

3. *Davis v. Guam*

In *Davis v. Guam*, looking to the bottom reveals seemingly counterintuitive attempts to proactively use the *Insular Cases* as a shield against reverse discrimination attacks. In 2011, Arnold Davis, a white resident of Guam, sued Guam in federal district court, alleging that the territory unlawfully discriminated against him when it prohibited him from registering to vote in a political status plebiscite that limited eligibility to "Native Inhabitants of Guam."[389] "Guam law directs the territory's Commission on Decolonization to 'ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States of America.'"[390] It also provides for a future plebiscite in which "Native Inhabitants of Guam"—individuals who became U.S. citizens by virtue of the 1950 Organic Act of Guam and their

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[385] Davis v. Commonwealth Election Comm'n, 844 F.3d 1087, 1089–90 (9th Cir. 2016) (holding that the voting limitation was race-based and violated the Fifteenth Amendment to the U.S. Constitution). "Persons of Northern Marianas descent" refers to the Northern Mariana Islands' Indigenous Chamorros and Carolinians. *Id.* at 1090.

[386] *Id.*

[387] Brief for Intervenors, *supra* note 376, at 28.

[388] Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990); *see* Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (1980) (upholding American Samoa's ancestry-based restriction on the alienation of land).

[389] Defendant's Motion for Summary Judgment, *supra* note 14, at 1.

[390] Davis v. Guam, 785 F.3d 1311, 1313 (9th Cir. 2015) (quoting 1 GUAM CODE ANN. § 2105). The Commission on Decolonization was established "for the Implementation and Exercise of Guam Self-Determination for the Native Inhabitants of Guam." 1 GUAM CODE ANN. § 2104.

descendants—will choose between independence, free association with the United States, or statehood.[391] "Guam will conduct the plebiscite if and when 70 percent of eligible Native Inhabitants register."[392] The Commission on Decolonization will then "transmit the plebiscite's results to the President, Congress and the United Nations . . . ."[393]

Davis alleged that Guam's law racially discriminated against him in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Fifteenth Amendment, the Voting Rights Act, and the Organic Act of Guam.[394] The U.S. District Court for the District of Guam dismissed the case for lack of standing and ripeness.[395] The Ninth Circuit Court of Appeals reversed and remanded.[396]

On remand, in his motion for summary judgment, Davis denied the existence of colonization's harms to Guam's Indigenous Chamorros.[397] For him, Guam cannot articulate "a compelling state interest to justify its discriminatory voting scheme" because it cannot show "that Native Inhabitants of Guam are entitled to reparations for any alleged wrongs committed against them as a race."[398] For the conservative advocacy group representing Davis, the Center for Individual Rights, Chamorros are instead a "favored" race above all others—the voting limitation is a "tactic" waged by Chamorros to "build[] a racial identity for a favored 'native' race in opposition to 'other' races."[399]

It is significant that a white U.S. citizen is once again claiming reverse discrimination to dismantle a benefit for "Native Inhabitants" in the style of *Rice v. Cayetano*, in which the U.S. Supreme Court ruled that a Native Hawaiian-

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[391] Defendant's Motion for Summary Judgment, *supra* note 14, at 4. The law defines "Native Inhabitants of Guam" as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons." 1 GUAM CODE ANN. § 2102. The 1950 Guam Organic Act granted citizenship to:

> (1) Spanish subjects who inhabited Guam on April 11, 1899, when Spain ceded Guam to the United States in the Treaty of Paris (and their children); (2) persons who were born on Guam and resided there on April 11, 1899 (and their children); and (3) persons born on Guam on or after April 11, 1899, when Guam was subject to U.S. jurisdiction.

Davis, 785 F.3d at 1313 n.1; *see* Organic Act of Guam of 1950, 48 U.S.C. § 1421 (2012).

[392] *Davis*, 785 F.3d at 1313.

[393] *Id.*

[394] *Id.* at 1314.

[395] *Id.*

[396] *Id.* at 1316.

[397] Memorandum in Support of Plaintiff's Motion for Summary Judgment at 17–18, Davis v. Guam, No. 1:11-cv-00035 (D. Guam Oct. 30, 2015).

[398] *Id.*

[399] Davis v. Guam, CTR. FOR INDIVIDUAL RTS., https://www.cir-usa.org/cases/davis-v-guam (last visited Sept. 19, 2018).

only voting limitation was an unlawful proxy for race.[400] But perhaps most significant about the *Davis* case is Guam's strategic use of the *Insular Cases* framework to advance a limited measure of self-determination for Chamorros. Guam argues that Congress, pursuant to its plenary power under the Territorial Clause, can treat territories in ways that would otherwise offend the Constitution.[401] Thus, as an instrumentality of Congress and in employing Congress's "Native Inhabitant" classification, Guam can also limit its political status plebiscite to a particular group of people, even if based on ancestry.[402]

In particular, Guam argues that in the unincorporated territories, Congress can make ancestry-based restrictions "so long as the discriminatory classification is supported by any conceivable rational basis."[403] Key to Guam's argument is that the Guam law in question, though a territorial law, was "enacted in response to a federal measure," Guam's Organic Act.[404] In Guam's Organic Act, Congress identified a class of persons—"Native Inhabitants of Guam"—"to whom it extended citizenship and a limited measure of self-government, with the understanding that a fuller measure would one day follow."[405] Because it was enacted in response to that measure, Guam argues that its law limiting voting in the political status plebiscite should likewise be subject to rational basis review.[406]

