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JOSEPH BLOCHER & MITU GULATI

Navassa: Property, Sovereignty, and the Law of the Territories

ABSTRACT. The United States acquired its first overseas territory—Navassa Island, near Haiti—by conceptualizing it as a kind of property to be owned, rather than a piece of sovereign territory to be governed. The story of Navassa shows how competing conceptions of property and sovereignty are an important and underappreciated part of the law of the territories—a story that continued fifty years later in the *Insular Cases*, which described Puerto Rico as "belonging to" but not "part of" the United States.

Contemporary scholars are drawn to the sovereignty framework and the public-law tools that come along with it: arguments about rights and citizenship geared to show that the territories should be recognized as "part of" the United States. But it would be a mistake to completely reject the language and tools of property and private law, which can also play a role in dismantling the colonial structure—so long as it is clear that the relevant entitlements lie with the people of the territories. Doing so can help conceptualize the harms of colonialism in different ways (not only conquest, but unjust enrichment), and can facilitate the creation of concrete solutions like negotiated economic settlements, litigation against colonial powers, and the possibility of auctions for sovereign control.

AUTHORS. Faculty at the law schools of Duke University and the University of Virginia, respectively. For conversations about this topic, we thank David Billington, Chris Buccafusco, Guy Charles, Jacqueline Charles, Justin Desautels-Stein, Gio Fumei, Ira Kurzban, Christina Ponsa-Kraus, and Mark Weidemaier. The editors of the *Yale Law Journal*, especially Ethan Fairbanks, Alexis Kallen, Rekha Kennedy, Danny Li, and Bo Malin-Mayor, provided excellent suggestions.

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INTRODUCTION

The U.S. territories and the concepts with which scholars, judges, and lawyers address them are suspended in a netherworld: the unincorporated territories "belong[] to" but are not "part of" the United States, as the Supreme Court held in the *Insular Cases*.[1] This legal no man's land has continuing consequences for the millions of Americans living in the territories, and it also presents fundamental challenges for those attempting to understand, let alone unwind, the United States's colonial legacy.[2] What are the territories? The contemporary debate proceeds in the language of public law, but federal authority over the territories derives from the Property Clause.[3] What role might private law play in resolving their status?

In this Article, we show how the present state of affairs is partially traceable to confusion and manipulation of the concepts of property ("belonging to") and sovereignty ("part of"), and that each has a potentially important role to play going forward. The trajectory of debate about the territories' status has moved

1. Downes v. Bidwell, 182 U.S. 244, 287 (1901) (describing Puerto Rico as "a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution").

2. *See, e.g.*, José A. Cabranes, *Some Common Ground*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 39, 40-41 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001) ("Speaking plainly and honestly about our history requires us to acknowledge, without rancor and without embarrassment, that *colonialism* is a simple and perfectly useful word to describe a relationship between a powerful metropolitan state and a poor overseas dependency that does not participate meaningfully in the formal lawmaking processes that shape the daily lives of its people."); Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 61, 74 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) ("It is now an unassailable fact that what we have in the United States-Puerto Rico relationship is government without the consent or participation of the governed. I cannot imagine a more egregious civil rights violation, particularly in a country that touts itself as the bastion of democracy throughout the world. This is a situation that cannot, and should not, be further tolerated.").

3. U.S. CONST. art. IV, § 3, cl. 2 ("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 . . . ."). The analogy between sovereignty over territory and ownership of real property is thus unavoidable with regard to the law of the territories, whatever one thinks of it more broadly in international law. *Compare* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 192 (2019) (arguing that the analogy "appears more useful than it really is," and drawing a firm distinction between *imperium* and *dominium*), *with* JUSTIN DESAUTELS-STEIN, THE RULE OF RACIAL IDEOLOGY: ON BORDERS, EXCLUSION, AND THE RISE OF POSTRACIAL XENOPHOBIA 30 (forthcoming 2022) (on file with authors) ("[T]he relation between sovereignty and property is *more* useful than we tend to think, precisely because we tend to link *imperium* with sovereignty and *dominium* with individual right.").

from the former conception to the latter, and for understandable reasons. Nations historically used property concepts to justify conquest while avoiding the duties and obligations of governance, as the case of the U.S. territories painfully illustrates.[4] The contemporary question is thus seen as one of public law and governance, as are the suggested remedies: arguments about citizenship, rights, and sovereignty. These arguments are powerful and essential, but incomplete, because the property framework also contains tools that can help clarify and resolve the territories' legal status. The challenge therefore is not to reject the tools of property—concepts like ownership, economic incentive, transfer, and payment—but to reforge them for the tasks at hand: self-determination, economic justice, negotiation, and reparations.

Sovereignty and property are among the most contested and ambiguous terms in legal thought, and we do not purport to offer new or certain definitions of them here. But we do think that they invoke different broad families of concepts, generally tracking the distinction—again, blurry and contestable—between public and private law. As Martti Koskenniemi puts it, "Sovereignty and property form a typical pair of legal opposites that while apparently mutually exclusive and mutually delimiting, also completely depend on each other. Their relationship greatly resembles the equally familiar contrast between the 'public' and the 'private,' or 'public law' and 'private law.'"[5] The division between private and public law, in turn, can generally be thought of as "a naturalized law of things on the one side and a politicized law of power on the other."[6] Broadly speaking, our argument is that the law of the territories—not unlike, say, takings law[7] or the debate over reparations[8]—rewards close consideration of both public- and

4. *See infra* notes 246-247 and accompanying text.

5. Martti Koskenniemi, *Sovereignty, Property and Empire: Early Modern English Contexts*, 18 THEORETICAL INQUIRIES L. 355, 388 (2017).

6. DESAUTELS-STEIN, *supra* note 3, at 29.

7. *See, e.g.*, Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 TOURO L. REV. 265, 265 (2014) ("[T]he Supreme Court treats its takings jurisdiction as if it were contained in a sealed container, whose key premises are matters of public law, to be decided by Justices who have often only a passing knowledge of the private law concepts on which I believe all public law deliberations must ultimately rest. This disconnect between the public and private law dooms the former to intellectual incoherence because of its disregard of the latter."). Though we do not pursue the analogy here, the Takings and Property Clauses of the Constitution—the latter being the root of the law of the territories—similarly bring together private- and public-law concepts.

8. As Adrienne D. Davis notes, "Over the [past] two decades, the private law model has become somewhat of an outlier in reparations discussions, largely set aside in favor of broader, more explicitly political approaches," but "even with its doctrinal limits, the private law, corrective justice approach yields some significant benefits as a discursive framework for grappling with

private-law concepts. The language of property, for example, can help recognize and even remedy political and social phenomena that might not immediately register as private-law issues.[9] As we see it, the argument that a territory is entitled to statehood resonates in public law;[10] an argument that damages are owed for the wrongful taking of a territory, however, might resonate more in private-law concepts like restitution and unjust enrichment.[11]

To illustrate the significance of the property and sovereignty frameworks and set the stage for evaluating them, we begin with the story of a single overseas territory—the oldest of all the U.S. territories,[12] and in that sense the place where the story of U.S. imperialism began: Navassa,[13] a sunbaked and uninhabitable rock buried under a million tons of bird droppings, and located roughly forty

reparations." Adrienne D. Davis, *The Coxford Lecture: Corrective Justice and Reparations for Black Slavery*, 34 CAN. J.L. & JURIS. 329, 330 (2021). For contributions taking a private-law approach to reparations, see, for example, Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. (2004); and Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24:1 B.C. THIRD WORLD L.J. 81 (2004).

