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Quiescent Sovereignty of U.S. Territories

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QUIESCENT SOVEREIGNTY OF U.S. TERRITORIES

MICHAEL J. KELLY*

Under modern democratic theory, the font of sovereignty springs from the people; however, traces of its past as a power emanating from the Crown continue to haunt the domestic and international status of sub-sovereign legal entities such as U.S. Territories. Quiescent sovereignty describes that which is possessed by the people of the Territories; a sovereignty that is theirs, but that is wielded on their behalf by the federal government. Although fiduciary responsibilities attach to this arrangement, cycles of attention/neglect are the modus vivendi. Bilateral relationships between the Territories and the federal government are varied, but such differences should not impact their voices in Congress. Institutional adjustments to provide more impetus to Territorial issues are readily possible. Just as the European Union came to realize the importance of sub-national input at the federal level by creating the European Union's Committee of the Regions, so too should the U.S. House of Representatives create a Permanent Select Committee on Territorial Affairs chaired by a Territorial Delegate.

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I. INTRODUCTION

When Stacey Plaskett took the floor of the United States Senate one month after the bloody insurrection against the Capitol on January 6, 2021, to manage her portion of the impeachment trial of President Donald J. Trump, she spoke truth to power. “Truth is truth, whether denied or not, and the truth is, President Trump had spent months calling his supporters to a march on a specific day, at a specific time, in specific places to stop the certification [of the U.S. presidential election].”¹ As the congressional Delegate from the U.S. Virgin Islands, Ms. Plaskett stood in the well of the Senate, facing down those seeking to destroy their own government, *defending* a presidential election in which her constituents couldn’t even vote; *defending* an American democracy not fully open to her. The symbolism of that moment should be lost on no one.²

Americans living in the U.S. Territories of Guam, Puerto Rico, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands are vestigial, yet living, reminders of our country’s not so rosy past. Although this past never

1. 167 CONG. REC. S630 (2021). In her presentation, Ms. Plaskett displayed a love of country, common among non-voting Americans living in the Territories, that was lacking on the part of citizen-voter insurrectionists who seized the Capitol on January 6:

When I first saw this model . . . , I thought back to September 11. I know a lot of you Senators were here. . . . I was also here on September 11. I was a staffer at that time. . . . I worked in the Capitol, and I was on the House side.

This year is 20 years since the attacks of September 11, and almost every day I remember that 44 Americans gave their lives to stop the plane that was headed to this Capitol Building. I thank them every day for saving my life and the life of so many others.

Those Americans sacrificed their lives for love of country, honor, duty—all the things that America means. The Capitol stands because of people like that—this Capitol that was conceived by our Founding Fathers, that was built by slaves, that remains through the sacrifice of service men and women around the world.

And when I think of that, I think of these insurgents, these images, incited by our own President of the United States, attacking this Capitol to stop the certification of a Presidential election, our democracy, our Republic.

Id. at S634.

2. Like Ms. Plaskett, America’s first Treasury Secretary, Alexander Hamilton, also hailed from the West Indies and New York City; as a founding father, the bricks he laid in our American political foundation remain cornerstones of the national government. See RON CHERNOW, ALEXANDER HAMILTON (2004).

completely equated citizenship with voting rights,³ linkage sometimes occurred. For example, at our genesis both White men and White women were citizens, yet women could not vote—nor could impoverished White men. By the mid-19th Century, “equality” was considered to have been achieved by extending the franchise to all White men regardless of their financial position. Citizenship was granted to both Black men and Black women after the Civil War, yet gender-based discrimination in voting continued. White women achieved the right to vote in 1920, and Native Americans achieved citizenship in 1924 but not full voting rights in some states until 1957.⁴ The franchise was then extended to citizen youth in 1971.⁵

Despite this protracted, sometimes grudging, expansion of participation in our American democracy, citizens or residents of U.S. Territories remain disenfranchised. For those living in Ms. Plaskett’s at Large Congressional District for the U.S. Virgin Islands, they are U.S. citizens but can only send a non-voting delegate to one house of Congress; further, they cannot vote for the U.S. presidency.⁶ Territorial residency arbitrarily limits citizenship.⁷ Yet the Territories are constituent parts of the United States.⁸ Since the voices of American islanders in the Territories cannot be registered at the ballot box, the only way they can be heard is through their five non-voting delegates to Congress; consequently, that voice must be amplified.

Over a century ago, President Woodrow Wilson described “our territories over sea” as lying “outside the charmed circle of our own national life” in his first State of the Union address to Congress in 1913.⁹ A description that unfortunately holds true today. Despite acknowledging this otherness, he cast America’s duty toward them as a fiduciary one—acting on their behalf and for

3. T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* 5 (2002).

4. U.S. CONST. amend. XIX; Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, 45 HUM. RTS. MAG., no. 1, Feb. 9, 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/ [<https://perma.cc/32CW-33F3>].

5. Grace Panetta, Olivia Reaney & Talia Lakritz, *The 19th Amendment Passed 100 Years Ago Today. The Evolution of American Voting Rights in 244 Years Shows How Far We’ve Come—And How Far We Still Have to Go*, BUS. INSIDER, Aug. 18, 2020, <https://www.businessinsider.com/when-women-got-the-right-to-vote-american-voting-rights-timeline-2018-10> [<https://perma.cc/HGP6-HLAB>].

6. DOUG MACK, *THE NOT-QUITE UNITED STATES OF AMERICA* xxiii (2017).

7. For example, my Chamorro law student’s change in residency from Guam to Nebraska gave her the right to vote for president in the 2020 presidential election, yet her parents and grandparents, still residents of Guam, were unable to do so.

8. MACK, *supra* note 6, at xiii.

9. President Woodrow Wilson, State of the Union Address to Congress (Dec. 2, 1913).

their betterment, but also acting as trustee that considers the unique situation in each territory:

[T]here stand out our obligations toward our territories over sea. Here we are trustees. . . . Such territories, once regarded as mere possessions, are no longer to be selfishly exploited; they are part of the domain of public conscience and of serviceable and enlightened statesmanship. We must administer them for the people who live in them and with the same sense of responsibility to them as toward our own people in our domestic affairs. No doubt we shall successfully enough bind Porto Rico and the Hawaiian Islands to ourselves by ties of justice and interest and affection, but the performance of our duty toward the Philippines is a more difficult and debatable matter. We can satisfy the obligations of generous justice toward the people of Porto Rico by giving them the ample and familiar rights and privileges accorded our own citizens in our own territories, and our obligations toward the people of Hawaii by perfecting the provisions for self-government already granted them; but in the Philippines we must go further. We must hold steadily in view their ultimate independence, and we must move toward the time of that independence as steadily as the way can be cleared and the foundations thoughtfully and permanently laid.¹⁰

Both historically and currently regarded as part of the United States, America's territories have appeared and disappeared over time—some becoming states, while others become independent. On occasion, America goes to war when they are attacked, as in the case of our entry into the Second World War after Japanese assaults on the American territories of Hawaii, Wake Island, the Philippines, Guam, and Midway.¹¹ Conversely, America can fail to come to their rescue when natural disasters strike, such as the devastation wrought on Puerto Rico by Hurricane Maria.¹² Indeed, a consistent theme characterizing America's relationship with our territories has in fact been our inconsistency.

Importantly, despite disparate treatment, U.S. Territories do not exist in a legal vacuum. However, the legal order in which they reside, and the kind of sovereignty they enjoy, is of a Janus-faced character: at once both distinctly international and distinctly domestic.¹³ Conceptually, sovereignty is a tricky

10. *Id.*

11. Anna Diamond, *Telling the History of the U.S. Through its Territories*, SMITHSONIAN MAG., Jan. 2019.

12. *Id.*; Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CAL. L. REV. 1249, 1252 (2019).

13. Luke Glanville, *The Antecedents of 'Sovereignty as Responsibility'*, 17 EUR. J. INT'L REL. 233, 242–43 (2010).

thing—those who don't have it want it more than anything else, and those who have it oftentimes mishandle it. Crawford describes it as one of the least helpful aspects of law that we must still contend with: "The term 'sovereignty' has a long and troubled history, and a variety of meanings. . . . It is not itself a right, nor is it a criterion for statehood."¹⁴

In form, sovereignty comes in all shapes and sizes and is divisible in many ways, as our constitutional system has shown. But the source of sovereignty is always the same: The people. Quiescent sovereignty describes the type of sovereignty that pertains in U.S. Territories. This quasi-dormant sovereignty is exercised by them in the governance of their internal affairs and on their behalf externally by the federal government. Although the people of the Territories, with the exception of American Samoa, may have had no say in the possession of their islands by the United States, they subsequently have chosen to remain with the United States.

Expression of the Territories' quiescent sovereignty at the federal level should be heard. Channeling the voices of our Territories into a newly formed House Permanent Select Committee on U.S. Territories would not only accomplish that amplification, but also focus their power into new, meaningful oversight and hearings, as well as open a new path to heightened legislative impact. Currently, territorial voices in Congress are nonexistent in the Senate and muted in the House—buried in what is functionally an unnamed subcommittee of the Natural Resources Committee.

This Article revisits colonial and territorial sovereignty theory in Part II—once accepted in the pre-human rights era as enlightened governance theory¹⁵—explores sovereignty theory as a foundation for understanding the quiescent sovereignty of U.S. Territories in Part III, and then offers an institutional solution in Part IV operationalizing that quiescent sovereignty in a manner

14. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 32 (2d ed. 2006).

15. Lebbeus R. Wilfley, *How Great Britain Governs Her Colonies*, 9 *YALE L.J.* 207, 207 (1900). Wilfley featured a case study of how the British Empire governed its colonies as a roadmap for how the United States should govern its own newly acquired territories in the wake of the Spanish-American War, declaring, "The record of the Colonial Empire of Great Britain is a wonderful record," and that:

The peculiar interest which attaches to the study of the Colonial Empire of Great Britain at the present time arises out of three considerations. First, because it is the most extensive and successful system of colonization the world has seen; second, because the prestige which it has brought to the British nation is being seriously menaced by the reversals now being sustained by British arms in South Africa; and, third, because the United States have recently acquired possessions, some of which are so far removed from our shores and are surrounded by such climatic, social, racial and religious conditions that they will have to be treated, for a time at least, as dependencies, before they can be incorporated into the Federal Union.

Id.

aimed at increasing the political influence of U.S. Territories in Congress. As important as they are, Territorial movements for statehood and voting rights are ably discussed elsewhere¹⁶ and, as such, are not treated in this Article.

As abstract as this analysis may be, there is a certain urgency underlying it. The dawn of the 21st Century has seen a return of big powers bestriding the planet with renewed thirst for territorial acquisition. Russia grabbed Crimea from Ukraine and claimed the Arctic seabed by planting a Russian flag under the North Pole, and China continues to increase direct governance from Beijing in Hong Kong, the territory it acquired from Great Britain with promises to the contrary, while simultaneously ratcheting up its territorial claims to Taiwan and aggressive possession of the South China Sea—where it has built up over eighty islands and reefs in a ring that encompasses 85% of the 1.4 square nautical miles of ocean.¹⁷

In an age when territorial expansionism is in vogue once again, America needs to get its territorial act together sooner rather than later. This Article's contribution is intended as a significant step in that direction.

II. COLONIAL & TERRITORIAL SOVEREIGNTY THEORY

Sovereignty is power. It is the power to control one's own destiny; the foundation of self-determination.¹⁸ Self-determination, in turn, is an extension of popular sovereignty. "A legitimate government, according to this conception, derived their powers from the consent of the people."¹⁹ Possessions of other states, be they colonies or territories, cannot fully exercise that power. Yet, by virtue of the people living in them, such possessions theoretically have that residual power, albeit resting in a dormant or quiescent state.²⁰ Sovereignty is then exercised on behalf of that possession by the dominant state.

16. See, e.g., José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389 (2007); Joseph Blocher and Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229 (2018).

17. MACK, *supra* note 6, at 277–78; Robert A. Manning & Patrick M. Cronin, *Under Cover of Pandemic, China Steps Up Brinkmanship in South China Sea*, FOREIGN POL'Y, May 14, 2020, <https://foreignpolicy.com/2020/05/14/south-china-sea-dispute-accelerated-by-coronavirus/> [<https://perma.cc/8PC2-DEGU>]; Steven Pifer, *Crimea: Six Years After Illegal Annexation*, BROOKINGS, May 17, 2020, <https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/> [<https://perma.cc/YK75-ZYTJ>].

18. Lori Damrosch, *Nationalism and Internationalism: The Wilsonian Legacy*, 26 N.Y.U. J. INT'L L. & POL'Y 493, 500 (1994).

19. Glanville, *supra* note 13, at 240.

20. David Isenberg, *Reconciling Independence and Security: The Long-Term Status of the Trust Territory of the Pacific Islands*, 4 UCLA PAC. BASIN L.J. 210, 220 (1985); M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 10–17 (1926).

Modes of exercising this sovereignty by the dominant state can take many forms: complete internal and external control; retention of external control while granting internal governance/autonomy; or even retention of external control while granting internal governance to a corporate entity such as in the case of the British East India Company.²¹ Regardless of its form of exercise, the conceptual foundations of sovereignty have changed over time.

A. Historical Roots

Historically, Euro-centric civilization acquired and disposed of territory around the globe in a casually transactional manner, not unlike the buying and selling of apartment complexes near a city center. Akin to landlords who hold and convey such titles, states gave no more thought to the people living in those territories than the landlords give to the people living in their apartments.²² This transactional approach was grounded in its theoretical origins: “The international rules regarding territorial sovereignty are rooted in the Roman law provisions governing ownership and possession, and the classification of the different methods of acquiring property is a direct descendant of the Roman rules dealing with property.”²³ Such was the state of affairs.

However, just prior to the Enlightenment, two unlikely things converged, creating a perfect storm that transformed international law. First was the conception of statehood, and second was the conception of popular sovereignty. The disastrous Thirty Years’ War in Europe concluded with the Peace of Westphalia in 1648.²⁴ Agreements struck there are commonly regarded as the birthplace of the state system, underpinning modern international law.²⁵ Instead of individual rulers (monarchs and emperors), states became the primary actors on the international stage. Consequently, state interests came to the fore. The interests of kings and queens, typically directed at squabbling royal families

21. See generally PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA* (2011); LINDLEY, *supra* note 20, at 94. For a discussion of atrocities committed by entities such as the British and Dutch East India Companies in the discharge of their internal governance mandates see MICHAEL J. KELLY, *PROSECUTING CORPORATIONS FOR GENOCIDE* 16–26 (2016).

22. See, e.g., Lau Siu-Kai, *Colonial Rule, Transfer of Sovereignty and the Problem of Political Leaders in Hong Kong*, 30 J. COMMWEALTH & COMP. POL. 223 (July 1992); LINDLEY, *supra* note 20, at 328 (“In the earliest periods of European expansion into countries inhabited by backward peoples, little or no respect was, as a rule, paid to the lives or liberties of the natives . . . the story of their treatment at the hands of the Europeans is a painful one.”).

23. MALCOLM N. SHAW, *INTERNATIONAL LAW* 412 (5th ed. 2003).

24. Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 371–73 (2005).

25. Glanville, *supra* note 13, at 234–35.

with concerns about which princess would wed which prince to secure which military alliance, were replaced with much broader interests of the state, characterized by securing better trade routes and stabilizing international relations, as the primary motivating factors in foreign affairs.²⁶

The second conception, arising before Westphalia and peaking in its aftermath, relocated the locus of sovereign power. From the time of Caesar, beginning with the demise of the Roman Republic and the establishment of the Roman Empire, sovereign power resided in the vessel of the ruler.²⁷ More often than not, that person ruled by divine right and, therefore, could not be easily challenged. 17th Century democratic thinkers, for a variety of reasons not least of which included avoiding further royal adventures across national frontiers, laid the foundations for extracting sovereignty from the vessel of the ruler and placing it in the people.²⁸ Westphalia afforded a unique opportunity by creating the secularized state to be the new vessel in which the people could vest their sovereign power and elect governments to animate that sovereignty on their behalf.²⁹ “[A] state’s power is understood to derive from its members. The idea of popular sovereignty is that a contract has been formed among the members to establish a state to delegate to it powers to act on their behalf.”³⁰

The states and governments that emerged into this new world took a variety of forms—some completely embracing democratic theory as in the cases of Switzerland or France, others blending the approaches with increasing parliamentary supremacy as with Great Britain, and still others resisting for as long as possible, as with Tsarist Russia or Imperial Austria-Hungary or Ottoman Turkey, until the great leveling of the First World War finally lay waste to most of the old systems. Wilson’s ideal of self-determination took

26. Kelly, *supra* note 24, at 371–73.

27. Glanville, *supra* note 13, at 240; John A. Jameson, *National Sovereignty*, 5 POL. SCI. Q. 193, 194–95 (1890).

28. Kelly, *supra* note 24, at 374–77.

29. Kelly, *supra* note 24, at 370–77:

Once Westphalia took the religion out of the rule, sovereignty was essentially secularized. Writing during the peace negotiations at Westphalia, Hobbes developed his famous social contract theory in *Leviathan* (1651) to explain the autonomous self-sufficient commonwealth (state) which no longer required divine authority for legitimacy. Although he acknowledged God’s continued relevance, Hobbes severed the dependency relationship between what he termed the immortal God (divine) and the mortal God (state), describing the mortal god as an “artificial man” constructed from the collectivity of men adhering to the same social contract within which “sovereignty is an artificial soul, as giving life and motion to the whole body.”