Indeed, in some cases from the Pacific Island territories, territorial peoples have employed the *Insular Cases* framework as a vehicle for limited self-determination. In *Wabol v. Villacrusis*, for example, the Ninth Circuit upheld Congress's power under the Territorial Clause to shield ancestry-based restrictions on certain acquisitions of land from the Equal Protection Clause.[407] Article XII of the constitution of the Commonwealth of the Northern Mariana Islands "provides that '[t]he acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.'"[408] The Ninth Circuit determined that applying the Equal Protection Clause in this instance would frustrate the interests of both the

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[400] Rice v. Cayetano, 528 U.S. 495, 514 (2000); *see* Eric K. Yamamoto, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (Aug. 20, 2000, 12:00 PM), http://www.colorlines.com/articles/colonizers-story-supreme-court-violates-native-hawaiian-sovereignty-again (critiquing the *Rice* decision's distortion of civil rights and twisting of history to undermine Native Hawaiian self-governance).

[401] Defendant's Motion for Summary Judgment, *supra* note 14, at 13.

[402] *Id.* at 13–15.

[403] *Id.* at 14.

[404] *Id.*

[405] *Id.* at 15.

[406] *Id.*

[407] Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

[408] *Id.* at 1452 (alteration in original) (quoting N. MAR. I. CONST. art. XII, § 1).

people of the Northern Mariana Islands and the United States, as well as threaten Native culture, property, and social identity:

> We think it clear that interposing this constitutional provision would be both impractical and anomalous in this setting. Absent the alienation restriction, the political union would not be possible. . . . For the NMI people, the equalization of access would be a hollow victory if it led to the loss of their land, their cultural and social identity, and the benefits of United States sovereignty. It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.[409]

As Guam contended in its motion for summary judgment, Congress similarly "saw fit [by way of Guam's Organic Act] to uphold its *international obligations* vis-à-vis the island's 'native inhabitants,' guaranteeing them a limited measure of self-government, with the understanding that the ultimate expression of self-determination had yet to occur."[410] "[Guam's Organic Act] contribute[s] *toward fulfillment* of the obligation assumed by the United States under article 73 of the United Nations Charter to promote the political, economic, social, and educational advancement of the inhabitants of the non-self-governing Territories under United States administration."[411] As such, Guam argues, its law limiting voting in the political status plebiscite, which employs the Guam Organic Act's "Native Inhabitant" definition, furthers the United States' obligation to repair the lasting harms of colonization.[412]

On March 8, 2017, the U.S. District Court for the District of Guam ruled in Davis's favor.[413] The court held "that the Plebiscite statute impermissibly imposes race-based restrictions on the voting rights of non-Native Inhabitants of Guam, in violation of the Fifteenth Amendment," and also violates the Fourteenth Amendment.[414] The court flatly rejected Guam's *Insular Cases* argument because Congress "explicitly extended the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to Guam when it

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[409] *Id.* at 1462.

[410] Defendant's Motion for Summary Judgment, *supra* note 14, at 17.

[411] *Id.* (alteration in original) (quoting S. REP. NO. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840).

[412] *See id.* at 9.

[413] Decision and Order Re: Motions for Summary Judgment, Davis v. Guam, No. 1:11-cv-00035 (D. Guam Mar. 8, 2017).

[414] *Id.* at 25.

enacted the Organic Act of Guam."[415] Guam has appealed to the Ninth Circuit Court of Appeals.[416]

If Davis ultimately prevails, Guam's commitment to repair historical harms will be significantly impaired. All voters in Guam—even those not within the class of intended beneficiaries of the right to decolonization—will be able to vote in a future political status plebiscite. This result discounts the need to rectify injustices uniquely suffered by the "Native Inhabitants of Guam"—those identified in Guam's Organic Act as holding the right to exercise their collective self-determination through a future decolonization process. This impending threat to the "Native Inhabitant" vote is particularly critical today, when some are increasingly calling for independence from the United States to facilitate Guam's decolonization.[417]

Moreover, if the appellate court agrees that "Native Inhabitant" is an impermissible racial classification, other Chamorro programs are at risk. The Chamorro Land Trust Act, which requires the Chamorro Land Trust Commission "to advance the social, cultural and economic development and well-being of the Chamorro people by way of residential, agricultural and commercial land distribution and economic assistance programs,"[418] uses the same "Native Inhabitants" definition.[419] If a recently filed lawsuit by the U.S. Department of Justice[420] successfully dismantles this program, as many fear, Chamorros could lose land being held in trust in part to restore a limited measure of self-determination.

Similar fears accompanied the U.S. Supreme Court's decision to strike down a Native Hawaiian-only voting limitation in elections for trustees to the quasi-state agency, the Office of Hawaiian Affairs (OHA), in *Rice v.*

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[415] *Id.*

[416] Docketed Cause and Entered Appearances of Counsel, Davis v. Guam, No. 17-15719 (9th Cir. Apr. 13, 2017).

[417] Telephone Interview with Julian Aguon (Feb. 15, 2017); Anna Fifield, *Some in Guam Push for Independence from U.S. as Marines Prepare for Buildup*, WASH. POST (June 17, 2016), https://www.washingtonpost.com/world/asia_pacific/some-in-guam-push-for-independence-from-us-as-marines-prepare-for-buildup/2016/06/16/e6152bd2-324b-11e6-ab9d-1da2b0f24f93_story.html?utm_term=.001ded5a7d3e.