9. *See, e.g.*, Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1024 (2009) (noting that "[t]hough property law historically has been used to legitimize the conquest of indigenous lands, indigenous groups worldwide are now employing this same body of law to lay claim to their own cultural resources" and defending an account of cultural property); Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. (forthcoming 2022) (on file with authors) (showing how some Black sharecroppers in the post-slavery South were able to leverage property and tort claims to achieve a measure of legal remedy for violence when public-law remedies like criminal law and civil-rights legislation were unavailable); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1714 (1993) (arguing that "rights in property are contingent on, intertwined with, and conflated with race").

10. It is also an argument that we support and have made elsewhere. *See* Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229 (2018).

11. For a suggestion that Haiti might have such a claim, see *infra* notes 288-291 and accompanying text. *See generally* HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1997) (exploring the relevance of unjust enrichment as a remedy for territorial takings).

12. Roy F. Nichols, *Navassa: A Forgotten Acquisition*, 38 AM. HIST. REV. 505, 510 (1933) ("To the general public Navassa is still as obscure as it always has been, but nevertheless it remains the oldest of our islands whether possessions or 'appurtenances.'").

13. The French and Haitian Creole spellings are "La Navasse" and "Lanavaz," respectively. As our story and critique are largely internal to U.S. law and legal sources, we follow the spelling conventionally employed in the United States.

miles from Haiti,[14] which also claims the island.[15] Beginning with an unoccupied and seemingly minor territory helps us isolate and grasp conceptual threads that run through the treatment of inhabited territories like Puerto Rico. Pulling on those threads can unravel a lot of colonial fabric.

The United States acquired Navassa in 1857, pursuant to the Guano Islands Act,[16] which gave the President power to recognize as appurtenances to the United States any islands discovered and mined for guano by U.S. citizens.[17] The Act also explicitly provided that the United States need not retain the islands once mining was complete.[18] The underlying framework was in that sense one familiar to property law: the incentive structure was commercial, the mode of acquisition was Lockean,[19] and nothing in the Act committed the United States

14. Nichols describes it as "a barren isle, shaped like an oyster shell, about a square mile in area, formed of volcanic limestone and so filled with holes as to have the appearance of a petrified sponge." Nichols, *supra* note 12, at 507; *see also* Kevin Underhill, *The Guano Islands Act*, WASH. POST.: THE VOLOKH CONSPIRACY (July 8, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/08/by-kevin-underhill-the-guano-islands-act/ [https://perma.cc/WU5Y-2G5T] (reviewing recent litigation over Navassa and saying that "[t]he real question [is] why anybody in his right mind would want Navassa Island, a waterless hellhole from which all the dung has already been mined").

15. For a detailed evaluation of Haiti's claim, see Fabio Spadi, *Navassa: Legal Nightmares in a Biological Heaven?*, IBRU BOUNDARY & SEC. BULL., Autumn 2001, at 125 ("[T]here seems to be an even balance between the two claimants' legal positions. Or, at least, the knot is so tight that probably no one can successfully untie it by pulling just one strand at a time."). Our view is that Haiti's claim is strong enough to merit compensation. *See* Joseph Blocher & Mitu Gulati, *The U.S. Stole Billions from Haiti. It's Time to Give It Back.*, SLATE (Sept. 14, 2021, 2:26 PM), https://slate.com/news-and-politics/2021/09/the-united-states-owes-haiti-reparations.html [https://perma.cc/Z6KR-QA5X].

16. Act of Aug. 18, 1856, ch. CLXIV, 11 Stat. 119 (codified as amended at 48 U.S.C. § 1411 (2018)).

17. 48 U.S.C. § 1411 (2018) ("Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.").

18. 48 U.S.C. § 1419 (2018) ("Nothing in this chapter contained shall be construed as obliging the United States to retain possession of the islands . . . after the guano shall have been removed from the same."). This section is titled "Right to abandon islands." *Id.*

19. The familiar Lockean proviso—echoed in the language of the Guano Islands Act, *supra* note 17—validates the property claims of those who mix their labor with an unowned resource while leaving as much and as good for others. Recent scholarship in the political theory of territoriality has explored Lockean theories of sovereign territory. *See, e.g.*, David Miller, *Property and Territory: Locke, Kant, and Steiner*, 19 J. POL. PHIL. 90, 90-93 (2011) (describing the individualist Lockean theory of sovereign territory associated with Hillel Steiner and others); Cara Nine, *A Lockean Theory of Territory*, 56 POL. STUD. 148, 154-55 (2008) (defending a "collectivist Lockean theory" under which "*the state* acquires territorial rights in much the same way that individuals acquire property rights" (emphasis added)).

to actually govern the islands. This approach might be contrasted with a sovereignty-type framework in which new territory becomes part of a nation-state whose borders are insulated from change.[20] In fact, the United States, like many imperial powers at the time, often explicitly resisted sovereignty—in part because of the obligations that it might entail.[21]

The story of Navassa is thus in part a story of a colonial power using the concepts of property and sovereignty to its advantage, and thereby relegating the island—like Puerto Rico and the other unincorporated territories—to the status of a "disembodied shade."[22] But even as the dust was settling on the *Insular Cases* and the United States was fighting a war over the status of its largest territory (the Philippines), U.S. legal scholars were exploring—and complicating—the conceptual relationship between property and sovereignty.[23] That ongoing exploration and the law of the territories have much to learn from each other.

Contemporaneously, international law was moving away from the property framework, making it incumbent upon colonial powers to treat their territories

20. *See infra* notes 255-257 and accompanying text (discussing the international legal principle of *uti posseditis*, which favors existing borders). We use sovereignty and property as animating concepts because—despite their blurry edges—they are legal concepts and, we argue here, central to the law and rhetoric surrounding the territories. But the basic themes of control and change could be captured by other terminology as well, as in Sam Erman's recent exploration of what he calls "status manipulation." Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1192 (2021) (reviewing DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019)) ("Status is a legal classification that relates people or places to polities while assigning them a condition or position. It . . . generally presents as fixed and enduring. By contrast, manipulation involves purposeful change . . . ."). In Erman's terminology, our goal here is to focus on ensuring that the proper parties—that is, the people of the territories—have control over that manipulation.

21. *See infra* Section II.A (chronicling the State Department's statements throughout the late 1800s and early 1900s equivocating about—and even denying—U.S. sovereignty over Navassa).

22. Downes v. Bidwell, 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting).

23. *See infra* Section II.B. The classic reference is Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927-1928). For a recent discussion, see 18 THEORETICAL INQUIRIES L. (2017), which compiles papers presented at a 2015 conference on "Sovereignty and Property," including contributions by Eyal Benvenisti, Jean L. Cohen, Hanoch Dagan & Avihay Dorfman, Sergio Dellavalle, Larissa Katz, Martti Koskenniemi, Thomas W. Merrill, Katharina Pistor, Arthur Ripstein, Joseph William Singer, Laura S. Underkuffler, and Jeremy Waldron. Of course, the relationship between concepts like sovereignty and property—and their rough Roman-law analogues of *imperium* and *dominum*—were also of interest to earlier legal thinkers contemplating or attempting to justify colonialism. *See generally* KEN MACMILLAN, SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576-1640 (2006) (describing how the English utilized elements of Roman common law to legally justify their colonial expansion); Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 TORONTO L.J. 1 (2011) (noting the role of Spanish legal scholars in pioneering the use of private-rights doctrine as it related to colonial expansion).

as something other than possessions to be conquered, exploited, or bartered for economic gain.[24] By the middle of the nineteenth century, this development, combined with the rise of the principle of self-determination, helped precipitate a wave of decolonization worldwide.[25]

But shifting to a public-law frame that treats sovereignty as both an obligation and a given obscures other possible solutions. Governance arrangements became more a product of status than of contract.[26] This reification of sovereign territory is an implication of territorial sovereignty, and—with limited and contestable exceptions for self-determination[27] or humanitarian intervention[28]—it obscures the degree to which borders and sovereign territory are man-made contingencies that can and sometimes should be voluntarily changed.[29] Part of our goal here is to unsettle those assumptions and to suggest how private-law concepts like entitlement and transfer might be adapted to unwind the colonial structures they were once used to build. For generations, Western powers used

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24. *See infra* Section II.B.