Id. at 374 (footnotes omitted) (quoting THOMAS HOBBS, *LEVIATHAN* 9, 117–21 (Richard Tuck ed., Cambridge Univ. Press 1991)).

30. ALEINIKOFF, *supra* note 3, at 4–5.

center stage,³¹ opening the final path for popular sovereignty to represent the “sole legitimate form for sovereign statehood” as enshrined in the U.N. Charter.³²

Underlying this re-ordering were the colonial empires which had been steadily built up around the world by Europe’s hegemonic powers, ostensibly for geostrategic and economic gain, although the latter justification proved illusory.³³ Ironically, as European people were increasingly achieving more freedom and self-determination within their European states, people in Africa, Latin America, and Asia coming under colonial control, were losing theirs—even though a sense of fiduciary duty was embedded at least in colonization theory,³⁴ if not fully in practice.³⁵ The acquisition of territory drove this process.

According to Shaw, there are five principal approaches to the acquisition of territory under international law: “[O]ccupation of *terra nullius*, prescription, cession, accretion and subjugation (or conquest).”³⁶ None of which required European powers to take into account non-European peoples living in acquired lands. The only counter claims which mattered were those by other Europeans. *Terra nullius*, Latin for nobody’s land, is unclaimed territory, prescription is a method of achieving title after prolonged possession, cession involves the transfer of territory from one sovereign to another (usually at the end of a war but also by purchase or grant), accretion is the creation of new territory attached to existing territory, and subjugation is self-explanatory.³⁷

Regardless of the approach taken, “the method of acquiring additional territory is by the sovereign exercise of effective control.”³⁸ There is an establishing phase and a maintaining phase to achieving effective control, even though the phases are not applied the same ways in different situations:

[I]ts essence is that ‘the continuous and peaceful display of territorial sovereignty . . . is as good as title.’ Such control has to be deliberate sovereign action, but what will amount to effectiveness is relative and will depend upon, for example, the

31. Glanville, *supra* note 13, at 242. *But c.f.*, Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT’L L. 255 (1996) (discussing the steady erosion of self-determination as an exercisable right into a mere privilege).

32. Glanville, *supra* note 13, at 243.

33. Avner Offer, *The British Empire, 1870–1914: A Waste of Money?*, 46 ECON. HIST. REV. 215 (1993).

34. LINDLEY, *supra* note 20, at 328–36.

35. Glanville, *supra* note 13, at 244–45.

36. SHAW, *supra* note 23, at 417.

37. *Id.* at 419–26.

38. *Id.* at 441.

geographical nature of the region, the existence or not of competing claims and other relevant factors, such as international reaction. It will not be necessary for such control to be equally effective throughout the region. . . . Effectiveness has also a temporal as well as a spatial dimension . . . , while clearly the public or open nature of the control is essential. The acquiescence of a party directly involved is also a very important factor Where a dispossessed sovereign disputes the control exercised by a new sovereign, title can hardly pass. . . . [M]ere possession by force is not the sole determinant of title.³⁹

European colonial powers mostly used occupation of *terra nullus*,⁴⁰ cession, and subjugation to build their empires. But possession did not solve the question of inherent sovereignty. For that, we must again journey through time chronologically. While popular sovereignty theory had vested the locus of this power in the people⁴¹ to be granted to a government to act for the state on their behalf, importantly, little thought was given to people residing in acquired territory. Non-European inhabitants of acquired territories either had no sovereignty or the sovereignty they were recognized as having was confined to internally proscribed enclaves, much like the confinement of Native Americans to reservations, established under the sovereignty of the national government.⁴²

39. *Id.* at 441–42. Thus, for example, Russia’s forceful occupation and annexation of Ukraine’s Crimea peninsula in 2014 places that territory in Russia’s possession, but so long as Ukraine challenges this possession, a position backed by a majority of foreign governments recognizing Ukraine’s claim, title to Crimea has not passed to Russia. See G.A. Res. 68/262 (Mar. 27, 2014); G.A. Res. A/73/L.47 (Dec. 17, 2018); MATTHEW M. MCMAHON, CONQUEST AND MODERN INTERNATIONAL LAW: THE LEGAL LIMITATIONS ON THE ACQUISITION OF TERRITORY BY CONQUEST 14 n.35 (1940) (“The holding of a conquered territory is regarded as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed” (quoting 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 290 (1906))). Over a long period of time in possession, however, prescription may lead to Russia acquiring title. SHAW, *supra* note 23, at 446. However, as recently as the summer of 2021, Western democratic governments continue to challenge Russia’s claim. *Russian Jets and Ships Shadow British Warship*, BBC NEWS, June 23, 2021, <https://www.bbc.com/news/av/world-europe-57587777> [<https://perma.cc/9UE2-3247>] (describing the UK sailing the destroyer H.M.S. Defender within 12 nautical miles of the Crimean coast in the Black Sea and, despite being harassed by Russian jets with Moscow claiming the ship was in Russian waters, the UK insisted it was in Ukrainian waters).

40. David Strang, *Contested Sovereignty: The Social Construction of Colonial Imperialism, in STATE SOVEREIGNTY AS A SOCIAL CONSTRUCT* 31 (Steve Smith ed., 1996).

41. Jameson, *supra* note 27, at 193–94.

42. Lindley, *supra* note 20, at 18; Strang, *supra* note 40, at 31–34.

It was not until the initial stirrings of what would later become the modern human rights movement that people were seen to be equal. This recognition of equality, regardless of race, ethnicity, or national origin, then transposed popular sovereignty theory alongside it. At that point, colonial powers were seen to be exercising the sovereignty of the people of their colonial possessions on behalf of those possessions; thus, the inherent sovereignty of the territory in question could be considered dormant, or quiescent.

Thus, Jennings begins to consider the question of derivative sovereignty: “[I]n so far as ‘sovereignty’ is used to mean rights, duties, powers and competencies or titles it would seem that these might be derived, even in a legal sense, from another sovereignty.”⁴³ However, once a colony emerged as an independent state, its full sovereignty was activated, and it could then act with self-determination in the world on its own behalf.

Despite formalized resolutions and paper processes manifested by the United Nations in an attempt to manage it, the decolonization process during the 1940s–70s was a messy and deadly affair. On one extreme, colonial evacuation coinciding with flawed partition schemes cast diverse populations in India/Pakistan and Israel/Palestine into chaos;⁴⁴ on the other, Algeria wasn’t at all sure it didn’t want to integrate into France, and France wasn’t certain it disagreed with this prospect.⁴⁵ However, most experiences, with varying degrees of disorganization, fell somewhere in between.

Implicit recognition of how sovereignty was re-orienting itself from the starting point of fully supreme colonialism to the ending point of decolonization is evidenced in some ways by how the British Empire internally restructured itself across this roughly 200-year period. “At its height, the British Empire comprised over 13,000,000 square miles—nearly one-quarter of the earth’s land surface Britain was responsible for ruling 500 million people, over a fifth of the earth’s population.”⁴⁶ By the end of the Second World War, this had dropped to sixty-two dependencies, and today it includes only a remnant scattering of overseas islands and enclaves with a total population of about

43. R. Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 24 (2017).

44. See Jonathan D. Greenberg, *Generations of Memory: Remembering Partition in India/Pakistan and Israel/Palestine*, 25 *COMP. STUD. S. ASIA, AFRICA & MIDDLE EAST* 89 (2005); Rabia Umar Ali, *Planning for the Partition of India 1947: A Scuttled Affair*, 30 *PAK. J. HIST. & CULTURE* 113 (2009).

45. Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 *TEX. INT’L L.J.* 1, 5 (2003); Ali A. Mazrui, *Consent, Colonialism, and Sovereignty*, 11 *POL. STUD.* 36 n.4 (1963); Hans J. Morgenthau, *Asia: The American Algeria*, 32 *PUB. AFF.* 43 (July 1, 1961).

46. ASHLEY JACKSON, *THE BRITISH EMPIRE: A VERY SHORT INTRODUCTION* 1 (2013).

300,000.⁴⁷ So pervasive was the Empire that over 80% of modern states in the world were affected by it. Indeed, today there are only twenty-two countries that Britain did not invade at some point in history.⁴⁸

Constitutional disagreement within the Empire, in fully articulated form, began in the 1770s with the American Revolution. The Crown's view was not only that its sovereignty was supreme over the British colonies, but that Parliamentary supremacy extended throughout the entirety of the Empire as well.⁴⁹ While the American view acknowledged the Crown's external sovereignty, it denied Parliamentary supremacy—eschewing it in favor of the power of colonial assemblies as expressions of colonial sovereignty under the Crown.⁵⁰ As Madison put it:

The fundamental principle of the Revolution was, that the Colonies were coordinate members with each other and with Great Britain, of an empire united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament, as in the British Parliament. And the royal prerogative was in force in each Colony by virtue of its acknowledging the King for its executive magistrate, as it was in Great Britain by virtue of a like acknowledgement there. A denial of these principles by Great Britain, and the assertion of them by America, produced the Revolution.⁵¹

Even “Adam Smith thought that the American colonies were an asset, but that the effort to govern them from London was folly.”⁵² America's break with Britain may have proved the point. By 1839, Parliament was coming around to this general proposition, faced with further discontent in the colonies and dominions stemming from constant and unnecessary friction between centralized executive administration through London's Colonial Office and local colonial legislatures. In his influential report to Parliament, Lord Durham suggested home rule for the British colonies was the best path for the preservation of the empire.⁵³ The division between what each colony should

47. BARRY E. CARTER, ALLEN S. WEINER & DUNCAN B. HOLLIS, *INTERNATIONAL LAW* 490 (7th ed. 2018).

48. STUART LAYCOCK, *ALL THE COUNTRIES WE'VE EVERY INVADED: AND THE FEW WE NEVER GOT ROUND TO* 4 (2012).

49. Stanley N. Katz, *The American Constitution: A Revolutionary Interpretation*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 25 (Richard R. Beeman, Stephen Botein & Edward Carlos Carter II, eds., 1987).

50. ROBERT LIVINGSTON SHUYLER, *PARLIAMENT AND THE BRITISH EMPIRE 194–96* (1929).

51. *Id.* at 196.

52. Offer, *supra* note 33, at 215.

53. SHUYLER, *supra* note 50, at 199–210.

decide for itself and what Britain should decide for it fell roughly along internal/external lines:

Perfectly aware of the value of our colonial possessions, and strongly impressed with the necessity of maintaining our connexion with them, I know not in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the mother country. The matters, which so concern us, are very few. The constitution of the form of government,—the regulation of foreign relations, and of trade with the mother country, the other British Colonies, and foreign nations,—and the disposal of the public lands, are the only points on which the mother country requires control.⁵⁴

This formula eventually took expression in various ways throughout the Empire, for instance while in dominions such as Canada or Australia, “the British Parliament has ceased to be an Imperial Parliament in any real sense of that term,” in the 1919 Government of India Act, Parliament noted the basis of the Indian constitution as providing for “the gradual development of self-governing institutions, with a view to the progressive realization of responsible government.”⁵⁵ By 1926, as the foundation stones of the British Commonwealth were being laid, this internal/external division of sovereignty was more expressly stated,⁵⁶ although even by then South Africa, Australia, Canada, India, and New Zealand were signing the Treaty of Versailles which in itself manifested some component of external capacity.⁵⁷

Consequently, certain colonies could exercise the internal aspect of their sovereignty to run their own affairs, while the colonial power would exercise that colony’s external aspect of sovereignty—much as the practice has continued today with respect to failed states, wherein an external state or group of states, or even an international organization, may exercise the failed or collapsed state’s external sovereignty on that state’s behalf during its period of failure or collapse.⁵⁸

54. *Id.* at 205.

55. *Id.* at 194–95.

56. *Id.* at 194–97, 222.

57. T. Baty, *Sovereign Colonies*, 34 HARV. L. REV. 837, 841 (1921).

58. Kenneth Chan, *State Failure and the Changing Face of the Jus ad Bellum*, 18 J. CONFLICT & SEC. L. 395, 407–09 (2013) (discussing the examples of Somalia, Iraq, and Afghanistan).

Finally, post-World War II decolonization accorded that second aspect, external sovereignty, to new states realizing their full sovereignty.⁵⁹ Public international law was altered to reflect equitable considerations for such newly sovereign states, such as development of the “clean slate” doctrine which enabled new states to emerge unencumbered by treaties entered into or public debts incurred by former colonial powers.⁶⁰ Structurally, for former British colonies, membership in the British Commonwealth of Nations accorded them favored immigration and trade rights as well.⁶¹

B. *The American Experience*

As colonies themselves, the United States certainly possessed an informed perspective of what sovereignty meant to them.⁶² The key driving forces leading to the Revolutionary War and the break from Great Britain revolved around questions of representation, self-determination, and autonomy. Like the U.S. Virgin Islands with respect to Congress, as colonies neither Virginia nor New York nor any other British North American colony had a vote in the British Parliament. Even so, colonial Americans may have been willing to forego such representation and gone along with an internal/external form of their own quiescent sovereignty if the Crown had been willing to acknowledge a limit to Parliament’s power and offered recognition of the kind of internal colonial self-governance that Britain eventually accepted much later:⁶³

[B]y 1774 [Americans] developed the notion that, although Parliament had no legal authority to legislate for [the] colonies outside the realm, an exception could be made for the regulation of imperial trade (“one expressly declared to be not of right but only by way of voluntary concession”) by colonial consent (“except in matters of ‘internal polity’”).⁶⁴

59. Although between 1870 and 1987, “130 colonial dependencies of Western states became recognized independent states or were fully incorporated as parts of sovereign states,” it was the post-war era from 1946–1986 that brought the decolonization process to its fullest flower. See David Strang, *From Dependency to Sovereignty: An Event History Analysis of Decolonization 1870–1987*, 55 AM. SOC’L REV. 846, 846, 850 fig. 1 (1990).

60. CARTER, *supra* note 47, at 482–87.

61. See Paul L. Robertson & John Singleton, *The Commonwealth as an Economic Network*, 41 AUSTRAL. ECON. HIST. REV. 241 (2001).

62. See Katz, *supra* note 49 (discussing emerging notions of American national sovereignty). *But cf.* Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907) (arguing against a national conception of American sovereignty).

63. Katz, *supra* note 49, at 25–26; Gordon S. Wood, *The Problem of Sovereignty*, 68 WM. & MARY Q. 573, 573–75 (2011).

64. Katz, *supra* note 49, at 25.

However, Britain was steadfast in its assertion “there was nothing beyond the power of the English Parliament,”⁶⁵ and the ensuing struggle birthed the United States—a fact ultimately recognized by the Crown in 1783’s Treaty of Paris.⁶⁶ From inception as a new country, the United States established and set aside territories, such as the Northwest Territory,⁶⁷ that would eventually be subdivided into new states joining the Union on an equal footing with the original thirteen⁶⁸—for example, Ohio, Indiana, Michigan, Illinois, and Wisconsin. As a state in the Westphalian sense, within the international legal system, the United States relied on the traditional approaches to territorial acquisition available to it under customary international law, but the question of domestic legal authority to do so was not as clear.

The U.S. Constitution did not expressly authorize the federal government to acquire territory.⁶⁹ In fact, President Jefferson “expressed the opinion that Louisiana could not be acquired under the existing Constitution, and accordingly recommended its amendment.”⁷⁰ However, when that solution was not forthcoming, Jefferson proceeded with the Louisiana Purchase under the theory of implied constitutional authority⁷¹—an authority that was endorsed by the U.S. Supreme Court⁷² and has not been seriously questioned since.

Unlike European states, driven by a desire to expand and consolidate global colonial assets, the 19th Century acquisition of territory by the United States was not in furtherance of creating a colonial empire, but to create the country.⁷³ The systematic acquisition of territories, followed by organization of those

65. *Id.* (quoting C.H. MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTION INTERPRETATION* 16 (1958)).

66. Treaty of Paris, U.S.–Great Britain, art. I, Sept. 3, 1783, 8 Stat. 80.

67. See the Nw. Ordinance of July 13, 1787, collected as one of four Organic Laws of the U.S. in the preface to the U.S. Code. 1 U.S.C. §§ XLV–LXXV (2012). For the Nw. Ordinance’s original text, see 32 J. OF THE CONTINENTAL CONGRESS 1774–1789, at 334–43 (Roscoe R. Hill ed., 1936). After adoption of the U.S. Constitution, the Ordinance was brought into conformity with the new legislative system through reenactment by Congress with minor revisions. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51–53 (1789).

68. Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1823 n. 4 (2011).

69. Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 399 (1898–99); Frank J. R. Mitchell, *The Legal Effect of the Acquisition of the Philippine Islands*, 39 AM. L. REG. 193, 194 (1900).