[418] *About Us*, CHAMORRO LAND TR. COMMISSION, http://dlm.guam.gov/chamorro-land-trust-commission (last visited Sept. 19, 2018).

[419] 21 GUAM CODE ANN. § 75101(d) ("The term *Native Chamorro* means any person who became a U.S. citizen by virtue of the authority and enactment of the Organic Act of Guam or descendants of such person.").

[420] Press Release, U.S. Dep't of Justice, Justice Department Sues Guam's Government for Racial and National Origin Discrimination in Violation of the Fair Housing Act (Sept. 28, 2017), https://www.justice.gov/opa/pr/justice-department-sues-guam-s-government-racial-and-national-origin-discrimination-violation.

Cayetano.[421] By characterizing programs for Native Hawaiians as "racial preferences," *Rice* not only undermined that Native Hawaiian self-governance effort, but it "ignite[d] a rash of new 'civil rights' lawsuits to dismantle Hawaiian health care, education, housing, and cultural programs."[422] In the 2016 election, a conservative Native Hawaiian, who is opposed to the OHA's support of Native Hawaiian programs, won a seat as an OHA trustee by appealing to non-Native Hawaiian voters who gained the right to vote in *Rice.*[423]

Thus, Chamorro attempts to deploy the *Insular Cases* framework as a shield against reverse discrimination attacks and "to fight for liberation"[424] have urgent and far-reaching consequences. The outcome will impact not only the *Davis* case, but ongoing Chamorro efforts to support their material and cultural needs and heal persisting wounds of U.S. colonization.

4. *Segovia v. Board of Election Commissioners*

Segovia v. Board of Election Commissioners reveals the *Insular Cases'* constriction of territorial peoples' rights to participation in the larger U.S. polity. Six U.S. citizens who are former residents of Illinois and who now reside in Puerto Rico, Guam, and the U.S. Virgin Islands challenged the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[425] They claimed that UOCAVA violates their rights to equal protection and due process because it bars them from casting Illinois absentee ballots in federal elections now that they reside in those three territories.[426] In contrast, U.S. citizens who are former Illinois residents can cast Illinois absentee ballots if they move to the Northern Mariana Islands, American Samoa (pursuant to the Illinois Military and Overseas Voter Empowerment Act), or a foreign country.[427] The plaintiffs argued that UOCAVA's "selective enfranchisement" of absentee

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[421] Rice v. Cayetano, 528 U.S. 495, 523 (2000). The OHA was created by state constitutional amendment to promote Native Hawaiian self-determination through programs and advocacy efforts, and to "[s]erv[e] as a receptacle for reparations." HAW. REV. STAT. § 10-3.

[422] Yamamoto & Corpus Betts, *supra* note 254, at 545.

[423] Rick Daysog, *Newly-Elected OHA Trustee Wants to Cut Funding to Sovereignty Programs*, HAWAII NEWS NOW (Nov. 9, 2016, 9:32 PM), http://www.hawaiinewsnow.com/story/33674033/ohas-newest-trustee-opposes-native-hawaiian-sovereignty (reporting that political analysts predict increases in non-Native Hawaiian voter scrutiny of the OHA).

[424] Julian Aguon, counsel for Guam, commented that by using the *Insular Cases* in this fashion he is "deploying the anti-canon to fight for liberation. It's counterintuitive, but brilliant and imaginative." Telephone Interview with Julian Aguon (Sept. 16, 2016).

[425] Segovia v. Bd. of Election Comm'rs, 201 F. Supp. 3d 924, 928 (N.D. Ill. 2016); *see* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310 (2012).

[426] Complaint at 20, *Segovia*, 201 F. Supp. 3d 924 (No. 15-cv-10196). Plaintiffs also alleged that the Illinois Military and Overseas Voter Empowerment Act (Illinois MOVE) violated their equal protection and due process rights to interstate travel. *Id.*; *see* Illinois Military and Overseas Voter Empowerment Act, 10 ILL. COMP. STAT. 5/20-1 (2015).

[427] *Segovia*, 201 F. Supp. 3d at 929.

voters in the Northern Mariana Islands deprives absentee voters in Puerto Rico, Guam, and the U.S. Virgin Islands of the fundamental right to vote.[428]

Pursuant to UOCAVA, "State" refers to a U.S. State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.[429] An "overseas voter" is "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States."[430] Since Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa are considered "States," the *Segovia* plaintiffs under UOCAVA are not "overseas voters."[431]

In 2016, Judge Gottschall of the U.S. District Court for the Northern District of Illinois granted the defendants' motion for summary judgment as to the plaintiffs' equal protection claim.[432] The court acknowledged the anomalous situation faced by many territorial residents in part rooted in the *Insular Cases*: "[T]he current voting situation in Puerto Rico, Guam, and the U.S. Virgin Islands is at least in part grounded on the *Insular Cases*, which have been described as 'establish[ing] a less-than-complete application of the Constitution in some U.S. territories,' based on explicitly racist views . . . ."[433]

However, the court ruled that "under the rational basis standard, the challenged provisions of the UOCAVA are constitutional."[434] The right to vote is "fundamental," stated the court, but only for "citizens of a state."[435] In contrast, territorial residents do not have a constitutional right to vote in federal elections, and "[w]ithout a constitutional right, there can be no fundamental right."[436] "This is critical," noted the court, "as only '[t]he guaranties of certain fundamental personal rights declared in the Constitution' apply to the territories."[437] Because U.S. citizens residing in territories do not have a fundamental right to vote, "the fact that the individual plaintiffs are United States citizens who used to be able to vote in Illinois does not mean that they

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[428] *Id.* at 939.