25. *See* ROBERT ALDRICH & JOHN CONNELL, THE LAST COLONIES 113 (1998).

26. *See infra* notes 271-274 and accompanying text (discussing Henry Maine's famous dictum); *see also* Erman, *supra* note 20, at 1192 ("Status poses as immemorial and permanent despite always being constructed and reconstructed—an apt metaphor for a nation that endlessly violates its ideals without rejecting them."); Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, 48 (2010) ("Every established order tends to produce . . . the naturalization of its own arbitrariness." (quoting PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 164 (Richard Nice trans., 1977))).

27. *See* International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171; W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 147 (1977) ("Today, there is no doubt that self-determination, as defined in U.N. and general international practice, is a principle of international law which yields a right to self-government that can be claimed legitimately by *bona fide* dependent peoples.").

28. For a broad overview, see generally *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY (Dec. 2001), https://www.globalr2p.org/wp-content/uploads/2019/10/2001-ICISS-Report.pdf [https://perma.cc/MUT6-E2RM]. For a collection of criticism, see CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT: INTERROGATING THEORY AND PRACTICE (Philip Cunliffe ed., 2011).

29. *See, e.g.*, ALBERTO ALESINA & ENRICO SPOLAORE, THE SIZE OF NATIONS 1-2 (2003) (criticizing international economists for taking borders as a given); TIMOTHY WILLIAM WATERS, BOXING PANDORA: RETHINKING BORDERS, STATES, AND SECESSION IN A DEMOCRATIC WORLD (2020) (questioning the value of stable borders and advocating a more robust right of secession); Nancy Birdsall, *The True True Size of Africa*, CTR. FOR GLOB. DEV. (Nov. 11, 2010), http://www.cgdev.org/blog/true-true-size-africa [https://perma.cc/G5QC-MPM5] (noting that Africa's "economic size" is roughly equivalent to that of Chicago plus Atlanta, which is "why Africa's leaders wish they could overcome the politics of sovereignty and eliminate the cost of all those borders—something the Europeans have been working on for half a century").

private-law tools to exploit and profit from their colonies. Surely it requires some justification now to tell those colonies that the same tools are unavailable to them—that they, having enriched the metropoles, cannot pursue arguments of unjust enrichment; or that they, having been treated like property, cannot now choose to transfer or sell their territory. The conceptual and practical obstacles are considerable, and we address some of them below,[30] but that is not reason enough to reject the effort, especially considering that the tools of public law have significant complications of their own.[31]

In fact, powerful and wealthy nations continue to use private-law tools to wring benefits from sovereign territories, for example by entering into long-term leases for military bases,[32] or through large-scale industrial and public-works projects that have the effect of projecting sovereign authority abroad.[33] This private-law toolkit—including concepts like contract (only possible once one has established entitlements) and damages—can be used to help the territories as well. This would not mean treating territories as "belonging to" the United States, subject to barter or trade as Congress sees fit.[34] That notion should be rejected not because it involves property, but because it gives the entitlement to the wrong party—to the United States, rather than to the people of

30. *See infra* Part III.

31. Some complications, in fact, are basically identical, like deciding *who* gets to approve either a sale of territory or a transition to independence, or what the threshold for approval should be.

32. The lease for Diego Garcia is a prominent and controversial example. *See* Marwaan Macan-Markar, *Mauritius Makes Play for Future with US Base on Diego Garcia*, NIKKEI ASIA (Nov. 18, 2020, 3:06 PM JST), https://asia.nikkei.com/Editor-s-Picks/Interview/Mauritius-makes-play-for-future-with-US-base-on-Diego-Garcia [https://perma.cc/4P7E-G394].

33. *See* Lauren Frayer, *In Sri Lanka, China's Building Spree Is Raising Questions About Sovereignty*, NPR (Dec. 13, 2019, 10:02 AM), https://www.npr.org/2019/12/13/784084567/in-sri-lanka-chinas-building-spree-is-raising-questions-about-sovereignty [https://perma.cc/DU2Z-WKDD]; *see also* Aziz Rana, *How We Study the Constitution: Rethinking the* Insular Cases *and Modern American Empire*, 130 YALE L.J.F. 312, 327 (2020) ("[G]lobal realities suggested a new mode of international engagement. Rather than directly controlling territory, the United States would assert constant economic and military power abroad.").

34. On this point, Christina Ponsa-Kraus has persuasively argued that the Supreme Court's decisions in the *Insular Cases* "stood for the proposition that the acquisition of a territory by the United States could be followed by its separation from the United States . . . [creating] a constitutional doctrine of territorial deannexation." Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005); *see also* Blocher & Gulati, *supra* note 10, at 235 (arguing that international law would not, and should not, allow this).

the territories.[35] If colonial powers could, and in some ways still do, use sovereignty as a valuable asset, why can't colonized people do the same now that the asset is theirs?

Getting clear about this entitlement helps illuminate the possibilities for what we have elsewhere described as a "market for sovereign control."[36] Sovereign control has been ceded, traded, gifted, leased, and otherwise transferred between nations for centuries. Sometimes those transfers have been coercive or exploitative; other times they have been voluntary and welfare-enhancing. What is generally missing, however, is a good legal mechanism for transfers of sovereignty beyond the context of former colonies becoming independent (which, it should be noted, many do not want).[37] Sir Hersch Lauterpacht noted that "[t]he part of international law upon which private law has engrafted itself most deeply is that relating to acquisition of sovereignty over land, sea, and territorial waters."[38] But less attention has been paid to the use of private law in divesting territory.

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35. We argue this point at greater length in Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797 (2017). But we draw on elements of earlier thinking, including luminaries like Emer de Vattel:

> Some have dared to advance this monstrous principle, that the conqueror is absolute master of his conquest, — that he may dispose of it as his property . . . and hence they derive one of the sources of despotic government. But, disregarding such writers, who reduce men to the state of transferable goods or beasts of burthen, — who deliver them up as the property or patrimony of another man, — let us argue on principles countenanced by reason and conformable to humanity.

3 EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, ch. XIII, § 201, at 388 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758).

36. Blocher & Gulati, *supra* note 35, at 801. For a sampling of scholarship exploring these points, as well as offering critiques, see generally John F. Coyle, *Friendly and Hostile Deals in the Market for Sovereign Control: A Response to Professors Blocher and Gulati*, 66 DUKE L.J. ONLINE 37 (2017); Anna Gelpern, *Cinderella Sovereignty*, 67 DUKE L.J. ONLINE 65 (2017); Karen Knop, *A Market for Sovereignty? The Roles of Other States in Self-Determination*, 54 OSGOODE HALL L.J. 491 (2017); and W. Mark C. Weidemaier, *A (Very Thin) Market for Sovereign Control*, 66 DUKE L.J. ONLINE 67 (2017).

37. *See infra* notes 264-266 and accompanying text; *see also* Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 L. & CONTEMP. PROBS. 215, 233-36 (2017) (arguing that the right of self-determination encompasses a right to remain part of the empire).