70. Mitchell, *supra* note 69, at 195.

71. *Id.*

72. *Id.* at 196; Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism, and Self-Determination*, 46 STETSON L. REV. 233, 237 (2017).

73. Peralta, *supra* note 72, at 238.

territories, incorporation, and then finally statehood, was a fairly linear legal path established by Congress. In addition to purchase and cession of territories via treaties with Native American tribes, Figure 1 demonstrates the mixture of approaches to territorial acquisition of land in North America from European powers, utilized by the United States for this purpose: cession, purchase, and occupation. Indeed, in many cases overlapping techniques ensued, such as cession via treaty from a European power of their rights to the territory and near simultaneous purchase via treaty from Indian nations living on those same lands.



Figure 1: 19th Century Continental United States Territorial Acquisitions⁷⁴

Other 19th Century U.S. territorial acquisitions included Alaska, by purchase from Russia,⁷⁵ and Hawaii, ultimately by subjugation.⁷⁶ With a view toward expanding the country instead of colonizing distant locales, the federal

74. *Territorial Gains by the U.S.*, in *THE MAKING OF AMERICA* (Nat'l Geographic Soc'y 2002) <https://www.nationalgeographic.org/photo/territorial-gains/> [<https://perma.cc/QB3S-EFXF>].

75. William L. Iggiagruk Hensley, *There are Two Versions of the Story of How the U.S. Purchased Alaska from Russia: The Tale of 'Seward's Folly' Must Also Be Seen Through the Eyes of Alaska's Native Populations*, *SMITHSONIAN MAG.*, Mar. 29, 2017.

76. Thomas J. Osborne, *The Main Reason for Hawaiian Annexation in July, 1898*, 71 *OR. HIST. Q.* 161, 164 (June 1970).

government's view of sovereignty over territories on their way to statehood was one of more direct control. Prior to the American Civil War, that control included, for instance, deciding which territories would be set aside as free or slave-holding, as Figure 2 depicts, under the 1854 Kansas–Nebraska Act⁷⁷—repealing the Compromise of 1850,⁷⁸ which had allowed some of the territories to decide this question for themselves.



Figure 2: Designation of Slave-holding Status in Western Territories Under 1854 Kansas-Nebraska Act⁷⁹

As America moved into the modern era, it acquired more territories through cession in the wake of wartime victories. While the American experience of territorial acquisition did not exactly match the European experience of colonial expansion, there are nevertheless undeniable geostrategic benefits to America's maintaining territories abroad. During the period of world wars and the Cold War, deployment of military bases and assets sufficient to enforce U.S. interests

77. Kansas-Nebraska Act, ch. 59, 10 Stat. 277, 33rd Cong. (1854).

78. See Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 882 (2011).

79. *Kansas-Nebraska Act*, in THE MAKING OF AMERICA (Nat'l Geographic Soc'y 2002) <https://www.nationalgeographic.org/photo/kansas-nebraska-act/> [<https://perma.cc/M3E7-FM57>].

abroad was a paramount national security focus, and U.S. Territories facilitated that purpose—which continues today.⁸⁰ Moreover, potential for furtherance of economic interests should not be underestimated. In the latter case, one need only consider the amount of ocean U.S. Territories (both inhabited and uninhabited) bring under the United States’ jurisdiction, depicted in Figure 3 below, through the Exclusive Economic Zone (EEZ) regime under the United National Law of the Sea Convention.⁸¹

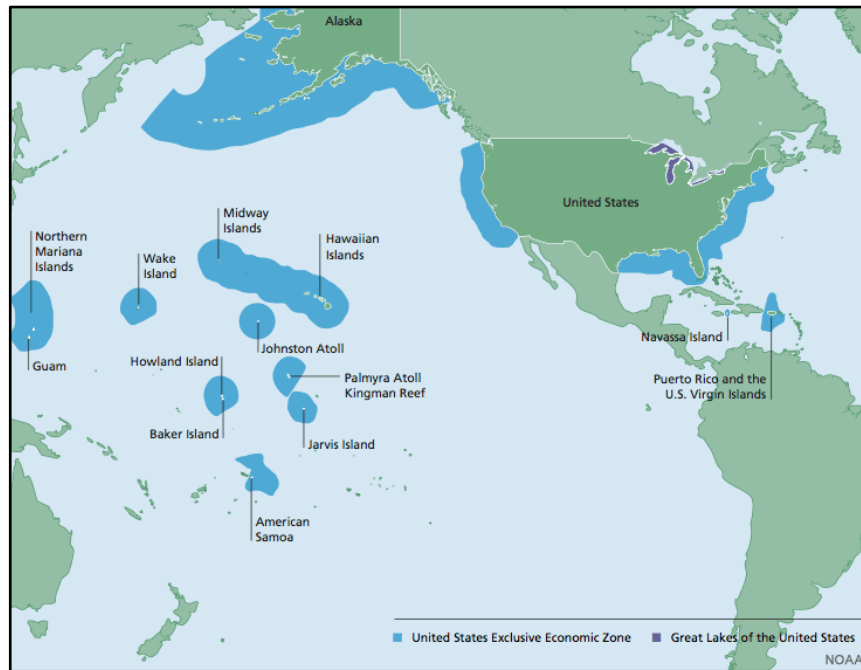


Figure 3: U.S. Exclusive Economic Zones⁸²

Once acquired, governance of overseas territories was not seriously questioned, but the rights of the people on the inhabited islands became problematic. Even if most of them were or would become U.S. citizens, were

80. Alexander B. Gray & Douglas W. Domenech, *U.S. Territories: The Frontlines of Global Competition with China*, REALCLEAR DEFENSE, Mar. 11, 2021 (“U.S. territories and possessions remain as strategically significant as they were when originally obtained.”).

81. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994).

82. National Oceanic and Atmospheric Administration [NOAA], *United States Exclusive Economic Zones* (2011), https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf [<https://perma.cc/4GSB-3CPA>].

they entitled to all of the constitutional rights of their fellow citizens living in the states? The Supreme Court, in a series of cases dealing with the territories acquired in 1898 known as the *Insular Cases*, devised a methodology, or perhaps a legal justification, to catch up with what Congress was already doing in the early 20th Century to address the issue that was both a dichotomy and a functionality in character.⁸³

The dichotomy consisted of classifying a U.S. Territory as either incorporated or unincorporated.⁸⁴ Incorporated territories were those considered by Congress to be on the path to statehood; unincorporated territories were not on the path to statehood—in fact, they might be on the path to independence and therefore only to be governed by the United States temporarily.⁸⁵ The Constitution applied in full to incorporated territories, but only selectively, based upon which fundamental rights Congress wished to extend, in the unincorporated territories⁸⁶—which today include the five inhabited U.S. Territories of Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa.

The functional approach determined which of the constitutional rights extended to these territories on a right-by-right basis.⁸⁷ Justice Kennedy continued to use this approach as recently as 2008 in *Boumediene v. Bush*,⁸⁸ deciding whether the right of habeas corpus applied to detainees at the U.S. military base in Guantanamo Bay, Cuba:

The *Boumediene* opinion indicates by example some of the factors that might make the enforcement of a familiar right in an unfamiliar location “impracticable and anomalous.” One is its cultural inappropriateness, as illustrated by the hesitancy to impose common law procedures on a population accustomed to the civil law in the *Insular Cases*. Another is the tendency of the right to interfere with intergovernmental cooperation in contexts where the United States cannot operate unilaterally. Third, there are logistical constraints that may result from

83. Peralta, *supra* note 72, at 241–42.

84. *Id.*

85. Gustavo A. Gelpí, *Comment on Blocher & Gulati’s ‘Puerto Rico and the Right of Accession’*, 43 YALE J. INT’L L.F. 1, 2 (2018).

86. Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 264 (2009) (“[T]he *Insular Cases* doctrine extended only a subset of ‘fundamental’ constitutional rights to so-called ‘unincorporated territories’ not expected to become states of the Union.”).

87. 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, 187 (2010).

88. *Boumediene v. Bush*, 553 U.S. 723 (2008).

distance or from the disorder prevailing in the location where the right would be enforced. This list is not necessarily exhaustive. These considerations justify the functional approach, partly on practical grounds, and partly because by now it is embedded in our constitutional doctrine.⁸⁹

In *Boumediene*, Justice Kennedy overlaid the functional approach with “a nontextual, normative valuation of the importance of the particular right under consideration.”⁹⁰ Justice Kennedy recalled “the ‘fundamental’ character of the (selected) rights extended to overseas territories under the *Insular Cases* and characterize[d] *habeas corpus* as ‘fundamental’ in his closing paragraphs. These distinctions underline his statement that the functional approach allowed the Court ‘to use its power sparingly and where it would be most needed.’”⁹¹

Validating this approach, however, comes with significant racial baggage. Although the United States had emerged from the blight of slavery after a protracted struggle, racism was still very much the order of the day at the turn of the 19th Century when the *Insular Cases* were decided. America’s federal institutions were not immune from reflecting that reality. The U.S. Supreme Court’s judgments in Native American cases and the Chinese exclusion cases were rife with racist pronouncements concerning the “otherness” of the people involved.⁹² In this context, the tone of the *Insular Cases* should come as no surprise:

Similar characterizations of the peoples of the new territories bestrew the pages of the *Insular Cases*. The doctrinal innovation of the cases was the distinction between incorporated and unincorporated territories. But that question was deemed to turn on congressional intent, as manifested in treaties and legislation, and there was no doubt that the congressional judgment was based largely on the race and perceived level of civilization of the inhabitants of the newly acquired territories. Areas populated by “barbarians” not thought fit for full U.S. membership were found not to have been incorporated into the United States, and those persons living in such territories were therefore not entitled to full constitutional protection.⁹³

In 2020, when presented an opportunity in *Fin. Oversight & Mgmt. Bd. for P.R. v. A*

89. Neuman, *supra* note 86, at 269.

90. *Id.* at 273.

91. *Id.* at 273.

92. ALEINIKOFF, *supra* note 3, at 28–29.

93. *Id.* at 29.

urelius Inv., LLC.⁹⁴ to overrule the widely-criticized *Insular Cases*, which Justice Breyer admitted during oral arguments hung like “a dark cloud” over Territorial status, the Court demurred, opting to find that old case law simply did not apply to the facts before them.⁹⁵ Consequently, while questioned, the *Insular Cases* still lurk around the constitutional corner, haunting the legal relationship between the United States and its Territories.

Indeed, one could say America’s *Insular Cases* in some ways mimicked Great Britain’s division of its legal order between one designed for those living in Great Britain proper, and a separate, lesser one, for those living in the colonial empire:

When the U.S. starts claiming large populated overseas territories, it starts defining itself as a legal entity and its body of law differently through a series of court cases known as the *Insular Cases*. The Supreme Court rules that the Constitution, which one might previously have assumed applied to the entire country, actually was restricted in this application. The United States went out to the Philippines and up to Alaska, but the Constitution didn’t follow it to all of those places. That was accommodating empire by dealing with this potential paradox between being, at the one end, a republic, and the other, an empire. The way to handle this was through a legal split whereby there’s one part of the country that’s governed by the Constitution, and there’s an extra-constitutional zone that’s governed by a different set of laws.⁹⁶

The American experience, adapted to our own unique constitutional federal system, certainly draws upon the historical roots of colonial and territorial sovereignty theory, but does so tentatively. At least one reason for this is our national ethos, woven across centuries, that includes both implicit and explicit (but always vague) promises of self-determination. U.S. Territories typically can opt for independence (either complete or freely associated with the United States), *status quo* as a Territory, or incorporation as a state. Various plebiscites have offered these options with varying results.

America’s acquisitions of two groups of territories offer convenient case studies on our (1) acquisition of territories, and (2) sovereignty-based options for continuance of or emergence from territorial status. Both are the result of cession by defeated states. After the Spanish-American War, the United States gained control of Puerto Rico, Guam, the Philippines, and Cuba: the first two

94. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

95. Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 *YLF* 284, 285–86 (Nov. 2, 2020).

96. Diamond, *supra* note 11.

remain with the U.S. as territories, the latter two are completely independent. Then, after the Second World War, the United States came into possession of a large swath of the Pacific Ocean that would become the Trust Territory of the Pacific Islands. Of the island regions therein, one remains a U.S. Territory, and three emerged as independent states freely associated with the United States.

With the first example, there was no uniform approach to American control of the four Spanish colonies ceded by Spain to the U.S. in 1898. While Cuba was thought from the beginning to be on a very quick path to independence, indeed that was much of the American public and political sentiment for going to war in the first place, there was disagreement over self-governance and independence for the Philippines, and not much thought at all beyond territorial status for Guam and Puerto Rico.⁹⁷

The second example stems from America's post-war acquisition from Japan of what would become the Trust Territory of the Pacific Islands. Comprised of the Caroline Islands, Marshall Islands, and Northern Mariana Islands, this area of the North Pacific known as Micronesia passed, during the course of four centuries, through a series of cessions from Spain to Germany to Japan and then to the United States.⁹⁸

Micronesian sentiment over this state of affairs is perhaps best expressed by an ancient Saipanese, whose attitude is the soul of pragmatism: "In my youth I learned Spanish and German. At middle age I learned Japanese and now, in my old age, I find myself taking English lessons. I wonder, will I someday have to learn Russian?"⁹⁹

Geographically, the trust area encompassed 2,141 islands spread over 5% of the Pacific Ocean—a zone equivalent in size to the continental United States.¹⁰⁰ Populationally, only 100 of the islands were inhabited with a combined count of approximately 100,000 people whom derived from very different ethnic backgrounds: Chamorros, Marshallese and Palauans, Trukese, Yapese, Ponapeans, and Kusaieans.¹⁰¹ The U.N. Security Council approved this cessation in 1947 as a strategic trust territory wherein the United States agreed to develop political institutions, promote self-determination and

97. Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 65 n.30 (2013).

98. Keitner & Reisman, *supra* note 45, at 33–34.

99. Harry W. Bergbauer, Jr., *A Review of the Political Status of the Trust Territory of the Pacific*, 22 NAVAL WAR C. REV. 43, 47 (1970).

100. *Id.* at 43.

101. *Id.*

economic self-sufficiency, and instill social and educational advancement.¹⁰² Trusteeships under the U.N. system aligned more specifically with popular sovereignty theory than previous territorial arrangements. “An international trusteeship may be seen as conceptually parsing the inhabitants’ inherent, or residual, territorial sovereignty from their capacity to exercise such sovereignty’s attributes.”¹⁰³ American trusteeship lasted until 1994.¹⁰⁴

Although the United States encouraged all those within the Trust Territory of the Pacific to emerge from the trusteeship as one state, this large area was by no means a homogenous society,¹⁰⁵ strong ethnically-based self-determination movements within each region ensured that would not be the case.¹⁰⁶ As the Trust Territory of the Pacific broke apart into distinct political units over a multi-year period, it did so along the lines of absorption or independence.¹⁰⁷

The Northern Mariana Islands—with a population of approximately 74,600, spread over fourteen islands, in the North Pacific three-quarters of the way from Hawaii to the Philippines—voted by 78% in 1975 to join the United States as a U.S. Territory in the style of a commonwealth, which they did two years later.¹⁰⁸ Although the resulting covenant between the Northern Mariana Islands and the United States described it as being “in political union with and under the sovereignty of the United States,” Congress read its relative power under the Constitution’s territorial clause broadly “with full sovereignty vested in the United States, and the plenary legislative authority vested in the United States Congress,” while the Islands read it narrowly, noting “[n]either Congress nor any other . . . agency of the United States Government may utilize the territorial clause or any other source of power . . . to supersede the sovereign power of the CNMI to control and regulate matters of local concern.”¹⁰⁹

The locus of sovereignty lies somewhere in between, and certainly recognizes popular sovereignty theory:

As used in connection with the insular political communities affiliated with the United States, the concept of a

102. Trusteeship Agreement for the Former Japanese Mandated Islands, U.N. SCOR, 2nd Sess., 124th mtg. at 2–3, U.N. Doc. S/318 (Apr. 2, 1947).

103. Isenberg, *supra* note 20, at 220.

104. CARTER, WEINER & HOLLIS, *supra* note 47, at 492–93.

105. Harry G. Prince, *The United States, The United Nations, and Micronesia: Questions of Procedure, Substance, and Faith*, 11 MICH. J. INT’L L., 11, 36 (1989).

106. James Robert Arnett II, *The American Legal System and Micronesian Customary Law: The Legal Legacy of the United States to the New Nations of the Trust Territory of the Pacific Islands*, 4 UCLA PAC. BASIN L.J. 161, 164–65 (1985).

107. *See generally* Prince, *supra* note 105.

108. Keitner & Reisman, *supra* note 45, at 38–40.

109. *Id.* at 41–42.