[429] Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310(6) (2012).

[430] *Id.* § 20310(5)(B).

[431] *Segovia*, 201 F. Supp. 3d at 932.

[432] *Id.* at 951.

[433] *Id.* at 938 (quoting Paeste v. Gov't of Guam, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015)). Citing to the works of judges José Trías Monge and Juan Torruella, *Last Week Tonight with John Oliver*, and Senator Elizabeth Warren's Facebook page, the court acknowledged the extensive criticism leveled against "[t]he inconsistencies between the constitutional rights afforded to United States citizens living in states as opposed to territories." *Id.* at 938–39.

[434] *Id.* at 929.

[435] *Id.* at 940.

[436] *Segovia*, 201 F. Supp. 3d at 940–41.

[437] *Id.* at 941 (alteration in original) (quoting Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922)).

retain their fundamental right to vote when they move from Illinois to Puerto Rico, Guam, or the U.S. Virgin Islands."[438]

The court acknowledged that UOCAVA treats voters who now reside in the Northern Mariana Islands differently than those who now reside in Puerto Rico, Guam, or the U.S. Virgin Islands, but because Congress has wide latitude to make rules and regulations respecting the territories, UOCAVA's distinction between U.S. territories does not trigger strict scrutiny review.[439] Instead, Congress rationally treated the Northern Mariana Islands differently than the other territories.[440] As such, the court held that UOCAVA's exclusion of the Northern Mariana Islands from the definition of "State" was rational.[441] The plaintiffs appealed to the Seventh Circuit Court of Appeals.[442]

On appeal, the plaintiffs argued that the lower court erred in improperly expanding the now-discredited *Insular Cases* to hold that the right to vote is not "fundamental" in the territories.[443] They contended, among other things, that "[t]he district court's conclusion . . . —that heightened scrutiny never applies to the statutory extension of voting rights to new groups of individuals who are not constitutionally secured such rights—is a misapplication of equal-protection jurisprudence."[444] Instead, "[w]hen Congress or the states extend voting rights beyond the scope mandated by the Constitution," as Congress did with UOCAVA, "that extension must satisfy heightened scrutiny when it *excludes* some citizens from voting, regardless of whether those voters would have a constitutional right to vote absent that legislative action."[445]

Segovia is one of many lawsuits in which territorial residents have fought to secure the right to more fully participate in U.S. democracy. Territorial peoples have advanced both constitutional and international law arguments to obtain the

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[438] *Id.* at 942.

[439] *Id.* at 945.

[440] *Id.* at 945–49 (noting, among other things, that UOCAVA was enacted before the Northern Mariana Islands became a U.S. territory; the Northern Mariana Islands used to be a Pacific Trust Territory, for which the United States was trustee; and the Northern Mariana Islands hold a right to self-government under the Covenant that the other territories do not possess).

[441] *Id.* at 950. A few months later, the district court held that Illinois MOVE did not violate the plaintiffs' equal protection rights, and that UOCAVA and Illinois MOVE did not violate the plaintiffs' due process rights to interstate travel. Segovia v. Bd. of Election Comm'rs, 218 F. Supp. 3d 643, 645–46 (N.D. Ill. 2016).

[442] Segovia v. United States, *supra* note 18.

[443] Brief of Appellants at 13–14, 26, Segovia v. United States, 880 F.3d 384 (7th Cir. 2018) (No. 16-4240).

[444] *Id.* at 14.

[445] *Id.* The Seventh Circuit Court of Appeals held that the plaintiffs lacked standing to challenge UOCAVA because it does not prevent Illinois from providing the plaintiffs with absentee ballots and affirmed the district court's ruling that Illinois MOVE does not violate equal protection or the due process right to interstate travel. *Segovia*, 880 F.3d at 392.

right to vote in U.S. presidential elections.[446] Courts have held that the denial of the right to vote in such elections to territorial residents does not offend the U.S. Constitution, and neither international treaties nor customary international law obligate the United States to grant territorial peoples the right to vote.[447] Thus, territorial residents are subject to the plenary power of the United States, but have very little power to participate in the government that controls them. Indeed, as Judge Torruella noted in *Igartúa-de la Rosa v. United States*, "[n]o effective political pressure can be exercised by the subjects of this colonial relationship on the national political institutions with power to solve the problem."[448] This effectively insulates the United States from the transformative political pressures that could force it to repair centuries of colonization in the unincorporated territories.

B. Some Thoughts About Incorporating the Insular Cases *into Law School Courses from the Perspective of the Bottom*

As described above, the *Insular Cases* ought to be taught because over one hundred years after the cases were decided, they have unacknowledged yet real impacts on the self-determination of those colonized. But how might one begin to think about incorporating *Downes v. Bidwell* or other questions raised by the *Insular Cases* into existing courses? Painting in broad strokes, this Section suggests some ways to begin thinking about how to do so. Some courses that focus specifically on U.S. territories and U.S. colonization of course spend considerable time on the *Insular Cases*, but others, such as constitutional law, can incorporate questions raised by the *Insular Cases* as well.