38. H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) pt. II, ch. III, § 37, at 91 (1927); *see also* ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500-2000, at 213 (2014) ("From the moment a nation has taken possession of a territory in right of first occupier, and with the design to establish themselves for the future, [it] become[s] the absolute and sole proprietor[] of

One way to conceptualize the issue is as a question of allocating a valued resource—sovereign control over physical territory. In other contexts, the law assigns clear property rights, protects them, and lets parties bargain their way to mutual advantage, with appropriate constraints.[39] Creating a market for sovereign control, then, would mean assigning property rights in sovereign control and permitting them to be traded. It would mean moving borders to fit people, rather than people to fit borders,[40] subject to various limitations.[41] But none of that is possible without clarity regarding the underlying entitlements. That is the focus of this Article.

Part I tells the story of Navassa, and how "the droppings of birds played an important role in the history of U.S. imperialism."[42] This historical account serves not only to give Navassa the attention it deserves in the law of the territories, but also to show how it—like the other unincorporated territories—ended up being treated as both property and sovereign territory, albeit without the benefits of either categorization.

Part II embeds this story in broader developments in legal thought and international law, beginning with Morris Cohen's observation that seemingly obvious differences between property and sovereignty tend to blur the more deeply one thinks about them.[43] In the case of the territories, that ambiguity was central both to the *Insular Cases* and to the interpretations of State Department lawyers. And yet, however blurry, the line remains significant, as contemporaneous developments in international law demonstrate. In particular, the move away from property-law concepts—long a staple of international law, especially with regard

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it . . . ." (quoting 3 G.F. VON MARTENS, THE LAW OF NATIONS: BEING THE SCIENCE OF NATIONAL LAW, COVENANTS, POWER, ETC. FOUNDED UPON THE TREATIES AND CUSTOMS OF MODERN NATIONS IN EUROPE, ch. I, § 1, at 67 (William Cobbett 4th ed., William Cobbett trans., London 1829) (1789))).

39. Paul B. Stephan, *Blocher, Gulati, and Coase: Making or Buying Sovereignty?*, 66 DUKE L.J. ONLINE 51, 51 (2017).

40. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 122 (Oct. 16) (Dillard, J., concurring) ("It is for the people to determine the destiny of the territory . . . ."); G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960) (explaining that self-determination could lead to secession and the formation of a new state, association of a territory with an existing state, or integration of a territory into an already-existing state).

41. Blocher & Gulati, *supra* note 35, at 840-42.

42. LARRY GARA, THE PRESIDENCY OF FRANKLIN PIERCE 149 (1991).

43. *See* Justin Desautels-Stein, *The Realist and the Visionary: Property, Sovereignty, and the Problem of Social Change*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 77, 79 (Ingko Venzke & Kevin Jon Heller eds., 2021) ("[W]e should realise that we are dipping into the deepest reservoirs of our legal order, spaces in which property and sovereignty share a common language. At this grammatical depth, our liberal conceptions of property ownership and sovereign right blur." (footnote omitted)).

to the acquisition of territory[44]—and toward an emphasis on sovereignty has tended to cement the status quo, including existing colonial structures.

In Part III, using Navassa as an illustration, we argue that some aspects of the property paradigm should be recovered, and that they stand to help the U.S. territories and other colonial possessions. We explore three specific implications: negotiated economic settlements, litigation against colonial powers, and the possibility of auctions for sovereign control. The last of these, in particular, means adapting the property framework from uninhabited territories like Navassa to inhabited territories like Puerto Rico. By focusing on a small, uninhabited, and seemingly minor island, rather than mounting another attack on the *Insular Cases*, our goal is not to avoid the broader questions of democracy and the law of the territories, but to isolate and develop one particular theme: the use and potential promise of private-law concepts like property.

I. THE STORY OF NAVASSA

Law-of-the-territories scholarship understandably tends to focus on inhabited territories like Puerto Rico, where millions of American citizens still lack full voting rights. But to fully understand U.S. imperialism—and the conceptual confusion that enabled it and continues to haunt the people of the territories—we have to start fifty years earlier than the *Insular Cases* and on a much smaller scale.[45] Indeed, we might want to go back centuries, to when seabirds first started depositing the excrement that would eventually accumulate—especially on hot, uninhabited, rainless islands—into rock-hard layers many feet deep. The territorial American empire began with efforts to use law to justify the acquisition of this bounty. Consideration of that story, and especially Navassa Island, our oldest territory, brings contested and changing conceptions of property and sovereignty to the forefront.

A. The Flag Follows Enterprise

In the first half of the 1800s, the Western world discovered what people indigenous to South America had long known: guano is an extraordinary natural fertilizer.[46] This made it particularly valuable to American farmers on the East

44. *See infra* notes 50-55 and accompanying text.

45. In keeping with the focus of this Special Issue, our focus is on the territories, not other forms of U.S. imperialism.

46. *See* GREGORY T. CUSHMAN, GUANO AND THE OPENING OF THE PACIFIC WORLD: A GLOBAL ECOLOGICAL HISTORY (2013) (providing a detailed history of guano and its importance in the mid-

Coast, who were facing soil exhaustion and increasing competition from newly-acquired Western territories.[47] Peru, whose islands were blessed with massive deposits of the stuff, dominated the market.[48] U.S. farmers, seeking better terms, turned to their government.[49]

But how to get a cheap domestic source of guano? Historical models suggested that the answer could involve a combination of private enterprise and governmental conquest. From colonial charters[50] to the British East India Company,[51] intermingling of private and public interests had long been an engine for acquiring valuable resources and territory. Governments regularly created, supported, or recognized their citizens' "private" property claims—intertwining sovereignty and property in ways that expanded both.[52] Sir Edward Coke said of North American colonization that "[t]he ends of private gain are concealed

nineteenth century); *see also* Paul F. Johnston, *The Smithsonian and the 19th Century Guano Trade: This Poop Is Crap*, NAT'L MUSEUM OF AM. HIST. (May 31, 2017), https://americanhistory.si.edu/blog/smithsonian-and-guano [https://perma.cc/K5N3-MTDV] (describing how the world powers were all importing guano as early as the 1840s).

47. *See* ROY F. NICHOLS, ADVANCE AGENTS OF AMERICAN DESTINY 157 (1956); JIMMY M. SKAGGS, THE GREAT GUANO RUSH: ENTREPRENEURS AND AMERICAN OVERSEAS EXPANSION 2-3 (1994).

48. On the impact of the guano boom on Peru and its finances, see Catalina Vizcarra, *Guano, Credible Commitments, and Sovereign Debt Repayment in Nineteenth-Century Peru*, 69 J. ECON. HIST. 358 (2009).

49. *See* SKAGGS, *supra* note 47, at 11; Christina Duffy Burnett [Ponsa-Kraus], *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779, 783 (2005). Since U.S. intervention would lead to labor practices that have been analogized to slavery, *see infra* notes 141-148, 165 and accompanying text, it is also worth noting that "[t]he Peruvians solved their labor problems by a variety of heinous methods, including kidnapping and slavery," especially of Chinese peasants lured onto ships where they "sometimes found themselves shackled below deck, not unlike slavery-bound Africans." Brennen Jensen, *Poop Dreams*, BALT. CITY PAPER (Feb. 21, 2001), http://faculty.webster.edu/corbetre/haiti/misctopic/navassa/poop.htm [https://perma.cc/CFB6-BN7B].

50. *See* Koskenniemi, *supra* note 5, at 361 (arguing that "[t]he English state in the sixteenth century was much weaker than its Continental rivals" and thus "enlist[ed] the economic interests of the noble and mercantile classes" through privateering and monopoly charters).