“commonwealth” anticipates a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated. The commonwealth derives its authority not only from the United States Congress, but also by the consent of the citizens of the entity.¹¹⁰

Both the Republic of the Marshall Islands, comprised of five islands and twenty-nine atolls with a population of approximately 70,800, and the Federated States of Micronesia, comprised of 607 islands and a population of 135,869, emerged from the Trust Territory as independent states in free association with the United States.¹¹¹ Both negotiated compacts of free association with the United States, under which they retain plenary authority for self-governance and carry on their own foreign affairs, but the United States would continue economic support and carry on the security and defense affairs of the new states—which includes the right of the United States to “deny access there to any nation that the United States considers a threat.”¹¹² These arrangements were approved by plebiscites in each state in 1983 and signed into U.S. law in 1986.¹¹³

Palau, comprised of 200 islands with a population of approximately 20,000 living on eight of them, also opted for independence with free association, but took a more convoluted path.¹¹⁴ Palauans rejected an effort aimed at joining the Federated States of Micronesia in the 1970s and embarked on a politically tumultuous journey during the 1980s and early 90s.¹¹⁵ That journey set an unreachably high bar for Palauans to approve a compact with the United States that allowed for the “use, testing, storage or disposal of nuclear, toxic, chemical, gas or biological weapons” that was read by its Supreme Court to include transit of nuclear-powered U.S. naval vessels.¹¹⁶ Eventually, Palau did approve the compact and entered into free association with the United States along lines similar to that of the Marshall Islands and Micronesia in 1994.¹¹⁷

Both examples offer not only guidance on the paths that a flexible evolution of quiescent to full sovereignty can take but also demonstrate the international legal components (mostly treaty-based) between points of acquisition and

110. *Id.* at 42 (quoting 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, 451 (1992)).

111. *Id.* at 45–46, 48–50.

112. CARTER, WEINER & HOLLIS, *supra* note 47, at 492–93.

113. Keitner & Reisman, *supra* note 45, at 48–50.

114. *Id.* at 46, 50–51.

115. *Id.* at 50.

116. *Id.* at 50–51.

117. *Id.*

disposition of territories. Section III discusses the status of territories that remain with the United States.

III. QUIESCENT SOVEREIGNTY OF U.S. TERRITORIES

The United States possesses sixteen territories or claimed territories beyond the external borders of the continental United States, Alaska, and Hawaii.¹¹⁸ America's governance of these territories is pursuant to the Territorial Clause of the U.S. Constitution which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."¹¹⁹ Of these sixteen territories, five are inhabited: Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa, and the Northern Marianas Islands.¹²⁰ Except for American Samoa, the inhabited Territories are considered organized but "unincorporated," meaning they are not imminently on their way to statehood.¹²¹

To restate the central premise of popular sovereignty theorists, sovereignty in the modern world rests with the people. "In the modern era, the sovereign is always the people . . ."¹²² It is a bottom-up proposition, not top-down. As President Biden noted after the U.S.-Russian summit in 2021, "We don't derive our rights from the government. We possess them because we're born period and we yield them to a government."¹²³ Therefore, the sovereignty of the people living in U.S. Territories rests with them, not with the United States—a point expressly acknowledged, for example, in the Puerto Rican Constitution.¹²⁴

118. Cole Edick, *Relics of Colonialism: Overseas Territories Across the Globe*, 37 HARV. INT'L REV. 11 (Fall 2015).

119. U.S. Const. art. IV, § 3.

120. Ann M. Simmons, *American Samoans Aren't Actually U.S. Citizens. Does that Violate the Constitution?*, L.A. TIMES (Apr. 6, 2018, 2:50 PM), <https://latimes.com/nation/la-na-american-samoan-citizenship-explainer-20180406-story.html> [<https://perma.cc/7BD5-D45C>].

121. *Id.*

122. Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 262 (2004).

123. *Joe Biden Transcript After Meeting with Putin*, REV, June 16, 2021, <https://www.rev.com/blog/transcripts/joe-biden-press-conference-transcript-after-meeting-with-putin> [<https://perma.cc/Z5X2-JASQ>].

124. P.R. Const. art. I, § 1 ("The Commonwealth of Puerto Rico is hereby constituted. Its political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America."); P.R. Const. art. I, § 2 ("The government of the Commonwealth of Puerto Rico shall be republican in form and its legislative, judicial and executive branches as established by this Constitution shall be equally subordinate to the sovereignty of the people of Puerto Rico."). Notably,

Nevertheless, the United States maintains possession of the territories they reside in, acquired title to those territories in a variety of ways, and also continues to exercise sovereignty on their behalf in a variety of ways—mostly externally now instead of internally. As Crawford notes:

The question of sovereignty in international law [should not] be confused with the constitutional lawyer's question of supreme competence within a particular State Nor is it to be confused with the exercise of 'sovereign rights': a State may continue to be sovereign even though important governmental functions are carried out on its behalf by another State or by an international organization.¹²⁵

Quiescent sovereignty describes the latter arrangement. As outlined in more detail below, internally, self-governance has become the norm for U.S. Territories, while externally, decisions rest with the federal government.¹²⁶ The Restatement's definition of sovereignty makes room for this arrangement of the Territory exercising internal sovereignty while the United States exercises the external aspect: "'Sovereignty' is a term used in many senses and is much abused. . . . [I]t implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there."¹²⁷

In the old model, the United States established internal governing structures¹²⁸—appointing governors such as future president William Howard Taft in the Philippines for example—to exert more direct control of the territory.¹²⁹ Congress could decide what to do with a particular territory largely

American Samoans rejected language offered in 2010 to revise the 1967 revised American Samoan Constitution that recounted the cessation of sovereignty from Samoan tribal chieftains to the United States. See Final Draft of 2010 Amendments to the 1967 Revised Constitution of American Samoa (June 21 – July 3, 2010), https://web.archive.org/web/20110716140622/http://americansamoa.gov/sites/default/files/concon/Final_Draft.pdf [<https://perma.cc/36NL-NGLN>].

125. CRAWFORD, *supra* note 14, at 33.

126. Although internal governance of U.S. Territories has moved from the model of a government imposed by Washington D.C. to a model of self-governance, the U.S. Supreme Court recently reminded us that the Territories continue to reside in a dependency status. See *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016).

127. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 206 cmt. b (AM. L. INST. 1987).

128. Mitchell, *supra* note 69, at 197–210.

129. BONIFACIO S. SALAMANCA, *THE FILIPINO REACTION TO AMERICAN RULE 1901–1913* (1970).

without triggering popular sovereignty concerns,¹³⁰ such as unilaterally disposing of a territory via independence:

The once-U.S. territory was acquired from Spain along with Puerto Rico and Guam in 1898. In 1916 Congress granted the Philippines autonomy. In 1935 it established the Commonwealth of the Philippines as a transition to independence. Finally, in 1946 the Philippines became an independent sovereign. At no point did the people of the Philippines vote for independence.¹³¹

Congress now takes into account the voice of the people in the Territories, albeit not nearly enough. Administratively, although it is Congress's power that is plenary,¹³² much as in the case of America's relationship with federally recognized Tribes,¹³³ the executive branch handles territorial governance issues—first under the Navy, when the Territories were acquired, but now under the Department of Interior's Office of Insular Affairs (OIA),¹³⁴ with the exception of Puerto Rico, whose affairs are managed directly by the Office of the Deputy Assistant to the President for Intergovernmental Affairs.¹³⁵

America's populated Territories exist along a flexible, not fixed, sovereignty spectrum¹³⁶ running from states at the top end to unpopulated territories and federal enclaves at the bottom end. If sovereignty means power in terms of decision-making authority, then constitutionally, the United States

130. Mitchell, *supra* note 69, at 197–210. The U.S. Supreme Court's 19th Century view analogized the relationship between territories and the federal government to that between counties and their state governments. As Chief Justice Chase explained:

All territory within the jurisdiction of the United States, not included in any State must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government.

Id. at 204 (quoting *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880)).

131. Gelpí, *supra* note 85, at 4–5 (footnotes omitted).

132. Lin, *supra* note 12, at 1264–65.

133. *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (“Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.”).

134. H.R. Rep. No. 111-357, at 3 (2009), <https://www.congress.gov/111/crpt/hrpt357/CRPT-111hrpt357.pdf> [<https://perma.cc/6862-MLFN>].

135. THE OFFICE OF INTERGOVERNMENTAL AFFAIRS, <https://www.whitehouse.gov/iga/> [<https://perma.cc/P5RQ-6MZ8>].

136. A spectrum analysis is most useful for plotting types of sovereignty exercised by political sub-units in the U.S. federal system, especially with respect to territories. *See, e.g.,* Keitner & Reisman, *supra* note 45, at 41 (quoting Marybeth Herald, *The Northern Mariana Islands: A Change in the Course Under Its Covenant with the United States*, 71 OR. L. REV. 127, 135 (1992)), 63 (Appendix).

has the most, followed by federally recognized Native American tribes, described by John Marshall as “domestic dependent nations”—which under federal preemption power hold state jurisdictions at bay.¹³⁷ As Figure 4 depicts, the five inhabited Territories (from commonwealths to unorganized) occupy the middle ground on America’s sovereignty spectrum.

The District of Columbia is next with much less decision-making authority than the Territories. Like Territorial representatives, D.C.’s has a non-voting representative in Congress, and like Territorial residents, D.C. residents cannot vote for president.¹³⁸ However, unlike Territorial residents, D.C. residents are taxed.¹³⁹ Moreover, under the 1973 Home Rule Act, Congress retains control over D.C.’s budget, the president appoints all judges serving on D.C.’s superior court, and the laws passed by D.C.’s city council are reviewed directly by Congress—who can overturn them, which it has five times between 1988 and 2014.¹⁴⁰ Thus, D.C., ironically the seat of the federal government, arguably has less quiescent sovereignty than any of the U.S. Territories which lie thousands of miles from Washington.

At the lower end are uninhabited territories, which are subject to exclusive federal jurisdiction. Last are federal enclaves, also uninhabited—which typically consist of national parks, forests, and monuments and which, depending on the particular enclave, can give rise to either exclusive federal jurisdiction or concurrent state and federal jurisdiction.¹⁴¹

137. ALEINIKOFF, *supra* note 3, at 19.

138. See Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783 (2009).

139. *Id.* at 817.

140. D.C. Code § 1-201.01 (1973).

141. See Emily S. Miller, *The Strongest Defense You’ve Never Heard of: The Constitution’s Federal Enclave Doctrine and Its Effect on Litigants, States, and Congress*, 29 HOFSTRA LAB. & EMP. L.J. 73, 73–74 (2011).

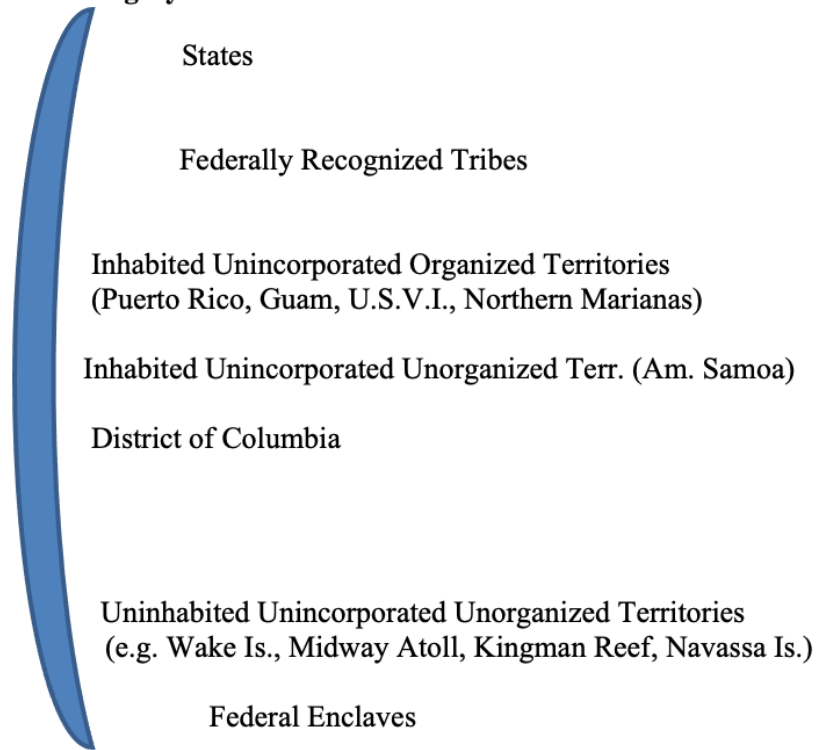
Most Sovereignty**Least Sovereignty**

Figure 4: Spectrum of Legal Entities under U.S. Federal Government

Among the unincorporated organized U.S. Territories, Puerto Rico and Guam are the oldest. Both were ceded to the United States in 1899 after the Spanish American War under the terms of the Treaty of Paris.¹⁴²

142. Treaty of Paris, U.S.–Spain, art. II, Dec. 10, 1898, 30 Stat. 1754.



Figure 5: Puerto Rico¹⁴³

Puerto Rico is the largest of the Territories, with a population of approximately 3.7 million—“a population larger than twenty-one of the States in the Union.”¹⁴⁴ Lying in the eastern portion of the Caribbean Island chain, Puerto Rico, with its deep-water port in San Juan, was long-prized by Spain as the gateway to its empire in the Western Hemisphere.¹⁴⁵ Puerto Ricans became U.S. citizens in 1917,¹⁴⁶ and since 1950 the island has been governed under the Federal Relations Act.¹⁴⁷ Puerto Rico adopted its own constitution in 1952 and since then has elected its own Governor and maintains a bicameral legislature.¹⁴⁸ As noted above, Puerto Rico is a self-governing commonwealth.¹⁴⁹ Periodically, and very recently, Puerto Ricans have supported statehood for the island and various bills have been introduced in Congress to that effect, but no significant backing has emerged for independence.¹⁵⁰

143. Puerto Rico, POLITICAL GEOGRAPHY NOW (Oct. 29, 2020), <https://www.polgeonow.com/2012/11/what-is-puerto-rico.html> [https://perma.cc/3GZB-HK4K].

144. Lin, *supra* note 12, at 1256.

145. C.R. Kutz, *The Defense of Spain's Colonial Empire*, 29 MIL. ENG'R 351, 352 (Sept.–Oct. 1937).

146. Jones–Shafroth Act of 1917, Pub. L. No. 368, § 5, 39 Stat. 951, 953 (1917).

147. Puerto Rico Federal Relations Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950).

148. U.N. Secretary of the Interior, Letter dated Oct. 9, 1952, from the Acting Secretary of the Interior to the Secretary of State, U.N. Doc. 711C.02/10-952 (Oct. 9, 1952).

149. *Id.*; R. SAM GARRETT, CONG. RESEARCH SERV., R44721, POLITICAL STATUS OF PUERTO RICO: BRIEF BACKGROUND AND RECENT DEVELOPMENTS FOR CONGRESS 5 (2017).

150. Syra Ortiz-Blanes & Bianca Padró Ocasio, *Could Puerto Rico Become a U.S. State? New Bill in Congress Faces an Uphill Battle*, MIAMI HERALD, Mar. 2, 2021.

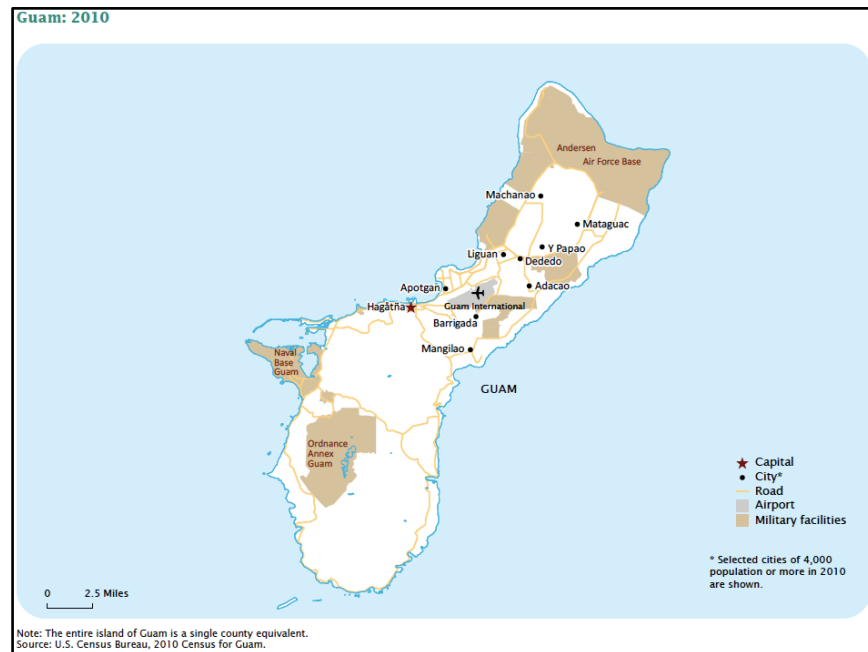


Figure 6: Guam¹⁵¹

Southernmost of the Mariana Islands, and the largest island geographically part of Micronesia, Guam is the westernmost territory of the United States. Having settled the island 3,500 years ago, the Chamorro are considered the indigenous people of Guam.¹⁵² Those born on the island are U.S. citizens under the 1950 Organic Act of Guam.¹⁵³ With a population of approximately 160,000 (37% Chamorro), Guam elects its own governor and a unicameral legislature.¹⁵⁴ There was a failed attempt in the 1980s to achieve commonwealth status like Puerto Rico and the Northern Marianas Islands.¹⁵⁵ As commonwealth status typically implies more *de jure* internal self-governance, Guam (along with the U.S. Virgin Islands and American Samoa) is technically not considered self-governing from an international and decolonization perspective; therefore, it is

151. JUSTYNA GOWOROWSKA & STEVEN WILSON, U.S. CENSUS BUREAU, P23-213, RECENT POPULATION TRENDS FOR THE U.S. ISLAND AREAS: 2000 TO 2010 6 (2015).