In some instances, it may be easier to teach the *Insular Cases* "from the bottom" than in others. For example, because of the nature of courses such as Race and Law, looking to the bottom—and, specifically, to the self-determination efforts of those most oppressed—is intrinsic to the way that type of course is taught.[449] On the other hand, a Federal Courts class considers more broadly the institutional design of the federal system and may not as easily lend itself to a program of study focused on self-determination.[450] However, I contend that at least *Downes v. Bidwell* and its lasting influence and impacts can and should be taught in a much wider range of courses than currently cover these crucial issues.

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[446] *See* Igartúa-de la Rosa v. United States, 417 F.3d 145 (1st Cir. 2005); Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001); Att'y Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984).

[447] *See, e.g.*, *Igartúa-de la Rosa*, 417 F.3d at 152.

[448] *Id.* at 168 (Torruella, J., dissenting).

[449] *See, e.g.*, PEREA ET AL., *supra* note 31; Malavet, *supra* note 58.

[450] *See, e.g.*, Levinson, *supra* note 41, at 265 n.90 (describing Helen Hershkoff's Federal Courts class, in which she "enlist[s] the insular cases in teaching a number of topics, including Congressional control of jurisdiction; the establishment of Article I courts and agency structure; and the relation between the unconstitutional conditions doctrine and structural protections").

According to most faculty I contacted, constitutional law is the most common and seemingly appropriate course in which to incorporate the *Insular Cases*.[451] For example, a discussion of *Downes* could appropriately illustrate issues of congressional power within the context of a larger separation of powers discussion. It could also fall fittingly into a discussion of the development of the United States' national identity and the evolution of early constitutional decision-making. For example, as *Processes of Constitutional Decisionmaking* demonstrates, *Downes* sets an important foundation for examining the creation of our "American Nation."[452] As the casebook illustrates, alongside cases and issues involving the Reconstruction Amendments, such as the *Slaughterhouse Cases* and *Plessy v. Ferguson*; early immigration cases like *Chae Chan Ping v. United States*; religious diversity cases, such as *Reynolds v. United States*; and other cases involving congressional powers, *Downes* sheds important light on the law's treatment of those peripheral to the U.S. polity.[453] In other words, it underscores decision-makers' attempts to expand the United States' reach without embracing new and different peoples—even as those decision-makers were grappling with how to handle groups of color already present in the United States.[454] *Processes of Constitutional Decisionmaking* groups such cases and questions into a chapter entitled "From Reconstruction to the New Deal: 1866–1934."[455]

Downes therefore demands examination of the important questions of imperial expansion, Congress's power to exercise jurisdiction "outside" of the United States (and the limitations on that power), and the impacts on the territorial peoples who were (and still are) the objects of that power. For example, *Constitutional Law* briefly queries in its "Separation of Powers" chapter whether "the Constitution follow[s] the flag" and whether the U.S. government was "bound by the Constitution when it exercise[d] jurisdiction outside of the United States."[456] *U.S. National Security Law* similarly excerpts one of the *Insular Cases*, *Dorr v. United States*, to illustrate the extraterritorial reach of the Constitution.[457] Not only were these questions of congressional power of great public importance and legal significance at the time, but they also impacted—and continue to impact—the self-determination efforts of a vast number of territorial peoples.

Similarly, in a Race and Law or Critical Race Theory course, discussion of *Downes* and the impacts of American expansionism on racialized communities

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[451] Four law faculty noted that they currently include or used to include the *Insular Cases* in their constitutional law courses or would include them if they were to teach constitutional law.

[452] BREST ET AL., *supra* note 29, at 444.

[453] *Id.* at 373–471.

[454] *See id.*

[455] *Id.* at 347.

[456] SULLIVAN & FELDMAN, *supra* note 144, at 421.

[457] FRANCK ET AL., *supra* note 147, at 1121–25.

is crucial. *Downes* prompts questions such as those found in *Latinos and the Law*: "What exactly makes it valid for Congress to decide what parts of the Constitution apply to conquered territory? Doesn't the principle of enumerated powers make Congress subject to the Constitution always?"[458] At the same time, *Downes* and its surrounding context provide ample opportunity to discuss both the historical and present-day impacts on the self-determination of territorial peoples—one could analyze the *Insular Cases*' racialized language in the context of the expansionist ideology of the time; the history of U.S. dominion over the territories, as part of the line of cases authorizing conquest[459]; the propriety of denying certain constitutional rights to peoples of unincorporated territories; the concrete and ongoing impacts on diverse groups and cultures from the Caribbean to the Pacific; and the proactive ways in which territorial peoples continue to advocate for both the civil rights of inclusion and full self-determination as autonomous peoples. For example, the application of the *Insular Cases* in *Tuaua v. United States* complicates the understanding of birthright citizenship,[460] a key topic of discussion in an Asian Americans and the Law course.[461]

The cases that arose following the *Insular Cases*—in which U.S. courts held that territorial peoples are not entitled to the same level of federal benefits as residents of the states[462] and do not have the right to vote in U.S. presidential elections[463]—compel students to consider the application of the Equal Protection Clause to territorial peoples. For example, *Race and Races* requires students to consider the permissive rational basis standard used to review Congress's unequal treatment of Puerto Ricans, asking, "How can Congress treat an entire group of people defined by Puerto Rican ancestry less generously and differently from other Americans?"[464] It queries whether Congress should reconsider territorial peoples' exclusion from the voting booth and from federal benefit programs, then invites students to consider why Congress has not yet done so.[465] In contrast, the *Insular Cases* and their modern-day incarnations

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[458] DELGADO ET AL., *supra* note 31, at 60; *see* PEREA ET AL., *supra* note 31, at 354.