51. *See* Philip J. Stern, *"Bundles of Hyphens": Corporations as Legal Communities in the Early Modern British Empire*, *in* LEGAL PLURALISM AND EMPIRES, 1500-1850, at 21, 24 (Lauren Benton & Richard J. Ross eds., 2013) (noting that because of the sophistication of the English corporation, "[t]he early modern English 'state' was . . . a composite of agents, networks, and 'grids of power' that operated within, aside, and sometimes in conflict with the sovereign Crown").

52. The most notorious example of this was King Leopold II's barbaric rule of the Congo Free State, which he simultaneously ruled and *owned* until, as the result of the century's first major international human-rights campaign, he was forced to sell sovereign control to Belgium. We explore those horrors—which were unfolding nearly contemporaneously with the story we tell here—and lessons for international law in Joseph Blocher & Mitu Gulati, *Transferable Sovereignty: Lessons from the History of the Congo Free State*, 69 DUKE L.J. 1219 (2020).

under cover of planting a Colony."[53] John Locke, architect of colonial constitutions, wrote that "[t]he great and chief end . . . of men's uniting into commonwealths and putting themselves under government is the preservation of their property."[54] It is unsurprising, then, that Locke's approach to the colonies was to establish such rules as would lead to expansion over new territory and would draw "the greatest conveniences of life . . . from it."[55]

Such models were still being employed in the late 1800s. Chartered-company governments owned roughly three-quarters of British territory acquired in Sub-Saharan Africa at that time,[56] just as the United States was taking its first imperial steps. In other instances, private actors established business interests abroad and then called on their home governments to protect them when those interests were threatened, thereby drawing sovereign power into property disputes in distant territories.[57]

The United States was drawn into the guano islands and thus into empire by the latter method. Throughout the early 1850s, enterprising sea captains began writing to Secretary of State Daniel Webster (by then somewhat addled by age and ill health, and also possibly conflicted by guano-related personal business interests),[58] asking whether certain islands in the Pacific might be "rightfully taken by a citizen of the United States."[59] In one prominent case, Webster wrote back that "it may be considered the duty of this government to protect citizens of the United States who may visit the Lobos islands for the purpose of obtaining guano."[60]

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53. BARBARA ARNEIL, JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM 68 (1996).

54. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690).

55. *Id.* at 137.

56. STEVEN PRESS, ROGUE EMPIRES: CONTRACTS AND CONMEN IN EUROPE'S SCRAMBLE FOR AFRICA 219 (2017) (citing Hartmut Pogge von Strandmann, *The Purpose of German Colonialism, or the Long Shadow of Bismarck's Colonial Policy*, *in* GERMAN COLONIALISM: RACE, THE HOLOCAUST, AND POSTWAR GERMANY 193, 202 (Volker Langbehn & Mohammad Salama eds., 2011)).

57. *See, e.g.*, PRESS, *supra* note 56, at 65 ("The court at Madrid had insisted since the days of Hernán Cortés that European powers must hold sovereignty over any provinces acquired by *conquistadores* overseas."). For an explanation of this phenomenon, see generally NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893-2013 (2013).

58. NICHOLS, *supra* note 47, at 162-66.

59. SKAGGS, *supra* note 47, at 22.

60. *Id.* at 23. For a detailed accounting of these petitions, see NICHOLS, *supra* note 47, at 162-82. There is an interesting historical analogy here to the Stuart-era practice of petitions seeking "letters patent" for overseas affairs. *See* MACMILLAN, *supra* note 23, at 80-89.

Acting on this implicit promise, U.S. citizens began to claim islands, mostly in the Pacific, and set up mining operations.[61] Sometimes they were confronted or evicted by agents of other countries claiming sovereignty over what the captains insisted was *terra nullius*.[62] For many years, these disputes were presented to Congress in the form of petitions for redress of grievances — essentially, applications for private bills.[63] This approach proved scattershot, however, and pressure developed for a more regularized process governed by statute.[64]

Here, too, historical and contemporary practice provided some models for how property and sovereignty claims could essentially leverage one another. The first of the Federal Homestead Acts was on the horizon — it would be passed in 1862, granting property rights in midwestern and western lands to heads of households or twenty-one-year-old men who agreed to live on and farm the land.[65] By rewarding those who mixed their labor with this supposedly unclaimed territory, the Acts used a basic Lockean model to incentivize both private-property claims and the expansion of national sovereignty.[66] The guano islands would eventually be acquired under similar theories.

American "discoverers" of the guano islands had an ally in the Senate who shared their desire for global commercial expansion and was willing to treat sovereign territory like real estate.[67] As Secretary of State, first under Abraham Lin-

61. SKAGGS, *supra* note 47, at 22-31.

62. NICHOLS, *supra* note 47, at 162-82.

63. SKAGGS, *supra* note 47, at 31. At least one such petition was filed by the Coopers regarding Navassa before the initial application for title was eventually recognized in 1859. *Id.* at 102-03. For a broader history of petitioning, see Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018).

64. NICHOLS, *supra* note 47, at 183 ("Guano prospecting was introducing a new type of exasperation into the relations between government and private enterprise. . . . The guano operators began to demand some law which would create procedures not dependent upon the whims of Secretaries.").

65. Homestead Act of 1862, ch. 75, 12 Stat. 392, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787.

66. *Cf.* PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 72 (2017) ("Land policies were particularly critical in enabling the government to overcome the weaknesses of a federal state by incentivizing and strategically privatizing an 'armed occupation' of citizens to settle and secure territory.").

67. *See* WALTER STAHR, SEWARD: LINCOLN'S INDISPENSABLE MAN 497-502 (2012) (describing William H. Seward's role not only in laying the foundations for acquiring Hawaii and building the Panama Canal, but also in making an effort to buy British Columbia).

coln and later Andrew Johnson, William H. Seward would engineer the purchase of Alaska from Russia for $7.2 million in 1867[68]—derisively known by some as "Seward's Icebox."[69] But before that, as economist and historian of the guano islands Jimmy M. Skaggs puts it, he acquired "Seward's Outhouse."[70]

In 1856, then-Senator Seward shepherded the passage of the Guano Islands Act.[71] Skaggs explains that the Act's "impact was far reaching and its consequences largely unforeseen. For certain its first effect was to demonstrate conclusively that in the United States, flag follows enterprise."[72] The text of the Act, which is still on the books, declares:

> Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.[73]

It goes on to grant "[t]he discoverer, or his assigns . . . the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States."[74]

Some critics of the Act, invoking the tradition of sovereign support for citizens' property claims described above,[75] suggested that the Act unnecessarily restated the existing rules. Senator John P. Hale of New Hampshire asked "why a special rule is endeavored to be inserted here, by way of this act of Congress, in relation to guano islands? . . . [T]he Government will undoubtedly enforce, at

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68. The United States paid Russia $7.2 million for Alaska. *See* Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America art. VI, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539. That same year, Seward successfully encouraged the Department of the Navy to take possession of Midway Island. SKAGGS, *supra* note 47, at 115.

69. SKAGGS, *supra* note 47, at 56.

70. *Id.*

71. Act of Aug. 18, 1856, ch. 164, 11 Stat. 119 (codified at 48 U.S.C. § 1411 (2018)).

72. SKAGGS, *supra* note 47, at 66; *see also* NICHOLS, *supra* note 47, at 201 ("[T]he pursuit of guano had started the United States on the road to acquiring possessions not within the bounds of contiguous continental territory. . . . [T]he first small beginnings of empire had been made at Navassa in the West Indies and on the coral reefs of the Pacific.").

73. 48 U.S.C. § 1411 (2018).

74. *Id.* § 1414.