152. Joseph E. Fallon, *Federal Policy and U.S. Territories: The Political Restructuring of the United States of America*, 64 PAC. AFF. 23, 38 (1991).

153. Organic Act of Guam, Pub. L. No. 81-630, § 206, 64 Stat. 384 (1950).

154. Lin, *supra* note 12, at 1257.

155. Jon M. Van Dyke, Carmen Di Amore-Siah & Gerald W. Berkley-Coats, *Self-Determination for Non-Self-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 626-28 (1996).

still listed with seventeen other dependencies on the U.N. Register of Non-Self-Governing Territories.¹⁵⁶

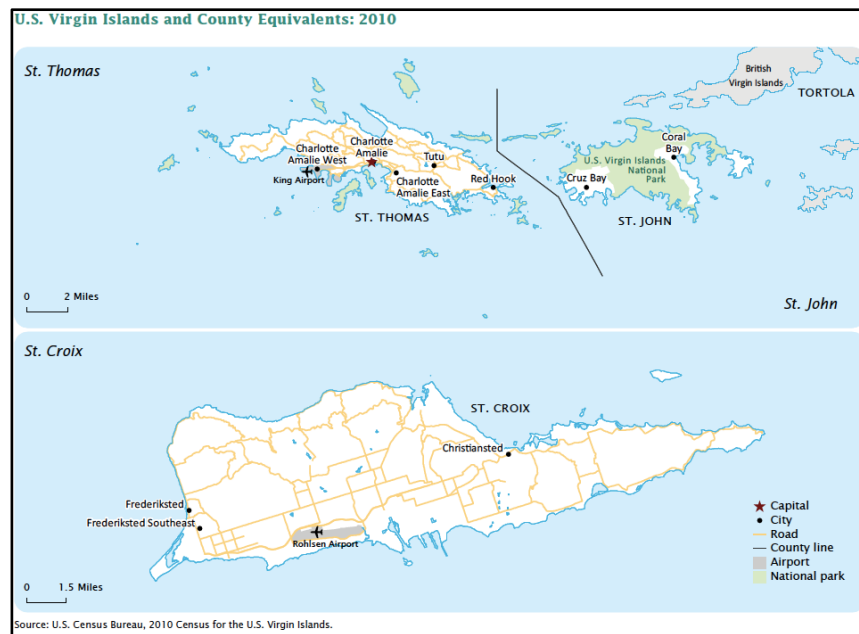


Figure 7: U.S. Virgin Islands¹⁵⁷

In 1917, the United States purchased the Virgin Islands from Denmark for \$25 million.¹⁵⁸ A mostly Afro-Caribbean population of approximately 100,000 live on the three main islands of St. Croix, St. John, and St. Thomas.¹⁵⁹ Congress' 1954 Revised Organic Act of the Virgin Islands is the statutory basis for the Territory's organization¹⁶⁰ and those born on the islands have U.S. citizenship.¹⁶¹ Since 1970, islanders have elected their own governor and their local interests are represented in a popularly elected unicameral legislature.¹⁶² The islands have been unable to produce a local constitution despite five

156. Lin, *supra* note 12, at 1265–66.

157. GOWOROWSKA & WILSON, *supra* note 151, at 8.

158. Lin, *supra* note 12, at 1260.

159. GOWOROWSKA AND WILSON, *supra* note 151, at 13, 18.

160. Revised Organic Act of 1954, Pub. L. No. 83-517, § 2, 68 Stat. 497 (1954).

161. Lin, *supra* note 12, at 1260.

162. *Id.*

attempts,¹⁶³ but a 2020 referendum resulted in a 72% approval for attempting to do so once again.¹⁶⁴

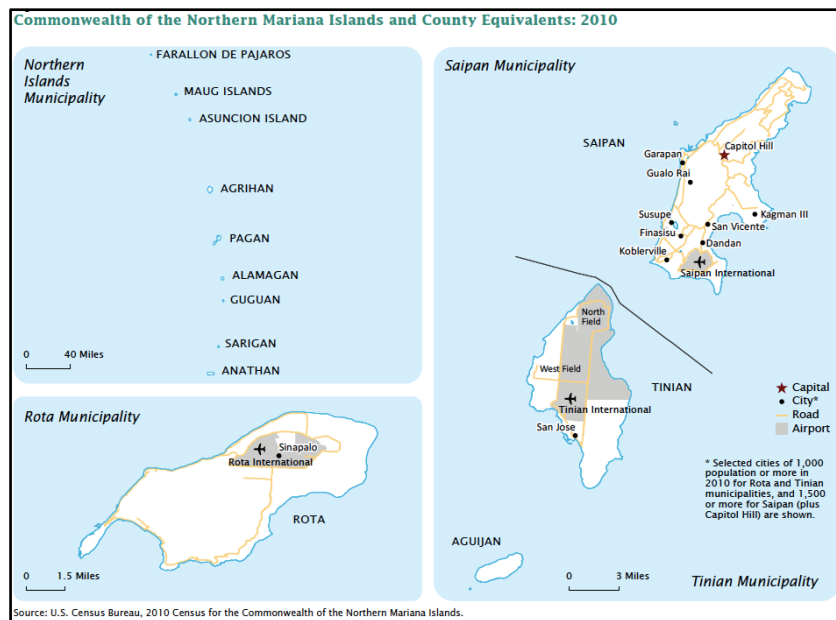


Figure 8: Northern Mariana Islands¹⁶⁵

The last unincorporated organized U.S. Territory is the Northern Mariana Islands. During the 1970s, as units within the Trust Territory of the Pacific were deciding what their future status would be, the Northern Mariana Islands elected to remain with the United States and entered into a covenant establishing them as a commonwealth in political union with the United States,¹⁶⁶ which subsequently led to them formally joining the United States in 1986. Like nearby Guam, it is home to a large Chamorro population (about 25%), with a total population of just over 50,000 living on the main islands of Saipan, Tinian, and Rota out of a total of fourteen islands that are the

163. *Id.* at 1260–61.

164. A.J. Rao, *Voters Overwhelmingly Push for Sixth Constitutional Convention*, V.I. DAILY NEWS (Nov. 4, 2020), http://www.virginislandsdailynews.com/news/voters-overwhelming-push-for-sixth-constitutional-convention/article_ad866ad1-2a36-51ed-b668-712da7e9175b.html [<https://perma.cc/9GNH-KRGK>].

165. GOWOROWSKA & WILSON, *supra* note 151, at 7.

166. Lin, *supra* note 12, at 1262.

northernmost in the Mariana Archipelago.¹⁶⁷ Northern Marianans are U.S. citizens and elect their own governor and bicameral legislature.¹⁶⁸

Unlike the other Territories, American Samoa is both unincorporated and unorganized.¹⁶⁹ Due west of Australia, American Samoa is the southernmost U.S. possession. With five main islands, it has a population of approximately 50,000 people,¹⁷⁰ almost 90% of which are ethnically Samoan. After much contesting among the United States and European powers over this strategic South Pacific area, American Samoa (the name chosen by the people therein for their territory) became part of the United States in 1900.¹⁷¹ Congress passed the Ratification Act in 1929 accepting the cessations of American Samoa's tribal leaders and formalizing its territorial status.¹⁷²

In 1949, the U.S. Department of Interior introduced legislation in Congress to incorporate American Samoa—but this was defeated through the influence of Samoan chieftains who wished to remain unincorporated, fearing a loss of their native customs and culture, a position that generally holds true today.¹⁷³ Consequently, American Samoa remains unincorporated and the Samoan people are considered U.S. nationals, but not citizens.¹⁷⁴ The Tenth Circuit in 2021 declined to recognize birthright citizenship of American Samoans, which was also opposed by the Territorial government, deferring instead to Congress:

167. *Id.* at 1262–63.

168. *Id.* at 1262.

169. Fallon, *supra* note 152, at 24.

170. Lin, *supra* note 12, at 1259–60.

171. JoAnna Poblete-Cross, *Bridging Indigenous and Immigrant Struggles: A Case Study of American Samoa*, 62 AM. Q. 501, 502–03 (Sep. 2010).

172. Islands of Eastern Samoa Act of 1929, 45 Stat. 1253, 46 Stat. 4; 48 U.S.C. § 1661 (2012) (“The cessations by certain chiefs of the islands of Tutuila and Manua and certain other islands of the Samoan group lying between the thirteenth and fifteenth degrees of latitude south of the Equator and between the one hundred and sixty-seventh and one hundred and seventy-first degrees of longitude west of Greenwich, herein referred to as the islands of eastern Samoa, are accepted, ratified, and confirmed, as of April 10, 1900, and July 16, 1904, respectively.”).

173. Riley Edward Kane, *Straining Territorial Incorporation: Unintended Consequences Form Judicially Extending Constitutional Citizenship*, 80 OHIO ST. L.J., 1229, 1230–31 n.7–8 (2019). For a detailed exposition of the American Samoa government's arguments to retain their status quo as an unincorporated U.S. Territory whose residents do not have U.S. citizenship, see Daniel Aga, Caribbean Regional Seminar on the Implementation of the Third Decade for the Eradication of Colonialism, Written Statement of the American Samoa Government, at 2, U.N. Doc. CRS/2017/CRP.5/Rev.1 (May 18, 2017), https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/2017_5_nsgt_american_samoa.pdf [<https://perma.cc/W7K2-BLA9>] (noting in addition to protecting Samoan culture, direct local control of immigration maintains a 90% ethnically Samoan population and 90% of lands owned “as communal family lands protected by local laws.”).

174. *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021), *reh'g denied en banc*, 20 F.4th 1325 (10th Cir. 2021).

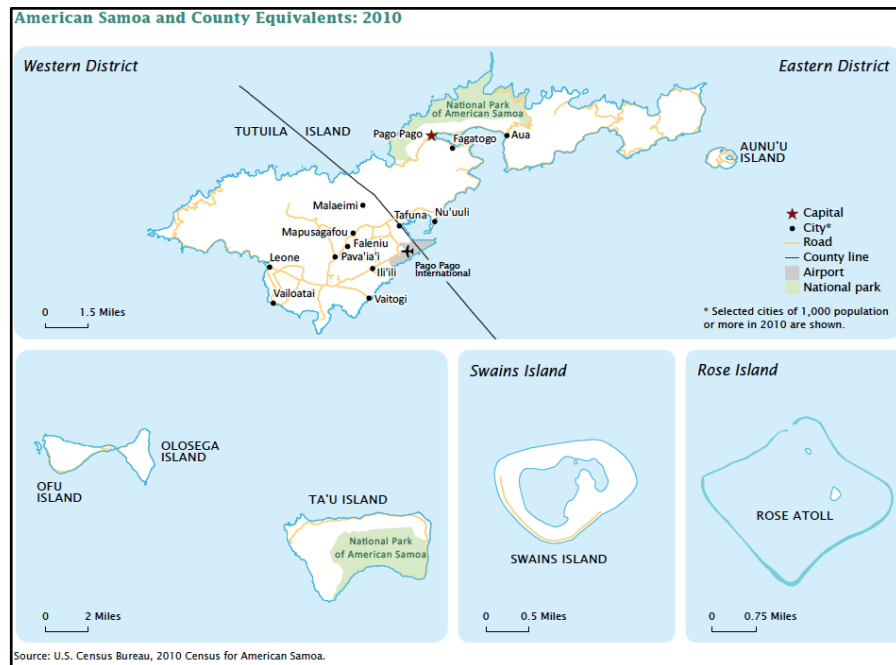


Figure 9: American Samoa¹⁷⁵

It is evident that the wishes of the territory's democratically elected representatives, who remind us that their people have not formed a consensus in favor of American citizenship and urge us not to impose citizenship on an unwilling people from a courthouse thousands of miles away, have not been taken into adequate consideration. Such consideration properly falls under the purview of Congress, a point on which we fully agree with the concurrence. These circumstances advise against the extension of birthright citizenship to American Samoa.¹⁷⁶

Nevertheless, the Territory has been self-governing with a popularly elected governor and bicameral legislature since promulgation of their constitution in 1967.¹⁷⁷ Figure 9 depicts American Samoa's position within the hierarchical federal system, which Fallon constructs following the dichotomy of the *Insular Cases*, which "are still the law of the land despite their imperialistic and racial underpinnings."¹⁷⁸

175. GOWOROWSKA & WILSON, *supra* note 151, at 5.

176. *Id.*

177. Lin, *supra* note 12, at 1259.

178. Gelpí, *supra* note 85, at 2.

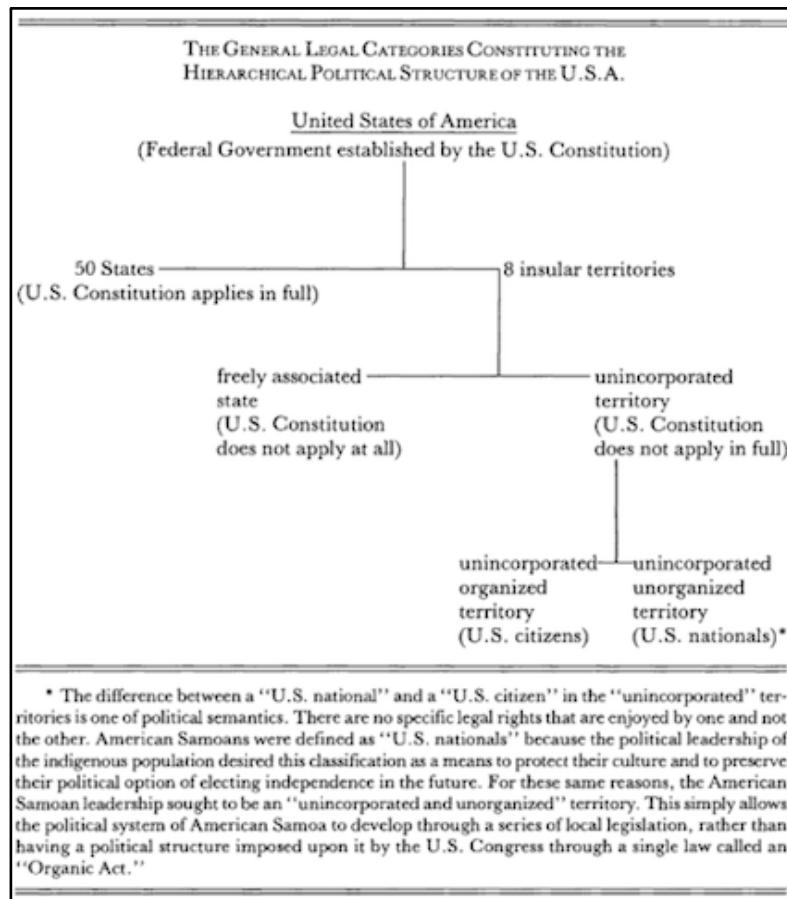


Figure 10: Constitutional Application & Citizenship in the Territories¹⁷⁹

Interestingly, on the point of incorporated versus unincorporated status, the case of Palmyra underscores the lack of a comprehensive and cohesive federal approach to U.S. Territories. One of the eleven uninhabited territories, Palmyra Atoll, which lies a thousand miles south of Hawaii, is classified as "unorganized" like American Samoa, but it is actually the only territory of the sixteen that is "incorporated." Thus, "[f]rom a legal standpoint, this five-square-mile atoll with no permanent population has more constitutional rights than any inhabited territory."¹⁸⁰

179. Fallon, *supra* note 152, at 24.

180. MACK, *supra* note 6, at xxviii. Palmyra's relatively superior constitutional status appears to have occurred by happenstance. The Atoll was brought into the Kingdom of Hawaii by King

Since quiescent sovereignty, like full sovereignty, rests with the people, it is useful to consider what it is the people actually desire. Plebiscites are typically used, although sometimes imperfectly, to ascertain the desires of the people—a practice that dates back at least to 1599 when a plebiscite that was held in the Philippines in response to King Philip’s decree “that the consent of the natives to Castilian sovereignty should be secured.”¹⁸¹

In the cases of Puerto Rico and the Northern Mariana Islands, both commonwealths have expressed their wishes to remain with the United States. In no less than six plebiscites between 1967 and 2020, Puerto Ricans expressed clear preferences for either statehood or *status quo*.¹⁸² When a plebiscite was held in 2017 for Puerto Rico to (1) become a U.S. State, (2) become independent and possibly enter a free association with the United States, or (3) maintain the status quo as a U.S. Territory, 97% chose statehood—even though turnout was less than a quarter of the electorate due to a political boycott.¹⁸³

The Northern Mariana Islands, as noted above, expressed similar sentiment to remain with the United States as the Trust Territory of the Pacific was breaking up. Likewise, Guamanians voted in a 1976 referendum for closer political ties with the United States and, in two 1982 plebiscites, to pursue commonwealth status with the United States like Puerto Rico and the Northern

Kamehameha IV in 1862 and remained part of Hawaii when it was annexed by the United States in 1898. By Act of Congress, Hawaii then became an “incorporated territory” in 1900. When Hawaii was admitted to the United States as a State in 1959, Palmyra Atoll was severed from its admission and remained an incorporated U.S. Territory, administered by the Secretary of the Interior. Consequently, the incorporated status of Palmyra is merely a forgotten legacy of another territory’s transition to statehood. See Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, § 6, 73 Stat. 4 (1959).