[459] E-mail from Juan Perea, Professor of Law, Loyola Univ. Chi. Sch. of Law, to Susan Serrano (Feb. 24, 2017, 7:56 AM HST) (on file with author) (noting that he teaches *Downes* in this context).

[460] *See* Tuaua v. United States, 788 F.3d 300, 307 (D.C. Cir. 2015).

[461] *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (holding that children born of Chinese foreign nationals, domiciled and residing in the United States, are entitled to birthright citizenship under the Fourteenth Amendment).

[462] *See* Harris v. Rosario, 446 U.S. 651 (1980); Califano v. Gautier Torres, 435 U.S. 1 (1978).

[463] *See* Igartúa-de la Rosa v. United States, 417 F.3d 145 (1st Cir. 2005); Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001); Att'y Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984).

[464] PEREA ET AL., *supra* note 31, at 367.

[465] *Id.* Similarly, in the context of "The Right to Participate," the notes and questions in *The Law of Democracy: Legal Structure of the Political Process* do not excerpt any of the *Insular Cases* but highlight U.S. imperialism in the nineteenth and early twentieth centuries, connecting it to the present-day denial of the right to vote to Puerto Ricans. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 42 (5th ed. 2016). Also, in the notes

raise compelling questions about some Indigenous peoples' desire to stave off the regressive application of the Equal Protection Clause in the territories in order to shield Native traditions and practices from constitutional attack.[466]

Using casebooks such as these, along with many other books and resources,[467] the *Insular Cases* have been or are being taught in classes such as United States Territorial Possessions[468]; Pacific Island Legal Systems[469]; The Constitution and American Expansion[470]; Hispanics, Civil Rights and the Law[471]; and Critical Race Studies,[472] among others.[473] Additionally, at least a

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and questions in a section on "The Right to Vote," *Comparative Constitutionalism: Cases and Materials* briefly connects Puerto Ricans' lack of voting rights to *Balzac v. Porto Rico* and *Igartúa-de la Rosa*. NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1539–40 (3d ed. 2016). In addition, a section on "Voting Rights and Electoral Participation" in *Racial Justice and Law* does not include the *Insular Cases*, but excerpts *Igartúa-de la Rosa* and underscores the interplay of voting rights, political status, race, American imperialism, and democratic principles. BANKS ET AL., *supra* note 151, at 933–38.

[466] *See* discussion *supra* Sections V.A.2, V.A.3.

[467] *See, e.g.*, RIVERA RAMOS, *supra* note 62; PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004); ROMÁN, *supra* note 125; FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 82; RECONSIDERING THE *INSULAR CASES*: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); LEIBOWITZ, *supra* note 46.

[468] Pedro A. Malavet, *Seminar: United States Territorial Possessions*, U. FLA. LEVIN C.L., http://nersp.osg.ufl.edu/~malavet/seminar/territoriesmain.htm (last updated July 30, 2012) (using MALAVET, *supra* note 467, and excerpts from LEIBOWITZ, *supra* note 46, to explore "the history of U.S. territorial acquisitions and the changing legal paradigms applied by the United States to its past and current territorial possessions").

[469] Syllabus, Susan K. Serrano & Julian Aguon, Pacific Island Legal Systems (LWPA 594) (Spring 2016) (on file with author).

[470] Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 82, at 121, 124 (describing his "The Constitution and American Expansion" seminar); *see* E-mail from Christina Duffy Ponsa, Professor of Legal History, Columbia Law Sch., to Susan Serrano (June 3, 2017, 5:44 AM HST) (on file with author) (noting that she teaches the *Insular Cases* to first-year law students).

[471] E-mail from Marc-Tizoc González, Assoc. Professor of Law, St. Thomas Sch. of Law, to Susan Serrano (Feb. 18, 2017, 7:15 AM HST) (on file with author) (explaining that his Hispanics, Civil Rights and the Law course "features several of the *Insular Cases*" and noting that when he teaches the course, he "find[s] particularly strong resonance between the *Insular Cases* and *Johnson v. M'Intosh*); Syllabus, Marc-Tizoc González, Hispanics, Civil Rights and the Law (Law 899L3) (Spring 2017) (on file with author) (including the Treaty of Paris, *Downes v. Bidwell*, the Jones Act, and *Balzac v. Porto Rico* in a segment on "Legal Statuses, Cultures, Histories, and Identities of Mexican Americans and Puerto Ricans"); *see* Syllabus, Charles R. Venator-Santiago, Puerto Rican Politics and Culture (POLS 3667) (Spring 2017) (on file with author); Syllabus, Charles R. Venator-Santiago, United States Territorial Law and Politics (POLS 2998) (Spring 2017) (on file with author).

[472] E-mail from Juan Perea, *supra* note 459 (noting that he teaches *Downes* in his Critical Race Studies class).