75. *See supra* notes 63-67 and accompanying text.

all times, the rights of discoverers of any of its citizens to any undiscovered land which they may discover."[76]

Seward replied by carefully distinguishing between the property-like interests covered by the Act and the sovereignty-like interests it disclaimed: "The object of the bill, then, is to favor and encourage certain American discoverers . . . to seek out, and to appropriate to the uses of the United States, under the authority of law, other deposits than those of the State of Peru."[77] He took pains to emphasize that "[t]here is no temptation whatever for the abuse of authority by the establishment of colonies or any other form of permanent occupation there," and that "the bill itself . . . provides whenever the Guano should be exhausted, or cease to be found on the islands, they should revert and relapse out of the jurisdiction of the United States."[78] He stressed that the bill allowed no "prospect for dominion" and that it was "framed so as to embrace only these more ragged rocks . . . which are fit for no dominion."[79]

The theme that emerged—and that remains central to the law of the territories—was a cake-without-the-calories approach to colonialism: the United States would reap the benefits of these far-flung territories without taking on the obligations of sovereign governance. From the beginning, then, American colonialism has been premised on the power to manage and alter boundaries, not simply to expand them.[80] Indeed, the Guano Islands Act provided that nothing in it should be construed as "obliging the United States to retain possession of the islands . . . after the guano shall have been removed from the same."[81] The Act was only a means of guaranteeing the extraction of valuable resources—not

76. SKAGGS, *supra* note 47, at 58 (quoting Senator John P. Hale). This principle of discovery, it should be noted, was not asserted with quite as much gusto when the opposing sovereign was, say, Great Britain. *Id.* at 106 ("It apparently mattered little . . . that circumstances surrounding Verd key [claimed by the British] were remarkably similar to those regarding Navassa, where the United States had cavalierly brushed aside Haitian claims."); *id.* at 127 ("Interestingly, however reluctant the U.S. government might have been to relinquish control of Caribbean appurtenances to sister American republics, it almost never disputed ownership with Great Britain once it became aware of English counterclaims, as with Morant keys."). It has often been rejected by U.S. courts when the party asserting discovery does so contrary to the federal government's interests. Adam Clanton, *The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty*, 26 UCLA PAC. BASIN L.J. 1, 7-15 (2008) (showing executive and judicial rejection of private claims regarding "discovery" of Atlantis, Isle of Gold, and Grand Capri Republic—would-be micronations off the coast of Florida—and yet acceptance of similar claims, favored by the U.S. government, in the case of Swains Island in the South Pacific).

77. SKAGGS, *supra* note 47, at 59 (quoting Senator William H. Seward).

78. Burnett [Ponsa-Kraus], *supra* note 49, at 785-86 (quoting Senator William H. Seward).

79. DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 52 (2019) (quoting Senator William H. Seward).

80. Burnett [Ponsa-Kraus], *supra* note 49, at 781.

81. 48 U.S.C. § 1419 (2018).

of expanding territorial sovereign empire. As one claimant put it in 1863, in the course of seeking Secretary Seward's help in negotiating a settlement with the British regarding a disputed guano island in the Caribbean, he did "not desire to occupy the Sombrero Key one day after ceasing shipments of guano . . . [for] permanent occupation of the island by any power or person would be absurd."[82]

One particularly significant phrase in the Act is its declaration that covered islands are to be considered as "appertaining" to the United States.[83] That odd word—blurring the line between property and sovereignty—originates with Seward's initial proposals,[84] which also contained references to "sovereignty," "territory," and "territorial domain," all of which were eventually stripped out.[85] As historian Daniel Immerwahr explains, "It was an obscure word, appertaining, as if the law's writers were mumbling their way through the important bit. But the point was this: those islands would, in some way, belong to the country."[86] A later State Department memorandum would describe the term as "deft, since it carries no precise meaning and lends itself readily to circumstances and the wishes of those using it."[87] Indeed.

The concept of appurtenance came to play a more prominent role in the law of the territories when the Supreme Court made it central to the reasoning of the *Insular Cases*.[88] As Justice White put it in *Downes v. Bidwell*:

> The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the

82. SKAGGS, *supra* note 47, at 92 (quoting Secretary William H. Seward).

83. 48 U.S.C. § 1411 (2018).

84. SKAGGS, *supra* note 47, at 57.

85. Burnett [Ponsa-Kraus], *supra* note 49, at 784 (quoting early drafts of the Guano Islands Act); *see also* NICHOLS, *supra* note 47, at 183-84 (quoting an 1856 proposal to Congress, on behalf of some guano-island captains, which would have given the "right of sovereignty and eminent domain of, to and over the same").

86. IMMERWAHR, *supra* note 79, at 51-52.

87. SKAGGS, *supra* note 47, at 57 (quoting, with modification, OFF. OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, THE SOVEREIGNTY OF ISLANDS CLAIMED UNDER THE GUANO ACT AND OF THE NORTHWEST HAWAIIAN ISLANDS MIDWAY AND WAKE 317 (Aug. 9, 1932), https://evols.library.manoa.hawaii.edu/handle/10524/54209 [https://perma.cc/2ACC-7WS8]).

88. Burnett [Ponsa-Kraus], *supra* note 49, at 794 ("In perhaps the most concrete sign of its lasting influence, the act's unusual terminology for describing the relationship between guano islands and the United States would return for an encore in the better known episode of American overseas territorial expansion at the end of the nineteenth century.").

> United States in a domestic sense, because the island has not been incorporated into the United States, but was merely appurtenant thereto as a possession.[89]

In keeping with this mostly property-based terminology, the theory of acquisition in the Act is recognizably Lockean. This was the same basic logic that had earlier been used in *Johnson v. M'Intosh*[90] to justify the expropriation of Native land in the continental United States. And the Supreme Court would later invoke it in an 1890 opinion (discussed in more detail below[91]), upholding the Act's application to Navassa itself:

> By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession . . . of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired.[92]

Reliance on a concept of *terra nullius*—whether to support claims of property, or sovereignty, or both—made it essential to identify whether a given island was indeed "unoccupied." And had there been any desire to take this requirement seriously, one can imagine that guano-island entrepreneurs would have to demonstrate, with evidence and in open proceedings, the validity of their property claims. That did not happen.[93] The result, by the State Department's own later reckoning,[94] was frequent overstatement regarding lands having been "discovered."

89. Downes v. Bidwell, 182 U.S. 244, 341-42 (1901) (White, J., concurring).

90. 21 U.S. (8 Wheat.) 543, 567-71 (1823); Jedediah Purdy, *Property and Empire: The Law of Imperialism in* Johnson v. M'Intosh, 75 GEO. WASH. L. REV. 329, 336 n.36 (2007).

91. *See infra* Section I.C.

92. Jones v. United States, 137 U.S. 202, 212 (1890).

93. NICHOLS, *supra* note 47, at 202 ("American adventurers were none too learned in their international law nor too careful in their searches of title. Many of the dots they claimed to be uninhabited and unclaimed by other sovereignties, very soon appeared to have owners.").

94. *See infra* notes 226-244 and accompanying text.

B. Navassa and Haiti's Claim

More than 100 rocks, islands, and outcroppings would eventually be claimed under the Guano Islands Act,[95] but Navassa has the distinction of being the first.[96]

In the summer of 1857, one year after the Guano Islands Act was enacted, American Peter Duncan claimed to have discovered the island, describing it as "covered with small shrubs upon the surface, beneath which is a deposit of phosphatic guano, varying in depth from one to six feet, and estimated in quantity at one million of tons."[97] Duncan sought the exclusive rights promised under the Act, which he would eventually receive and transfer to the Navassa Phosphate Company (NPC).[98]

The claim did not go unchallenged. Before Duncan's petition had even been recognized under the Act,[99] Haitian Emperor Faustin-Élie Soulouque sent warships to proclaim sovereignty over the island and demand an end to American mining[100]—or at least that the work continue only under Haitian authority.[101] The American enterprise at that point was being run by the Cooper family, who had received Duncan's not-yet-perfected claim. Likely recognizing that Navassa was not quite as unclaimed as Duncan had asserted, the Coopers had preemptively asked the Secretary of State for protection.[102]

The historical record shows no evidence of any investigation by the U.S. government at that time into whether Haiti or any other nation had a better claim

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95. Underhill, *supra* note 14. Most of these were claimed in the Act's first few decades. Nichols, *supra* note 12, at 506 ("Under the authority of this act, between 1856 and 1885 some seventy islands and groups of islands were recognized as appertaining to the United States.").