181. Owen J. Lynch, Jr., *The Legal Bases of Philippine Colonial Sovereignty: An Inquiry*, 62 PHIL. L.J. 279, 290–91 (1987). Although the chieftains that appeared for the plebiscite eventually supported Spanish rule, as is often the case in modern referenda, the question on the ballot was intentionally misleading:

They based their voluntary submission on the contractual promise that the king and his subjects render each other certain services. In these documents the conquest was interpreted as a “liberation.” In overthrowing the pagan cults the Spaniards were said to have liberated the Filipinos from the enslavement of the devil as well as freed them from the oppressive and tyrannical government of their rulers. The positive benefits that the king promised to render were religious instructions, the administration of justice, and protection against their enemies.

Id.

182. Guy-Uriel Charles & Luis Fuentes-Rohwer, *No Voice, No Exit, But Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. 133, 147 (2021).

183. CARTER, WEINER & HOLLIS, *supra* note 47, at 491.

Marianas.¹⁸⁴ The groundwork for a new vote sometime after 2000 to clarify Guam's political status was scuttled after a successful legal challenge prevailed in the Ninth Circuit¹⁸⁵ against a Guamanian law that restricted voting to native Guamanians.¹⁸⁶ The U.S. Supreme Court declined to hear the case.¹⁸⁷

80% of U.S. Virgin Islanders voted in 1993 to remain a U.S. Territory, although the vote was invalidated because it did not meet the threshold of participation by at least 50% of registered voters.¹⁸⁸ Like the other Territories, American Samoa supports its alignment with the United States. Not only does no significant population within American Samoa desire to change its relationship with the United States, Samoans believe preservation of their customs and communal land tenure is tied to their original cessation by tribal leaders to the United States and, as recently as 2017, expressed that sentiment in no uncertain terms to the United Nations.¹⁸⁹ Although no plebiscite on political status has been held in American Samoa, a 2007 U.N. study on the political status of dependencies "did not recommend any change in the region's relationship with the United States" and "found that American Samoans wanted to 'remain part of the American family of states and territories,' they also wanted to make sure that 'a chosen status will not adversely affect customs and culture, and the perpetuation of the Samoan language.'"¹⁹⁰

Consequently, while the methods used to ascertain the people's wishes have been halting and certainly imperfect, and the precise parameters of the desired connection on the part of the Territories to the United States remain somewhat unfocused, the collective desire for a connection remains strong. The quiescent sovereignty paradigm appears to be acceptable to most, if not all, of American islanders in the Territories—even though full constitutional rights are not extended to them.¹⁹¹ To the extent acquiescence is essential to the perpetuation

184. Lisalinda Natividad, Pacific Regional Seminar on the Implementation of the Third Decade for the Eradication of Colonialism, Statement of the Non-Self Governing Territory of Guam, at 2, UN Doc. PRS/2012/CRP.9 (June 1, 2012), https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/2012_5_nsgt_guam.pdf [<https://perma.cc/ZY79-76ZH>].

185. *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019); see generally Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501 (2018).

186. 3 GUAM CODE ANN. § 21000 (2000), amended by Guam Pub. L. 33-148 (2016).

187. *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2739 (2020).

188. Bill Kossler, *Election 2020: Referendum is a Possible Road to USVI Constitution*, ST. THOMAS SOURCE (Oct. 28, 2020), <https://stthomassource.com/content/2020/10/28/election-2020-referendum-is-a-possible-road-to-usvi-constitution/> [<https://perma.cc/4WZJ-K4UK>].

189. Aga, *supra* note 173, at 7 n.32.

190. Poblete-Cross, *supra* note 171, at 505.

191. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HRD-91-18, U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION (1991).

of the Territories' quiescent sovereignty, all of the inhabited U.S. Territories have expressed as much.¹⁹²

The question then becomes, how are the voices of this quiescent sovereignty expressed? Voices are important in sovereignty's constant ongoing negotiation over who has an impact on decision-making and what weight such impacts should carry. Section IV argues for enhancing the collective voice of the Territories in the halls of the U.S. Congress as both an acknowledgment of their century-old loyalty and a recognition that further dignifies their quiescent sovereignty.

IV. FEDERAL POLITICAL REPRESENTATION

The 3.5 million people living in U.S. Territories account for just over 1.05% of the total U.S. population. Given this, and the fact of their physical separation from the rest of the country, some halfway around the world, it is perhaps unsurprising that not only does the federal government forget about the Territories, but the American people do as well.¹⁹³ For example, a 2017 poll taken after Hurricane Maria hit Puerto Rico revealed that nearly half of Americans don't know that Puerto Ricans are American citizens:¹⁹⁴

That attitude is ingrained. The territories almost never appear on maps of the country, and census statistics usually exclude them. (If it had been included, Manila would have been one of the top ten largest cities in the country in the 1940s.) You can see that neglect today in how little aid Puerto Rico and the U.S. Virgin Islands got [last year] after hurricanes Maria and Irma. Or by the lack of national attention to Typhoon Yutu, which laid waste to the Northern Marianas [this fall].¹⁹⁵

Yet such disregard is not returned. As noted above, the Territories have repeatedly expressed their desire to remain connected to the United States.

192. With the exception of Cuba, technically an American protectorate from 1898 to 1902 but never a U.S. Territory, see GEORGE GRAFTON WILSON, HANDBOOK OF INTERNATIONAL LAW 36–37 (1910), all of America's former territories have likewise maintained close ties to the U.S.—from full defense and security measures under now independent states with Compacts of Free Association to the U.S., to the Philippines, which still hosts twenty U.S. military facilities and has a bilateral mutual defense agreement with the U.S. See Mutual Defense Treaty, U.S.-Philippines, 3 U.S.T. 3947–52, Aug. 30, 1951.

193. Lin, *supra* note 12, at 1276–80; MACK, *supra* note 6, at xiv.

194. Kyle Droop & Brendan Nyhan, *Nearly Half of Americans Don't Know that Puerto Ricans are American Citizens*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html> [<https://perma.cc/VX2L-B4PK>].

195. Diamond, *supra* note 11.

Indeed, not only is a high degree of patriotism noted within the Territories, but high degrees of military service as well,¹⁹⁶ easily outpacing enlistment rates in the states.¹⁹⁷ However, Congress, perhaps mirroring the attitude of most the population, has remained largely ambivalent with respect to according representation to Territorial Americans.

Nevertheless, each of the inhabited U.S. Territories sends a popularly elected representative to Congress. These individuals are accorded a seat in the House of Representatives, which is designed to represent the people, but no seat in the Senate, which is designed to represent the states. Like the people they represent, who cannot vote for president, Territorial delegates cannot vote on the House floor; however, they are able to serve on House committees and do vote in those committees.¹⁹⁸ Table 1 records the committee assignments of Territorial delegates for the 117th Congress:

196. Jacqueline Love, *Doubt Puerto Ricans' American Citizenship? Just Look at War Records*, ORLANDO SENTINEL (Nov. 8, 2018, 1:45 PM), <https://www.orlandosentinel.com/opinion/os-op-puerto-ricans-fought-for-american-freedom-20181108-story.html> [<https://perma.cc/GD5V-BCVV>]; Grace Garces Bordallo & Audrey McAvoy, *Guam's Residents Feel U.S. Patriotism but Growing Concern*, ASSOC. PRESS (Aug. 10, 2017), <https://apnews.com/article/north-america-us-news-ap-top-news-north-korea-international-news-1805f53f99494ff69e7b210ecbba90a0> [<https://perma.cc/RLH9-9SYS>]; *American Samoa at a Glance*, U.S. ARMY (2014), https://www.usar.army.mil/Portals/98/Documents/At%20A%20Glance%20Prints/Samoa_ataglance.pdf [<https://perma.cc/YF8U-ZZHR>].

197. Braedyn Kromer, *Thousands of U.S. Veterans Call the Island Areas Home*, U.S. CENSUS BUREAU, May 2, 2016, <https://www.census.gov/newsroom/blogs/random-samplings/2016/05/thousands-of-u-s-veterans-call-the-island-areas-home.html> [<https://perma.cc/T445-QDZ4>]. Guam, for instance, has long been host to the U.S. Navy and will receive 5,000 more marines who are relocating from Okinawa, Japan under the military's Indo-Pacific troop realignment plans. Mar-Vic Cagurangan, *The U.S. Election that Doesn't Count: Guam Goes to the Polls but Votes Won't Matter*, GUARDIAN (Oct. 30, 2020), <https://www.theguardian.com/world/2020/oct/31/the-us-election-that-doesnt-count-guam-goes-to-the-polls-but-votes-wont-matter> [<https://perma.cc/WZ8J-D4P2>]. Instead of considering this a colonial occupation, Guamanians are supportive. Bordallo & McAvoy, *supra* note 196. "Guamanians enlist in the US military at a higher rate than any US state. One in every 20 of Guam's 165,000 residents is a military veteran, according to the US census." Cagurangan, *supra* note 197. American Samoa also has one of the highest enlistment rates in the country. Kirsten Scharnberg, *Where the U.S. Military is the Family Business*, CHI. TRIB. (Mar. 11, 2007), <https://www.chicagotribune.com/news/ct-xpm-2007-03-11-0703110486-story.html> [<https://perma.cc/G4DK-UVKG>]; *American Samoa at a Glance*, *supra* note 196.

198. H.R. Rule III, cl. 3 117th Cong. (2022).

TERRITORIAL DELEGATE	COMMITTEES	SUBCOMMITTEES
Stacy Plaskett (D-V.Is.)	Ways & Means Budget Agriculture	<u>Ways & Means:</u> – Oversight – Select Revenue Measures <u>Agriculture:</u> – Commodities Ex., Energy, Credit – Livestock, Foreign Agriculture – Biotech., Horticulture, Research
Michael San Nicolas (D-Guam)	Financial Services Natural Resources	<u>Financial Services:</u> – Investor Prot., Entrepreneurship, Capital Markets – Nat'l Sec., Int'l Dev., Mon. Pol'y <u>Natural Resources:</u> – Indigenous Peoples – Oversight & Investigation
Jennifer González-Colón (R-Puerto Rico)	Natural Resources Transportation	<u>Natural Resources:</u> – Water, Oceans, Wildlife <u>Transportation:</u> – Highways & Transit – Econ. Dev., Pub. Bldg., Emergency Management – Water Resources & Env't.
Gregorio Kilili Camacho Sablan (I-N. Mariana Is.)	Natural Resources Educ. & Labor Veterans Affairs	<u>Natural Resources:</u> – Nat'l Parks, Forests, Pub. Lands <u>Education & Labor:</u> – Early Childhood, Elem., Secondary <u>Veteran's Affairs:</u> – Disability & Memorial Aff. – Health
Aumua Amata Coleman Radewagen (R-Am. Samoa)	Natural Resources Small Business Veterans Affairs	<u>Natural Resources:</u> – Water, Oceans, Wildlife – Indigenous Peoples <u>Small Business:</u> – Rural Dev., Agriculture, Trade, Entrepreneurship – Econ. Growth, Tax, Capital Access <u>Veterans Affairs:</u> – Oversight & Investigations – Health

Table 1: Territorial Representation in the House¹⁹⁹

199. *Congressional Committees*, CONGRESSWOMAN STACEY E. PLASKETT, <https://plaskett.house.gov/biography/congressional-committees.htm> [<https://perma.cc/6FT7-MHRQ>]; *Committees and Caucuses*, THE OFFICE OF CONGRESSMAN MICHAEL F.Q. SAN NICOLAS, <https://sannicolas.house.gov/about/committees-and-caucuses> [<https://perma.cc/S76B-SYVP>];

The House's Natural Resources Committee is the designated home for Territorial concerns, or, as Congress refers to them, "Insular Affairs." These are quietly tucked away in what amounts to an invisible subcommittee, known in the 117th Congress as the "Full Committee on Insular Affairs," meaning it is not an identifiable subcommittee—the portfolio is handled at the full committee level, but the distinctly identifiable subcommittee has been lost. While the other Territorial delegates serve on this full committee, Ms. Plaskett from the U.S. Virgin Islands does not.

Historically, Insular Affairs has been a political football tossed among multiple manifestations of the House committee system. The House actually once had a standing committee on Insular Affairs, established in 1899 but abolished in 1946—its purview transferred to the Committee on Public Lands.²⁰⁰ In 1951, the Insular Affairs nomenclature was resurrected when the Committee on Public Lands became the Committee on Interior and Insular

Committees and Caucuses, U.S. CONGRESSWOMAN JENNIFER GONZÁLEZ-COLÓN, <https://gonzalez-colon.house.gov/about/committees-and-caucuses> [<https://perma.cc/HK2A-NWTP>]; *Committee Assignments*, U.S. CONGRESSMAN GREGORIO KILILI CAMACHO SABLAN, <https://sablان.house.gov/about-me/committee-assignments> [<https://perma.cc/6TXS-EW9E>]; *Committees and Caucuses*, CONGRESSWOMAN AUMUA AMATA COLEMAN RADEWAGEN, <https://radewagen.house.gov/about/committees-and-caucuses> [<https://perma.cc/PC6B-K92M>].

200. NAT'L ARCHIVES, GUIDE TO HOUSE RECORDS: CH. 13, RECORDS OF THE COMMITTEE ON INSULAR AFFAIRS, 56TH–79TH CONGRESSES (1899–1946):

On December 8, 1899, the House established the Committee on Insular Affairs to consider "all matters (excepting those affecting the revenue and appropriations) pertaining to the islands which came to the United States through the treaty of 1899 with Spain, and to Cuba." Just 6 days earlier, on December 6, 1899, the United States had acquired exclusive rights to certain islands in Samoa through an agreement with England and Germany. Subsequently, matters relating to American Samoa also came within the committee's jurisdiction. In 1902 the Republic of Cuba was established, and jurisdiction over matters concerning Cuba was transferred to the Committee on Foreign Affairs in 1906. Eventually, the jurisdiction of the Committee on Insular Affairs was expanded to cover the Virgin Islands of the United States which were purchased from Denmark by the treaty in 1916. In 1946 the committee was abolished and its responsibilities transferred to the Committee on Public Lands.

The Committee on Insular Affairs reported legislation concerning civil governments for each of the insular possessions. The committee also reported legislation concerning the clarification of citizenship status of inhabitants of the islands, ratification and confirmation of actions of the Philippine and Puerto Rican legislatures, matters relating to public works, harbor improvements, wharves, roads, railways, telephone and telegraph cables, electricity, trade and tariff laws, prohibition, education, taxes, bond issues, and relief from hurricanes and the depression. The committee also issued reports on the social, economic, and political conditions in the insular possessions.

Id. at 13.95–13.96.

Affairs.²⁰¹ That lasted until 1993, when Insular Affairs was pushed back down into a subcommittee of the newly designated Committee on Natural Resources.²⁰²

In the modern era, up through the 113th Congress, Insular Affairs came under the jurisdiction of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs; however, with the 114th Congress in 2015, the new Natural Resources Committee Chair shuffled the subcommittees, creating a new subcommittee on Indian, Insular and Alaska Native Affairs.²⁰³ However, from the 115th to the 116th Congress, Insular Affairs was dropped from having a title and existed as part of the jurisdiction of the Subcommittee on Indigenous Peoples of the United States.²⁰⁴ Now, in the 117th Congress, Insular Affairs continues to remain unidentified (neither a committee nor subcommittee with its own staff or budget), but has instead been taken up as a subject of the Natural Resources Committee; thus, when the full committee is dealing with Insular Affairs, it functionally becomes the “Full Committee on Insular Affairs.”²⁰⁵

This move, by current Natural Resources Committee Chair Rep. Raul Grijalva (D-Ariz.), was ostensibly meant to be an elevation of Insular Affairs as an issue to the full committee level. When Insular Affairs are taken up by the full committee, Rep. Grijalva chairs the session, as he would any meeting of the Committee, but the Vice Chair for Insular Affairs becomes Gregorio Sablan (I-N. Mariana Is.), and the Ranking Member for Insular Affairs becomes Jennifer González-Colón (R-P.R.)—both Rep. Sablan and Rep. González-Colón then fade back into regular committee membership when non-insular affairs are being considered.

201. NAT'L ARCHIVES, GUIDE TO HOUSE RECORDS: CH. 13, RECORDS OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 82–90TH CONGRESSES (1951–1968) at 13.107.

202. *Id.*

203. *New Subcommittees Announced for the House Natural Resources Committee*, AM. GEOSCIENCES INST. (Jan. 6, 2015), <https://www.americangeosciences.org/policy/news-briefs/new-subcommittees-announced-for-the-House-Natural-Resources-Committee> [<https://perma.cc/ZM6G-S927>].