[473] E.g., Syllabus, Judge Gustavo A. Gelpí, Seminar on the Constitutional and Historical Development of United States Territories: 1898–Present (Summer 2018) (on file with author).

passing mention of the *Insular Cases* appears in casebooks on national security law, conflicts of law, immigration law and policy, and American Indian law.[474] In many of these courses, one could also examine the concept of "fundamental" rights as applied to U.S. territorial peoples. As discussed above, while "fundamental limitations in favor of personal rights" are guaranteed to those residing in the U.S. territories, rights deemed non-fundamental are not.[475] "Fundamental" rights are those "so basic as to be integral to free and fair society." [476] In contrast, "non-fundamental" rights are "those artificial, procedural, or remedial rights that . . . are nonetheless idiosyncratic to the American social compact or to the Anglo–American tradition of jurisprudence."[477] According to this framework, even revered rights to equal protection are not fundamental in some territories.[478] This seemingly puzzling result provides the opportunity to explore the differences between the concept of "fundamental" rights as it applies in the states versus the territories, as well as the conflicts between, on the one hand, Indigenous groups' attempts to maintain tradition and, on the other, the application of concepts of equality and anti-discrimination in the territories.

In our Pacific Island Legal Systems class, Julian Aguon and I use the *Insular Cases* (in conjunction with international law governing the decolonization of dependent territories) to analyze the multifaceted development of Pacific Island legal systems and those islands' relationships with the United States. The students read key scholarly commentaries on the *Insular Cases* alongside the various territories' constitutions, statutes, case law, legal briefs, and news articles highlighting the *Insular Cases*' impacts on the self-determination efforts of the specific communities. Students thus increase their knowledge of the substantive laws of these jurisdictions while deepening their awareness of the larger legal systems in which these regional self-determination struggles have operated, as well as the impacts of the *Insular Cases* on those struggles.

Thus, the *Insular Cases* are a way to expand students' understanding of self-determination as more than just a concept that derives from U.N. instruments. It is a concept that speaks to repairing harms that require for remediation more than money or words or return of land. To repair these long-standing injustices is to respond to groups' self-determined ideas about injury and remedy.

Of course, many cases, areas of law, and legal questions compete for a place in law school courses, particularly in constitutional law. Law faculty are continually faced with skipping over several sections of casebooks or cutting

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[474] *See supra* notes 147–49 and accompanying text.

[475] Tuaua v. United States, 788 F.3d 300, 307 (D.C. Cir. 2015).

[476] *Id.* at 308.

[477] *Id.*

[478] *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

focus areas.[479] Indeed, one could argue that cases regarding slavery, early immigration, federal Indian law, and many others should be added to the curriculum as well. As Levinson contends, slavery-related cases are arguably just as important to cover as *Downes* in a constitutional law course because of slavery's impact on the formation of the United States as a nation.[480] However, as he observes, several historical cases may have been important in their time but have little impact today, while the impact of the *Insular Cases* is "a live issue of American politics and constitutional inquiry."[481] As *Race and Races* notes, the U.S. Supreme Court's "discussion of the status of Puerto Rico and its relationship to the United States had, and continues to have, enormous significance."[482]

VI. CONCLUSION

"Virgin Islanders are required to follow federal laws, [so] shouldn't we have a say in making those laws?" queried Pamela Colon, a U.S. Virgin Islands resident and plaintiff in *Segovia v. Board of Election Commissioners*.[483] "[W]ill the people of Guam ever be permitted to exercise their inalienable right to determine for themselves their ultimate relationship with the United States and their political status among the community of nations?" asked Joaquin Perez, a resident of Guam.[484] Their pleas echo Puerto Rican resident Erika Rodríguez's lament quoted at the start of this Article—residents of the unincorporated territories "have no voice."[485] Their powerlessness to influence national decisions that impact them underscores the lasting colonial relationship between the unincorporated territories and the United States.

The modern-day legal controversies impacting four million territorial people, described above, are nearly invisible to most Americans—and to most law students. The *Insular Cases* that dictate the results in those controversies are rarely considered, except in a few limited circumstances.[486] Most law school

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[479] Another challenge in incorporating the *Insular Cases* into existing classes is the political climate at a particular law school.

[480] *See* Levinson, *supra* note 41, at 244 n.10.

[481] *Id.*

[482] PEREA ET AL., *supra* note 31, at 349; *see* Malavet, *supra* note 46, at 254–55 (noting that *Downes* is a "living constitutional doctrine and it daily affects the lives of millions of our citizens by creating an underclass of citizenship and United States territory in a permanent state of constitutional uncertainty about its future").

[483] *It May Take a Constitutional Amendment Before USVI Residents Can Vote for President, Justice Sotomayor Says*, V.I. CONSORTIUM (Feb. 9, 2017), http://viconsortium.com/featured/it-may-take-a-constitutional-amendment-before-usvi-residents-can-vote-for-president-justice-sotomayor-says (quoting Pamela Colon).

[484] Joaquin P. Perez, *Perez: Military a Barrier to Guam's Self-Determination*, PAC. DAILY NEWS (Mar. 5, 2016, 8:30 PM), http://www.guampdn.com/story/opinion/2016/03/05/perez-military-barrier-guams-self-determination/81306672.

[485] Navarro, *supra* note 1 (quoting Puerto Rican resident Erika P. Rodríguez).