96. NICHOLS, *supra* note 47, at 189-90 ("In this humble fashion, the American nation took its first step into the path of imperialism; Navassa, a guano island, was the first noncontiguous territory to be announced formally as attached to the republic.").

97. *Jones*, 137 U.S. at 205 (quoting a memorial addressed to the Secretary of State by Peter Duncan).

98. *Id.* at 206.

99. Recognition took a while because Duncan apparently failed to file either the certificate of peaceable possession or the required bond. Nichols, *supra* note 12, at 507.

100. Jacqueline Charles, *Did the US Steal an Island Covered in Bird Poop from Haiti? A Fortune Is in Dispute*, MIA. HERALD (Nov. 26, 2020), https://www.msn.com/en-us/news/us/did-the-us-steal-an-island-covered-in-bird-poop-from-haiti-a-fortune-is-in-dispute/ar-BB1bojka [https://perma.cc/KZ5C-TB5T].

101. SKAGGS, *supra* note 47, at 100. Skaggs suggests that Haiti's intervention was spurred by a Jamaican partner of Cooper's—a person named Ramos—who suggested that Haiti lease the island to him. *Id.*

102. *Id.*

to Navassa—nor, for that matter, whether Duncan or the Coopers had even perfected a claim under the Guano Islands Act.[103] That said, given that there had been a global rush for guano for at least two decades at the time, it beggars belief that anyone thought Haiti—an impoverished nation, suffering under such an immense debt burden in the 1850s that it had to ask for a debt moratorium—would not have wanted an island rich in such a valuable asset.[104]

But the United States was too desperate for this "white gold" to be overly concerned with any competing Haitian claims. President Millard Fillmore devoted a full paragraph of his 1850 State of the Union address to the issue of bird droppings, declaring that "it is the duty of the Government to employ all the means properly in its power for the purpose of causing that article to be imported into the country at a reasonable price. Nothing will be omitted on my part toward accomplishing this desirable end."[105]

So instead of investigating the Duncan-Cooper claim that Navassa was unclaimed or abandoned, Secretary of State Lewis Cass directed the U.S. Navy to protect it. Cass's letter is often treated as early evidence of American sovereignty over the island (the Supreme Court would later cite it),[106] but the phrasing emphasizes that the Navy was sent to protect the economic interests of private citizens, not necessarily the sovereign territory of the United States:

> The President being of the opinion that any claim of the Haytian government to prevent citizens of the United States from removing guano from

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103. OFF. OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, THE SOVEREIGNTY OF GUANO ISLANDS IN THE CARIBBEAN SEA 379 (Sept. 30, 1932), https://evols.library.manoa.hawaii.edu/handle/10524/54209 [https://perma.cc/KBB4-98DM] ("*After* the Secretary of State had requested the Navy to send a warship to Navassa it was discovered that neither Cooper nor Duncan had filed the bond prescribed by the Guano Act." (emphasis added)).

104. As the price of independence in 1825, France imposed a 150-million-franc debt on Haiti—an amount equal to roughly 300% of Haiti's gross domestic product at the time—which stunted Haiti's growth for decades to come. *See* Simon Henochsberg, Public Debt and Slavery (1760-1915), at 26-27 (Dec. 2016) (master's dissertation, Paris School of Economics), http://piketty.pse.ens.fr/files/Henochsberg2016.pdf [https://perma.cc/ZWK8-S9QA]; Liliana Obregón, *Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt*, 31 LEIDEN J. INT'L L. 597, 611 (2018) ("Commentary from the time of the indemnity viewed it not as a recognition of sovereignty, but rather as an imposition upon Haiti as well as a form of surrender."). For a sense of the value that these deposits of guano would have yielded Haiti at the time, see Richard Sicotte, Catalina Vizcarra & Kirsten Wandschneider, *Military Conquest and Sovereign Debt: Chile, Peru and the London Bond Market, 1876-1890*, 4 CLIOMETRICA 293, 294-96 (2010), which describes how this asset impacted sovereign borrowing abilities at the time in Latin America.

105. *President Millard Fillmore, 1850 State of the Union Address* (Dec. 2, 1850), PRESIDENTIALRHETORIC.COM, http://www.presidentialrhetoric.com/historicspeeches/fillmore/stateoftheunion1850.html [https://perma.cc/4APZ-P7B7].

106. *See* Jones v. United States, 137 U.S. 202, 218 (1890).

> the Island of Navassa is unfounded[,] . . . directs that you will cause a competent force to repair to that island, and will order the officer in command thereof to protect citizens of the United States in removing guano therefrom against any interference from authorities of the government of Hayti.[107]

The United States was asserting and protecting economic interests, without actually claiming Navassa to be "part of" the nation.

At the same time, the United States was careful to reject Haiti's competing claim of sovereignty—thus effectively denying Navassa the opportunity to be "part of" any nation. The commander of the U.S.S. Saratoga, finding that the Haitians had already left Navassa, followed them to Port-au-Prince and left a message with Haiti's foreign minister to the effect that his ship had been sent "to look after the interests of an American company" and that "the enlightened government of Hayti" might wish to "revoke any orders" that violated "the rights of this company."[108] The Commander wrote:

> I hereby caution all persons of any government whatever, who may visit Navassa, to abstain from the slight interference with you, on pain of the displeasure of my Government and its prompt retributive action . . . . The Government is determined to extend to you that protection to which your Company under the laws of our country, is entitled.[109]

While Haiti did not dare test the might of the U.S. Navy, its foreign minister replied that the island was "part of the Haytian empire; that it was originally ceded to this government by the French."[110] That point was further emphasized by Benjamin C. Clark, Haiti's commercial agent in New York (lacking diplomatic relations with the United States, Haiti had no ambassador in Washington), who asked that the United States end "the infringement on the rights of Hayti involved in the unauthorized occupancy of Navasa [sic] Island by citizens of the United States."[111] An Assistant Secretary of State declined, citing the Guano Islands Act as evidence of the U.S. government's right to keep the island, but also noting that "the act does not make it obligatory upon the Government to retain

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107. *Id.*

108. SKAGGS, *supra* note 47, at 101.

109. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 379.

110. SKAGGS, *supra* note 47, at 102.

111. *Id.* at 102; *see also* NICHOLS, *supra* note 47, at 189 (claiming that "the Emperor was not disposed to get into trouble with the United States" and "contented himself with filing a protest through the Haitian commercial agent in the United States, B.C. Clark").

permanent possession of the Island."[112] Skaggs reads this as an attempt to "soften the blow," since it implied "that once the guano was gone the United States would renounce its claim to the place."[113] Such a renunciation has yet to emerge.

Part of the reason the United States so quickly dismissed Haiti's claim was likely that the United States barely recognized it as a sovereign, despite the fact that Haiti had been independent for more than a half century at the time Navassa was claimed.[114] Demonstrating the disdain with which the United States viewed Haitian sovereignty at the time, a prominent newspaper suggested at one point that Haiti itself be annexed for "fun and amusement."[115] Official recognition of Haiti did not come until 1864, after southern senators had departed to the Confederacy.[116] Eight years later (and again a year after that), Haiti issued formal protests against the U.S. occupation of Navassa—"supported by documentary

112. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 382; SKAGGS, *supra* note 47, at 102.