204. *House Natural Resources Committee Set to Hold First Meeting*, INDIANZ (Jan. 27, 2015), <https://www.indianz.com/News/2015/016258.asp> [<https://perma.cc/F6V2-WSGS>].

205. *See* COMM. ON NAT. RES., 117TH CONG., RULES FOR THE COMM. ON NAT. RES. 15, <https://www.congress.gov/117/cprt/HPRT43461/CPRT-117HPRT43461.pdf> [<https://perma.cc/VMD5-P24F>] [hereinafter COMMITTEE RULES]. “Insular affairs” underwent a similar trajectory in the Senate: from being a standing committee as the Committee on Territories and Insular Possessions (1921–29) and the Committee on Territories and Insular Affairs (1929–46) to being subsumed in 1947 as a subject of the Senate’s Committee on Energy & Natural Resources, only to return as the Committee on Interior and Insular Affairs from 1948–68. *See* NAT'L ARCHIVES, GUIDE TO SENATE RECORDS: CH. 12, RECORDS OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS AND PREDECESSOR COMMITTEES, 1816–1968, at 12.64–12.65. Insular affairs is now covered in the Senate as one of the subjects of the Committee on Energy and Natural Resources.

While some might agree that this is a promotion of sorts, from a subcommittee handling the subject to a standing committee handling the subject at the committee level, Insular Affairs actually has been further marginalized. Subsumed as an issue of the Committee, Insular Affairs no longer exists in a tangible, identifiable way. Indeed, when one searches for it on the House website, unlike other committees and subcommittees whose pages appear with identification of which members are serving as well as dedicated staff information and statements of jurisdiction, the Full Committee on Insular Affairs lists nobody to contact and appears to refer all viewers to the Office of Insular Affairs in the Department of Interior.²⁰⁶

In fact, this is not the case. The Full Committee on Insular Affairs apparently now calls itself, confusingly, the Office of Insular Affairs as well. While there is no description of what the Congressional version of OIA does on the Full Committee website, a short jurisdictional statement can be found on the page that lists, again confusingly, the “subcommittees” of the Natural Resources Committee:

The Office of Insular Affairs (OIA) coordinates federal legislation for the U.S. territories of American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, Puerto Rico, and the U.S. Virgin Islands (USVI). Residents of the territories are U.S. citizens or nationals. OIA also oversees legislation to provide federal assistance under Compacts of Free Association to the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, and helps maintain strategic relationships with all U.S.-affiliated insular areas.²⁰⁷

Coverage adds yet another layer to the discord. The Congressional OIA includes coverage of issues for Puerto Rico, while the Executive OIA does not—issues concerning Puerto Rico are handled elsewhere within the administration. The Committee staff acknowledge the confusion and explain that while the Congressional OIA focuses on policy and legislation, the Executive OIA focuses on execution and implementation. Staff members with experience in Insular Affairs, who previously worked for the subcommittee, now work for the full Natural Resources Committee.

206. See NATURAL RESOURCES COMM., FULL COMM. ON INSULAR AFFAIRS, <https://naturalresources.house.gov/subcommittees/full-committee-insular-affairs#:~:text=The%20Office%20of%20Insular%20Affairs,are%20U.S.%20citizens%20or%20nationals> [https://perma.cc/CPJ3-2U8M].

207. See HOUSE NATURAL RESOURCES COMM., SUBCOMMITTEES, <https://naturalresources.house.gov/subcommittees> [https://perma.cc/5E4A-VPHF].

To understand the current near-invisible and confused state of Insular Affairs in the House, one must go back to the re-shuffle of subcommittees in 2015. Back then, the new Committee Chair, Rep. Rob Bishop (R-Utah), added Insular Affairs to the Subcommittee on Indian and Alaska Native Affairs to create the Subcommittee on Indian, Insular and Alaska Native Affairs.²⁰⁸ This was seen in Indian country as an intentional dilution of focus on Native Americans.²⁰⁹ Indeed, the ranking Democrat, Rep. Grijalva, said, “We’re concerned that the proposed reorganization of the subcommittees may marginalize Native American tribal issues,” and moved to strike the reorganization to keep Indian affairs separated from Insular Affairs, but was defeated.²¹⁰

Consequently, it is not surprising that as chair, Rep. Grijalva, though not intending to purposely devalue Insular Affairs, once again stripped Insular Affairs away from Indian affairs in order to put a spotlight back on what is, after all, one of his key constituency groups in Arizona. Rep. Grijalva’s 3rd Congressional District in Arizona is “home to four sovereign nations: the Cocopah, Pascua Yaqui, Quechan, and Tohono O’odham,” as well as many “urban Native American residents.”²¹¹ The reconstituted Subcommittee for Indigenous Peoples of the United States now has a robust jurisdiction statement on its dedicated website:

As the sole Subcommittee with exclusive jurisdiction over American Indian, Alaska Native and Native Hawaiian issues in the House of Representatives, the Subcommittee oversees matters ranging from natural resources and land management, ownership, and leasing to Indian health care, tribal criminal justice, development of reservation economies, enhancement of social welfare and improvement of energy efficiency and renewable energy development initiatives on tribal lands.

The goal of the Subcommittee is to protect tribal sovereignty and tribes’ authority over their lands and natural resources while empowering tribal communities with

208. Rob Capriccioso, *Rep. Rob Bishop Angers House Colleagues over His Handling of Indian Affairs*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/rep-rob-bishop-angers-house-colleagues-handling-indian-affairs> [https://perma.cc/8ADE-E36L].

209. *House Committee Won’t Restore Indian and Alaska Native Panel*, INDIANZ (Jan. 28, 2015), <https://www.indianz.com/News/2015/01/28/house-committee-wont-restore-i.asp> [https://perma.cc/6RJ7-C6E8]. In fact, Rep. Bishop’s hostility toward Indian affairs and antipathy toward Native American sovereignty was later revealed in hearings that resulted in significant pushback from members of both parties. Capriccioso, *supra* note 208.

210. INDIANZ, *supra* note 209.

211. *About the District*, CONGRESSMAN RAÚL M. GRIJALVA, <https://standwithraul.com/district/> [https://perma.cc/E4L4-G9Y4].

enhanced self-governance authorities.²¹²

Meanwhile, Insular Affairs remains hidden within the full committee, not chaired by a Territorial delegate, and relegated to somewhere between non-existence and utter confusion on the Internet. Moreover, only subcommittees receive a dedicated budget.²¹³ The status of Insular Affairs in Congress—where the voice of Americans living in the Territories can be heard and where that voice “lives”—needs to be improved. Recognition by the European Union (EU) of the importance of subnational voices to the enrichment of Europe-wide legislation offers a guide on why and how to institutionally elevate and channel those voices from one of our closest democratic allies.

A. EU Committee of the Regions

The EU was formed by multilateral treaty among Member States at the beginning of the Cold War to integrate key sectors of Western European economies.²¹⁴ Closer integration and member state expansion occurred in the ensuing decades, along with necessary surrenders of more state sovereignty along the way.²¹⁵ All of this transpired at the nation-state level, with occasional referenda among populations, but without meaningful organized input by ethnically or linguistically distinct minority regions within Member States such as, Scotland, Catalonia, Bavaria, Corsica, or the Basque Country.

Although many of these distinct European regions, like American Territories, are self-governing,²¹⁶ they have little say in the decisions of the Member States within which they lie with respect to foreign affairs in general or European integration in particular. A gradual recognition of this oversight and the value of regional input on EU policy led to a structural solution. “The creation of the Committee of the Regions . . . was an expression of this

212. HOUSE COM. ON NATURAL RESOURCES, SUBCOM. FOR INDIGENOUS PEOPLES OF THE U.S., <https://naturalresources.house.gov/subcommittees/subcommittee-for-indigenous-peoples-of-the-united-states> [<https://perma.cc/9K4E-X26T>] (internal citation omitted).

213. See COMM. ON NAT. RES., *supra* note 205, at 19.

214. Craig Parsons, *Showing Ideas as Causes: The Origins of the European Union*, 56 INT’L ORG. 47 (2002).

215. Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT’L ORG. 171, 173 (1995). Indeed, recapture of sovereignty was a key determinant in the United Kingdom’s decision to exit the EU in 2016. Ryan K. Beasley, Juliet Kaarbo & Kai Opperman, *Role Theory, Foreign Policy, and the Social Construction of Sovereignty: Brexit Stage Right*, 1 GLOB. STUD. Q. 1, 3 (2021) (“During and after the referendum, domestic debate focused on issues connected to sovereignty and its relative value for Britain.”).

216. Lindsay Murphy, Comment, *EU Membership and an Independent Basque State*, 19 PACE INT’L L. REV. 321–22 (2007).

willingness to involve local and regional authorities and to enable them to represent their interests in the EU's institutional architecture."²¹⁷

Creation of the Committee of the Regions was an evolutionary process. Although the 1957 Treaty of Rome, one of the E.U.'s founding treaties, provided for regional policy, it was only in 1975, with the creation of the European Regional Development Fund, that such input began at the federal level.²¹⁸ Even then, there was disagreement between the Commission and the Parliament as to the role of the regions—the Commission viewing them more as economic units purposed for delivery of EU funds rather than as political actors.²¹⁹

Eventually, in 1991, as part of the *zeitgeist* sparked by the fall of the Berlin Wall, political will to integrate the Member States of the EU more quickly and more deeply was secured, and the 1992 Maastricht Treaty laid the legal foundations for the Committee's birth in 1994 as part of that deeper integration.²²⁰ Much of the forward motion was generated by the German Länder which "envisaged the creation of 'a regional interests body to enable the particular needs and interests of the regions to be taken into account in the Community's legislative process.'"²²¹ Loss of sovereignty was a driving concern for the Länder, who felt "[t]hey were becoming 'trapped nations' between the federal state and the EEC, at risk of a gradual erosion of their legislative power."²²²

As to what the new Committee of the Regions should be empowered to do, two seemingly irreconcilable visions emerged: the EU Commission wished it to be merely a consultative body of the Commission, but Germany wished it to be truly co-decisional in the EU legislative process.²²³ The compromise that was reached empowered the Committee closer to the German position, but it was not reached via the laborious draftsmanship of multiple groups and states seeking to find a solution; rather, *realpolitik* was the final arbiter:

An anecdote going the rounds at the Committee of the Regions sheds light on the Committee's sudden independence in terms of powers, status and system of consultation. Apparently, the outcome was the result of a last-minute deal between the French president and the German chancellor: "It was almost over and Mitterrand wanted to leave. His plane had the engines

217. BIRTE WASSENBERG, THE HISTORY OF THE COMMITTEE OF THE REGIONS 11 (2020).

218. *Id.* at 14.

219. *Id.*

220. *Id.* at 21–24.

221. *Id.* at 32.

222. *Id.* at 40.

223. *Id.* at 38–39.

running at the airport in Maastricht. And Mitterrand apparently said to Kohl: ‘Do you really want this Committee of the Regions?’ And Kohl replied: ‘Yes, I do, I need it for the *Länder*.’ To which Mitterrand said: ‘Then you shall have it.’”²²⁴

While it began with quite limited engagement, the Committee achieved both independence and influence by building up its inter-institutional relationships with other bodies within the EU.²²⁵ The reality of EU policy implementation explains the rationale underlying this natural basis for relationship-building: “Given that 70% of EU legislation needs to be implemented at the regional level, it was meant to give regional governments a greater voice in EU policy-making.”²²⁶

As a vehicle for the voices of subnational polities to be heard,²²⁷ the Committee has in fact evolved into a rather effective component of the EU legislative system.²²⁸ Formally, the Committee exists alongside the European Economic and Social Council in a consultative status for EU legislation that affects a certain range of areas. Yet, informally, the Committee has come to be regarded by the Commission as a body that “can provide expertise on the reality of implementation of EU policy on the ground, and local/regional situations,” and by the Parliament as a body that “could provide additional democratic legitimacy for European integration by bringing local concerns to the EU level and explaining EU decisions back in their regions.”²²⁹

Structurally, beyond its consultative and persuasive roles, the Committee can take on a watchdog role by challenging proposed EU legislation as violative of the principle of subsidiarity in the European Court of Justice.²³⁰ For example,

224. *Id.* at 43.

225. *Id.* at 74; SIMONA PIATTONI & JUSTUS SCHÖNLAU, SHAPING EU POLICY FROM BELOW: EU DEMOCRACY AND THE COMMITTEE OF THE REGIONS 89 (2015) (“[T]he multiple connections and cooperative arrangements that the [Committee of the Regions] has been developing with other bodies are part of its claim to help to link EU decision-making more directly to a particular category of stakeholders, that is, local and regional authorities, in order to increase the democratic legitimacy of EU policy-making.”).

226. Dave Keating, *Can an ‘EU of the Regions’ Offer an Alternative to Catalan Secession?*, EURACTIV (Oct. 8, 2017), <https://www.euractiv.com/section/future-eu/news/mon-can-an-eu-of-the-regions-offer-an-alternative-to-catalan-secession/> [<https://perma.cc/65AT-DQUZ>].

227. PIATTONI & SCHÖNLAU, *supra* note 225, at 57.

228. While it began with 189 representatives in 1994, through EU expansion, representation on the Committee of the Regions has risen to 350. Justus Schönla, *Beyond Mere ‘Consultation’: Expanding the European Committee of the Regions’ Role*, 13 J. CONTEMP. EUR. RES. 1166, 1172 (2017).

229. Schönla, *supra* note 228, at 1169.

230. Salvatore Fabio Nicolosi & Lisette Mustert, *The European Committee of the Regions as a Watchdog of the Principle of Subsidiarity*, 27 MAASTRICHT J. EUR. & COMP. L. 284, 285–86 (2020).

in 2018 a measure initiated by the Commission concerning EU regional funds was threatened with such a court challenge by the Committee of the Regions, and the Commission backed down, took the Committee argument into account, and amended the proposal accordingly.²³¹

European regions also realize a degree of sovereign dignity through representation on the Committee of the Regions—opening regional offices in Brussels, working with other representatives, interacting directly with the EU bureaucracy, and reporting back to their constituents on EU policy developments without going through national filters that may not report what is important to those minority regions. Indeed, the Committee of the Regions was one of the key brokers of conciliation between the national government of Spain and the regional government of Catalonia in the wake of the region’s referendum vote favoring independence.²³²

Perhaps one measure of the Committee’s effectiveness lies in the continuing dialogue that United Kingdom regions and territories seek to maintain with it. Within the U.K., the people of England were the key deciders in the referendum to leave the EU,²³³ as opposed to people in the British regions and territories.²³⁴ Consequently, the non-English region of Scotland and the British territory of Gibraltar (which shares a border with the EU via Spain), continue consulting with their contacts on the EU’s Committee of the Regions.²³⁵

In the end, Europe’s Committee of the Regions offers an example of how a group of democracies recognized the need for subnational representation at the federal level, and then achieved that in such a way that left open the possibility of expanding influence and participation in policy development and legislative impact. A structural accommodation to enhance the role of U.S. Territories in the House could yield similarly positive results. In fact, the conclusions of a

231. *Id.* at 286.

232. Nikolaj Nielsen, *Basque Threat of ‘Second Front’ for Independence*, EU OBSERVER (June 18, 2018), <https://euobserver.com/beyond-brussels/142109> [<https://perma.cc/VNN2-XECG>].

233. *EU Referendum: The Result in Maps and Charts*, BBC NEWS (June 8, 2021), <https://www.bbc.com/news/uk-politics-36616028> [<https://perma.cc/87K8-3BN9>].

234. Gavin Lee, *Brexit: End to Gibraltar Land Border Prompts Joy and Trepidation*, BBC NEWS (Jan. 16, 2021), <https://www.bbc.com/news/world-europe-55674148> [<https://perma.cc/KNY3-7GXJ>] (“People in Gibraltar voted overwhelmingly to stay in the EU in the Brexit referendum.”); Stephen Castle, *Of Brexit and Boris: What’s Driving the Call for Scottish Independence*, N.Y. TIMES (July 22, 2021), <https://www.nytimes.com/2021/05/08/world/europe/brexit-scotland-independence.html> [<https://perma.cc/2S2G-SDQA>] (“While England voted to leave the European Union, 62 percent of Scottish voters wanted to stay.”).

235. *Gibraltar Briefs EU Committee of the Regions on Border Concerns*, GIB. CHRON. (Nov. 16, 2020), <https://www.chronicle.gi/gibraltar-briefs-eu-committee-of-the-regions-on-border-concerns/> [<https://perma.cc/C9C7-J29K>].