[486] *See* discussion *supra* Section III.A.

courses do not include them, and most casebooks omit meaningful coverage of them.[487] As seen in the recent cases impacting Puerto Ricans,[488] American Samoans,[489] Chamorus of Guam,[490] and the voting rights of U.S. citizens residing in Puerto Rico, Guam, and the U.S. Virgin Islands,[491] the *Insular Cases* and the United States' colonial control over the territories continue to have monumental, yet largely unacknowledged, impacts on territorial peoples' self-determination.

For example, Guam is now bracing for a U.S. military buildup slated for 2022 that some fear will trigger a "demographic change in the makeup of the island that . . . will result in the political dispossession of the Chamoru people."[492] The buildup proposes doubling the size of the current U.S. military presence from 6,000 to 11,000, plus 1,300 dependents, the acquisition of land, and the construction of training facilities[493]—to add to the twenty-eight percent of the island already occupied by the U.S. military.[494] Because of its colonial status, rooted in part in the *Insular Cases*, the United States can treat Guam as "America's unsinkable aircraft carrier"[495] and do what it pleases with Guam's land.[496] But Chamorus and other Guam residents are mobilizing to protest militarization, call for changes to Guam's political status, and demand that

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[487] In 2000, constitutional law scholar Sanford Levinson "encourage[d] the welcoming of *Downes* and linked materials into the various canons of American constitutional inquiry." Levinson, *supra* note 41, at 266. Since then, it appears that more law faculty have incorporated some mention of the *Insular Cases* into casebooks and courses, but more is needed to shine light on territorial peoples' efforts to restore a measure of self-governance, particularly in light of the humanitarian crises in Puerto Rico and the U.S. Virgin Islands and the escalating threat of nuclear war in G· am. *See* Nichols, *supra* note 6; Aguon, *supra* note 7.

[488] Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016).

[489] Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015).

[490] Davis v. Guam, 785 F.3d 1311 (9th Cir. 2015).

[491] Segovia v. Bd. of Election Comm'rs, 201 F. Supp. 3d 924 (N.D. Ill. 2016).

[492] Aguon, *supra* note 222, at 67.

[493] Tiara R. Na'puti & Michael Lujan Bevacqua, *Militarization and Resistance from Guåhan: Protecting and Defending Pågat*, 67 AM. Q. 837, 845 (2015); Jon Letman, *Proposed US Military Buildup on Guam Angers Locals Who Liken It to Colonization*, GUARDIAN (Aug. 1, 2016, 9:43 AM), https://www.theguardian.com/us-news/2016/aug/01/guam-us-military-marines-deployment.

[494] Letman, *supra* note 493 (reporting that Guam houses a drove of bombers, fast-attack nuclear submarines, supersonic aircraft, an expeditionary helicopter squadron, a Naval Ordnance Annex, a terminal high-altitude area defense missile defense battery, Joint Region Marianas headquarters, Andersen air force base, Naval Base Guam, and "a 984,000-square-mile testing and live-fire training area"); *see* Perez, *supra* note 484.

[495] Fifield, *supra* note 417; Emma Reynolds, *'America's Best-Kept Secret': The People with US Passports But No Vote*, NEWS.COM.AU (Oct. 7, 2016, 8:53 AM), http://www.news.com.au/world/asia/americas-bestkept-secret-the-people-with-us-passports-but-no-vote/news-story/a5929ff7e93e9fc38e6994e0d7b86901.

[496] *See* Fifield, *supra* note 417; Aguon, *supra* note 137, at 141–42.

Chamorus "be permitted to exercise their right to political self-determination."[497]

This Article has argued that the *Insular Cases*, and possibly their contemporary incarnations, should be taught in law school because they are valuable for revealing the perspective of those most affected by them.[498] Looking to those at the bottom in the context of colonized peoples is most powerful when linked to the significant international human rights norm of self-determination.[499] Self-determination entails repairing the damage suffered by those who have experienced systemic oppression according to their self-shaped notions of reparation.[500] As described above, we can grasp a key aspect of the meaning of self-determination for territorial peoples by examining their present-day usages of or resistance to the teachings of the *Insular Cases*.

In Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands, peoples are engaging the *Insular Cases* in strategic and disparate ways. They are using approaches that are both defensive against further encroachment on self-governance efforts and proactively assertive as the foundation for repairing decades of social and political damage. They are pairing these approaches with community organizing, public education, media storytelling, and scholarly writing to tell the history of the United States' relationship with their lands, and highlighting group harms and the need for repair. Although Puerto Rico, the U.S. Virgin Islands, and Guam now garner increased media attention—largely in the context of massive hurricanes or nuclear war—the territories' political invisibility lingers. Learning about the *Insular Cases* from the bottom—their past impacts and present deployment—will thus open law students' eyes to the important interplay between the cases' doctrine and the self-determination efforts of those colonized.

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[497] LisaLinda Natividad & Victoria-Lola Leon Guerrero, *The Explosive Growth of U.S. Military Power on Guam Confronts People Power: Experience of an Island People Under Spanish, Japanese and American Colonial Rule*, ASIA-PAC. J., Dec. 6, 2010, at 1, 14.

[498] *See* Matsuda, *supra* note 27, at 324–25.

[499] *See supra* Part IV.

[500] *See* Tsosie, *supra* note 37, at 245.