2015 study on the contributions of the Committee of the Regions to democratic decision-making at the federal level in the EU mirror the institutional checks against federal domination that a permanent select committee on Territorial affairs could achieve at the federal level in the United States:

[T]he CoR [Committee of the Regions] contributes to democracy as non-domination by constantly reminding delegated national governmental representatives in the Council and directly elected members of the European Parliament of the potential domination inherent in EU legislation '[D]omination is not simply tyranny nor the ability to interfere arbitrarily. It is . . . rule by another, one who is able to prescribe the terms of cooperation' '[T]o have robust non-domination is to have a particular kind of normative status, a status allowing one to create and regulate obligations with others. This is *the status of non-domination rather than self-legislation.*' It is not to be ruled by others, but *to rule with others.*

. . . CoR activity can be certainly construed as contributing both to *deliberation* (the production of rules and obligations) and to *surveillance* (the control that these are not simply imposed). . . . [V]ery often the CoR contributes opinions on EU legislation which defend the right of the subnational *demos* of the Union to non-domination, that is, their right not to be 'imposed the terms of cooperation' particularly when such cooperation entails asymmetric costs and limitations on them. In alerting the other EU institutions of the danger of imposing the terms of cooperation . . . , the CoR gives its contribution to EU democracy interpreted as '*the capacity to deliberate and to change the terms of democratic cooperation, and thus have normative power over the distribution of normative powers.*' In this sense, the contribution of the CoR must not be solely assessed as a contribution to the formation of legislation . . . , but as a *contribution to the deliberation over the terms of democratic governance.*²³⁶

B. Permanent Select Committee on Territorial Affairs

Article I, Section 5, of the U.S. Constitution accords each house of Congress the flexibility to conduct its own internal business.²³⁷ Both houses

236. PIATTONI & SCHÖNLAU, *supra* note 225, at 16–17 (internal citations omitted).

237. U.S. Const. art. I, § 5.

utilize the committee system to accomplish their constitutional tasks.²³⁸ “The principal organizational device for achieving necessary specialization of tasks and division of labor in the United States Congress is the committee system. Congressional Committees have tended to become independent and autonomous little legislatures, occupying a formidable place in the congressional decision-making process.”²³⁹

The introduction to this section probed the ineffectiveness of the current arrangement of Insular Affairs being subsumed as a subject within the purview of the House’s full Natural Resources Committee, not chaired by a Territorial delegate, as a vehicle for delivering the subnational quiescent sovereign voices of the Territories meaningfully into the federal legislative system. The EU, facing a similar dilemma, found a way to achieve greater input from subnational units that were not being effectively represented by their national delegations through a structural solution: creation of the Committee of the Regions.

Correspondingly, the House should elevate Insular Affairs into a Permanent Select Committee on Territorial Affairs chaired by a Territorial delegate.²⁴⁰ Select Committees are of limited scope and jurisdiction and usually temporary in nature.²⁴¹ However, just as the House’s Select Committee on Intelligence, created in 1975, became the Permanent Select Committee on Intelligence in 1977, that temporary nature can change—as can its staffing, budget, and jurisdictional scope.

The Senate’s elevation of Indian affairs provides a ready precedent endorsing this structural response in an area of sovereignty concerns. In the 95th Congress (1977), the Senate created a Select Committee on Indian Affairs, then elevated it to a permanent select committee in the 98th Congress (1984),

238. George B. Galloway, *Development of the Committee System in the House of Representatives*, 65 AM. HIST. REV. 17 (1959). See H.R. Rule X–XI, 117th Cong. (2021).

239. Samuel C. Patterson, *The Professional Staffs of Congressional Committees*, 15 ADMIN. SCI. Q. 22 (1970) (internal citations omitted).

240. The proposed select committee could, and perhaps should, encompass more than U.S. Territories. A Permanent Select Committee on U.S. Territories, Tribes, and the Federal District would certainly bring sovereignty issues of federally recognized Native American tribes and the District of Columbia meaningfully into a more structurally sound representation with Territories. Similar to the Territories, the District of Columbia has a non-voting member of the House and at least two tribes, the Cherokee and Choctaw, have treaties that provide for representation in Congress; the Cherokee nation appointed a non-voting delegate-nominee in 2019, but the House has yet to approve her appointment. Brigit Katz, *Kimberly Teehee Will Be the Cherokee Nation’s First Delegate to Congress*, SMITHSONIAN (Sept. 4, 2019), <https://www.smithsonianmag.com/smart-news/kimberly-teehee-choerokee-nations-first-delegate-congress-180973046/> [<https://perma.cc/H5XZ-D8RS>]. However, to explore that expanded version of this select committee would require a related but very different sovereignty analysis than is offered here; thus, that discussion remains beyond the scope of this Article.

241. Galloway, *supra* note 238, at 17.

then redesignated it the Committee on Indian Affairs in the 103rd Congress (1993).²⁴² Thus, the Senate settled on a structural solution to lift Native American sovereignty issues into an important Congressional space.

Parallel elevation of Territorial sovereignty issues in the House is not unreasonable. Doing so would immediately realize at least three tangible benefits: (1) amplifying and focusing the voice of the Territories in Congress, (2) channeling the efforts and interests of Territorial delegates into a unit that can have meaningful power to conduct hearings, issue subpoenas, and conduct oversight, and (3) increasing the impact Territories can have on federal legislation.

First, a select committee chaired by a Territorial delegate, as opposed to a “full committee” or subcommittee not chaired by a Territorial delegate, essentially swaps a muted microphone for a much more communicative megaphone. Providing a structure for these five, out of 535, contributors to our democratic dialogue ensures not only that their voices are not lost in the cacophony of Congress but also that they are actually *heard*. Moreover, creating a permanent select committee would remove the vulnerability of Territorial affairs existing at the whim of the chair.

Nor should the power that comes with chairing a committee in the House be underestimated.²⁴³ Chairing a committee has both external and internal dimensions. Externally, once a Territorial delegate is appointed chair of a select committee, that delegate is then part of the leadership configuration of the House. Suddenly with the leadership “doors open,” a Territorial delegate would interact with the Speaker, Majority Leader, Majority Whip, and their respective staffs on more parity than other members of the House could.

Internally, not only do chairs set the agendas for their respective committees but they also control the budget, staffing, oversight direction, and participation in the legislative process—depending upon the parameters of the committee’s jurisdiction.²⁴⁴ Chairs also wield near plenary power in organizing/re-organizing their committee and subcommittee structure, as demonstrated by the arbitrary re-shuffling of Insular Affairs discussed in the introduction to this section. Moreover, recent research indicates that committee membership is far

242. *Committee Name History*, LIBRARY OF CONGRESS, <https://www.congress.gov/help/committee-name-history> [<https://perma.cc/74BD-37TA>].

243. JUDY SCHNEIDER & MICHAEL L. KOEMPEL, CONG. RSCH. SERV., RL34679, HOUSE COMMITTEE CHAIRS: CONSIDERATIONS, DECISIONS, AND ACTIONS AS ONE CONGRESS ENDS AND A NEW CONGRESS BEGINS 11 (2014).

244. Galloway, *supra* note 238, at 22–23; *see* H.R. Rule, *supra* note 238, at XI.

less important, certainly with respect to securing benefits for their legislative districts, than actually chairing a committee.²⁴⁵

Second, a select committee chaired by a Territorial delegate can more effectively build a record through inquiry and investigation if the committee is so empowered.²⁴⁶

The enabling chamber rule or resolution that gives a committee life is also the charter that defines the grant and limitations of the committee's investigative powers. The committee charter constrains committees in two meaningful ways. First, as a creation of its parent house, a congressional committee may inquire only into matters within the scope of the authority that has been delegated to it—i.e. within its jurisdiction. Second, in conducting investigations, a committee generally must comply with any procedural requirements contained in its charter, its own rules, or the rules of the parent chamber.²⁴⁷

Third, Territorial voices in the House can better influence legislation from a permanent select committee than from a temporary existence when Insular Affairs is on the agenda of the full committee, or even by a subcommittee confined to a certain subject area. In the 116th Congress, only 2.5% of over 9,000 bills introduced in the House became law.²⁴⁸ Untucking Territorial legislative concerns from several layers of the House's labyrinthine legislative process would better position those concerns to be addressed.

For example, by way of federal benefits, Americans residing in the Territories generally receive less than those living in the states²⁴⁹ and are more adversely affected by federal tax provisions other than income tax—which most do not pay.²⁵⁰ A tax measure introduced to deal with this would then be referred

245. Christopher R. Berry & Anthony Fowler, *Cardinals or Clerics? Congressional Committees and the Distribution of Pork*, 60 AM. J. POL. SCI. 692, 693 (July 2016); Christopher R. Berry & Anthony Fowler, *Congressional Committees, Legislative Influence, and the Hegemony of Chairs*, 158 J. PUB. ECON. 1 (Feb. 2018) (“[M]uch of the power of committees is concentrated among chairs.”).

246. See H.R. Rule, *supra* note 238, at XI.

247. CHRISTOPHER M. DAVIS, TODD GARVEY & BEN WILHELM, CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 39 (2021) (footnotes omitted).

248. Craig Volden & Alan E. Wiseman, *Committee Chairs Continue Their Lawmaking Decline*, THE HILL (Mar. 25, 2021), <https://batten.virginia.edu/about/news/volden-committee-chairs-continue-their-lawmaking-decline> [<https://perma.cc/NC5U-8KRC>].

249. Steve Limtiaco, *Feds Defend Law that Denies SSI Income Benefits to Guam Residents with Disabilities*, PAC. DAILY NEWS (Jan. 5, 2021), https://www.guampdn.com/news/local/feds-defend-law-that-denies-ssi-income-benefits-to-guam-residents-with-disabilities/article_421cc6e5-045c-548e-b223-7a178cadfc1f.html [<https://perma.cc/65KH-QGMV>] (recounting the story of a woman who received disability benefits for a genetic disorder while a resident of Pennsylvania, which were then terminated once she became a resident of Guam).

250. Lin, *supra* note 12, at 1266–68.

to the Ways & Means Committee, not the Insular Affairs subject area of the Natural Resources Committee. With the exception of twelve Appropriations subcommittees, subcommittees are less likely to receive legislative referrals.²⁵¹ Consequently, Territorial delegates would not be able to influence it from their position.

Stacey Plaskett has successfully short-circuited this process. In the 117th Congress, she obtained a coveted seat on Ways & Means, the first Territorial delegate to ever do so.²⁵² Once on that committee, a member is generally not allowed to serve on any other committee unless they receive a waiver from party leadership.²⁵³ She immediately introduced two bills, the Territorial Tax Parity Act and the Territorial Tax Equity and Economic Growth Act, to address the uneven tax issues experienced by Americans in the Territories.²⁵⁴

A permanent select committee would have much more leeway to move legislation affecting the Territories forward than a subcommittee relegated to defined subject area such as natural resources. The Speaker's referral power allows her to make multiple referrals;²⁵⁵ thus, Ms. Plaskett's territorial tax reform bills could simultaneously be referred to Ways & Means due to their subject matter as well as to a permanent select committee on U.S. Territories chaired by a Territorial delegate due to the area the bills affect.

Territorial Affairs in the House should be placed on par with how the Senate considers Indian Affairs. As demonstrated in the current Congress with respect to statehood movements for Puerto Rico and the District of Columbia, sovereignty concerns do not simply fade away. In the 117th Congress, the House has created a new Select Committee on Economic Disparity and Fairness in Growth.²⁵⁶ The House should now proceed to elevate the Committee on Natural Resources' Full Committee on Insular Affairs to a House Permanent Select Committee on Territorial Affairs chaired by a Territorial delegate.

251. MARK J. OLESZEK, CONG. RSCH. SERV., R46251, COMMITTEE JURISDICTION AND REFERRAL IN THE HOUSE 4 (2020).

252. A.J. Rao, *Plaskett to Sit on Influential House Panel*, V.I. DAILY NEWS (Dec. 24, 2020) http://www.virginislandsdailynews.com/news/plaskett-to-sit-on-influential-house-panel/article_d1546aa0-a8b9-5435-a449-860d3042916a.html [<https://perma.cc/X639-7EZT>].

253. Ms. Plaskett apparently received a waiver to also serve on the Budget and Agriculture Committees. *Id.*

254. Press Release, Stacey E. Plaskett, Congresswoman Stacey E. Plaskett Introduces New Legislation Aimed at Improving Economic Conditions in the Territory (Feb. 26, 2021), <https://plaskett.house.gov/news/documentsingle.aspx?DocumentID=3753> [<https://perma.cc/6EV2-23TL>].

255. OLESZEK, *supra* note 251, at 2.

256. Press Release, Nancy Pelosi, Pelosi Announces Creation of Select Committee on Economic Disparity and Fairness in Growth (Dec. 30, 2020) <https://www.speaker.gov/newsroom/123020> [<https://perma.cc/4YR2-9U84>].

Dropping the sobriquet Insular Affairs is symbolically important, not only to further distance the quiescent sovereignty concerns of American islanders in the Territories from the Supreme Court's racially charged *Insular Cases*, but to stop using colonial-era jargon in the modern age and to instead recognize "U.S. Territories" as such.

The procedure for select committee creation is fairly straightforward under House rules.²⁵⁷ Moreover, there is no legal barrier to doing so. Perhaps more importantly, the political parties are fairly equally represented among the Territorial delegates: two Democrats, two Republicans, and an Independent. Bipartisanship is a rare thing on Capitol Hill in the 21st Century, but this effort could be an example. Yet committee creation is ultimately a leadership decision, which means it currently rests with Speaker Nancy Pelosi and Majority Leader Steny Hoyer's team.

That team would then have to persuade the Natural Resources Committee to relinquish jurisdiction over Insular Affairs—a request most committee chairs would view not welcome. In the jurisdictional turf wars between committees, losing jurisdiction would necessarily have to come from the top. This could theoretically happen at any time via the House Rules Committee, as evidenced by the just-announced new select committee to investigate the January 6th insurrection.²⁵⁸ However, the more likely scenario might be during the 118th Congress re-organization.

As Majority Leader Hoyer said with respect to removing Confederate statuary from the Capitol, "It's never too late to do the right thing, and this legislation would work to right a historic wrong while ensuring our Capitol reflects the principles and ideals of what Americans stand for."²⁵⁹ Institutionally enabling the non-voting representatives of Americans in the Territories accomplishes both.

V. CONCLUSION

Justice Kennedy remarked in *Boumediene v. Bush*, "It may well be that over time the ties between the United States and any of its unincorporated territories

257. See H.R. Rule, *supra* note 238, at X and XI.

258. Felicia Sonmez, *Pelosi Introduced Legislation That Would Establish Select Committee to Probe Jan. 6 Capitol Attack*, WASH. POST (June 28, 2021), https://www.washingtonpost.com/politics/pelosi-introduces-legislation-that-would-establish-select-committee-to-probe-jan-6-capitol-attack/2021/06/28/1d40b2c8-d852-11eb-9bbb-37c30dcf9363_story.html [https://perma.cc/KX32-6MVL].

259. Alex Rogers, *House Votes to Remove Confederate Statues and Replace Roger B. Taney Bust*, CNN (June 29, 2021), <https://www.cnn.com/2021/06/29/politics/house-vote-confederate-statues/index.html> [https://perma.cc/Y773-GY2X].

strengthen in ways that are of constitutional significance.”²⁶⁰ Until that time comes, the Court’s previous observation in *Puerto Rico v. Sanchez Valle*, recognizing that “Congress has broad latitude to develop innovative approaches to territorial governance”²⁶¹ should be seen as an invitation.

Creating a new House Permanent Select Committee Territorial Affairs takes the Court up on that invitation in at least three ways: (1) amplifying the voice of the Territories in Congress, (2) channeling the energies of Territorial delegates into a focused power that can result in hearings and subpoenas, and (3) increasing the impact Territories can have on federal legislation. The time has come to place Territorial Affairs in the House on parity with Indian Affairs in the Senate.

Perhaps President Trump’s offer to purchase the territory of Greenland from Denmark in 2019, an offer rejected by Copenhagen just as the 1946 American offer had been, belies a certain mentality still clinging to the notion of transaction-based management of territories.²⁶² That mentality rests on the notion of plenary federal authority over U.S. Territories—an approach first articulated by the U.S. Supreme Court in the *Insular Cases* and one that remains its operative paradigm,²⁶³ despite the hopeful enunciations cited above.

This is all the more reason to strengthen the voice and effect of the Territories in Congress. Short of allowing them a floor vote, incorporating the Territories, or granting them statehood—none of which is meaningfully on the table—this is the most reasonable approach to increasing their participation in governance at the federal level, thereby further operationalizing their quiescent sovereignty. Such an internal structural adjustment to House rules is even more appealing given the absence of a legal barrier for doing so.

The spark that Stacey Plaskett lit in our collective political conscience about the status of American islanders in the Territories has created an opening to act. It is precisely because they cannot vote at home that their voice in Congress must be elevated—there is no other path short of extending the full American franchise to the Territories. The people of the U.S. Territories have demonstrated time and again through extensive military service and multiple plebiscites that they want to be part of the United States—*somehow*. It is well past time for America to reciprocate this commitment. Congress has an

260. *Boumediene v. Bush*, 553 U.S. 723, 758 (2008).

261. *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 77 (2016).

262. Peter Baker & Maggie Haberman, *Trump’s Interest in Buying Greenland Seemed Like a Joke. Then It Got Ugly.*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/trump-greenland-prime-minister.html> [https://perma.cc/H4NH-5AYM].

263. *Sanchez Valle*, 579 U.S. at 78.

opportunity to do so. Bringing the quiescent sovereignty of our Territories into fuller flower in the U.S. House of Representatives would be an important substantive and symbolic move in that direction.