113. SKAGGS, *supra* note 47, at 102. Later entreaties from Clark were simply ignored. KAREN SALT, THE UNFINISHED REVOLUTION: HAITI, BLACK SOVEREIGNTY AND POWER IN THE NINETEENTH-CENTURY ATLANTIC WORLD 145-47 (2019).

114. For discussions of the reactions to the Haitian revolution in the Western world, see, for example, THOMAS BENDER, A NATION AMONG NATIONS: AMERICA'S PLACE IN WORLD HISTORY 108 (2006), which describes heated debates among Adams, Jefferson, Hamilton, and others regarding support for the Haitian revolution; ROBIN BLACKBURN, THE AMERICAN CRUCIBLE: SLAVERY, EMANCIPATION AND HUMAN RIGHTS 222-79 (2013); JULIA GAFFIELD, HAITIAN CONNECTIONS IN THE ATLANTIC WORLD: RECOGNITION AFTER REVOLUTION 17-60 (2015); and Tim Matthewson, *Jefferson and the Nonrecognition of Haiti*, 140 PROC. OF THE AM. PHIL. SOC'Y 22, 22-38 (1996). *See also* MALICK W. GHACHEM, THE OLD REGIME AND THE HAITIAN REVOLUTION 309-13 (2012) (explaining how some Americans believed the Haitian revolution was evidence that emancipation movements led to economic disaster and violence and worried that the entry of slaves from Haiti would spread "the Haitian revolutionary 'contagion' throughout the American plantation states" (quoting EDWARD BARLETT RUGEMER, THE PROBLEM OF EMANCIPATION: THE CARIBBEAN ROOTS OF THE AMERICAN CIVIL WAR 43 (2008))).

115. Ken Lawrence, *Navassa Island: The U.S.'s 160-year Forgotten Tragedy*, HIST. NEWS NETWORK (May 5, 2019), https://historynewsnetwork.org/article/171898 [https://perma.cc/TAF2-BTUA] (quoting James Gordon Bennett, editor of the *New York Herald*—the nation's largest daily newspaper—writing in 1850 in support of a plan to "annex Hayti, before Cuba" and that doing so "would be a source of fun and amusement, ending in something good for the reduction of the island to the laws of order and civilization. . . . St. Domingo will be a State in a year, if our cabinet will but authorize white volunteers to make slaves of every negro they can catch when they reach Hayti"). Note that even Bennett seemed to assume that such acquired territory would be destined for statehood.

116. *See* CHARLES F. HOWLAND, AMERICAN RELATIONS IN THE CARIBBEAN: A PRELIMINARY ISSUE OF SECTION I OF THE ANNUAL SURVEY OF AMERICAN FOREIGN RELATIONS 117 (1929) (noting that "[p]ro-slavery sentiment was strong enough in the nation and in Congress to prevent recognition of Haitian independence" until then and that "[t]he southern representatives and their sympathizers were bitterly opposed to the recognition of negro republics, both because of their belief that this would acknowledge the equality of the black, and because after 1840 they thought to make the Caribbean an outpost slave colony").

evidence" in the words of a 1932 State Department report summarizing the dispute.[117] Per that report:

> The Secretary of State answered the first protest on December 31, 1872. He summarized the bases for the Haitian claim as follows: Discovery of the Island by Columbus; Spanish conquest, and the Franco-Spanish Treaty ceding to France part of St. Domingo; the Declaration of Independence of Haiti of 1803; the Ordinance of 1825 issued by Charles X of France recognizing the independence of the Island of St. Domingo; the Treaty of 1828 with Haiti in which France relinquished all claim to the Island; and, finally, half a century of peaceable, uninterrupted possession by Haiti.[118]

In response, the Secretary of State claimed that there had been no "actual occupation" prior to 1857, nor had Haiti "attempted to enforce any of its revenue laws in Navassa."[119] At most, then, Haiti had "a claim to a constructive possession, or rather to a right of possession; but, in contemplation of international law, such claim of a right to possession is not enough to establish the right of a nation to exclusive territorial sovereignty."[120] Notably, by the time these words were written in 1932, the United States was basically embracing the territorial sovereignty that Seward and others had long disclaimed.[121]

U.S. warships patrolled Haitian waters between 1857 and 1915, essentially ignoring Haitian sovereignty over those waters.[122] And for all of President Woodrow Wilson's pronouncements about the need to give former colonies the right of self-determination,[123] the United States effectively took over Haiti during his administration[124]—ostensibly because U.S. assets needed protection—and

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117. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 384.

118. *Id.* at 385.

119. *Id.*

120. *Id.* at 386; *see also* Guano Islands, 1 HACKWORTH DIGEST, ch. IV, § 77, at 513 (noting the 1872 and 1873 letters, which were also quoted in 1915 when the Minister of Haiti entered another formal protest); Spadi, *supra* note 15, at 115 (describing the countries as "anchored to their original positions" following the 1872-73 letters).

121. *See infra* notes 179-187 and accompanying text.

122. *See* WILLIAM EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD 330-31 (2006).

123. *See* Allen Lynch, *Woodrow Wilson and the Principle of "National Self-Determination": A Reconsideration*, 28 REV. INT'L STUD. 419, 422-29 (2002).

124. This hypocrisy is described in James Weldon Johnson, *Self-Determining Haiti*, NATION (Aug. 28, 1920), https://www.thenation.com/article/archive/self-determining-haiti [https://perma.cc/FC7H-WHHC].

would control it more or less directly until 1934.[125] Since then, with a few exceptions, the United States has supported a variety of dictators and kleptocrats in Haiti.[126]

Haiti, for its part, has never renounced its claim to Navassa. Roughly two dozen of Haiti's constitutions — including the current one — claim Navassa as an inalienable part of the country.[127] The U.S. press noted Haiti's constitutional claim when the question of Navassa's sovereignty was working its way up to the Supreme Court in the late 1880s.[128] Notably, in some instances, U.S. representatives in Haiti pressured the Haitian Foreign Office to head off such constitutional amendments.[129]

The United States, meanwhile, has ignored repeated Haitian demands that the island be returned,[130] and under current conditions Haiti seems unlikely to press its claim.[131] Our inquiries suggest that there was a point, during René Préval's presidency roughly two decades ago, when a U.S. law firm was tasked with analyzing whether a legal claim could be brought against the United States.[132] But that Haitian government and subsequent ones have decided not to litigate

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125. *See* Off. of the Historian, *U.S. Invasion and Occupation of Haiti, 1915-34*, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1914-1920/haiti [https://perma.cc/Z8N9-JVXM].

126. *See* Vanessa Buschschluter, *The Long History of Troubled Ties Between Haiti and the US*, BBC NEWS (Jan. 16, 2010, 1:14 PM GMT), http://news.bbc.co.uk/2/hi/8460185.stm [https://perma.cc/5Y3Y-44PB].

127. Larry Rohter, *Port-au-Prince Journal; Whose Rock Is It? And, Yes, the Haitians Care*, N.Y. TIMES (Oct. 19, 1998), https://www.nytimes.com/1998/10/19/world/port-au-prince-journal-whose-rock-is-it-and-yes-the-haitians-care.html [https://perma.cc/G96G-2BZ9] (asserting that all but one of Haiti's twenty-four constitutions have done so); Spadi, *supra* note 15, at 115 (asserting that all since 1856 have done so).

128. Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 458 n.18 (1956) ("The latest reports from the West Indies declare that the newly-adopted Constitution of Hayti declares that the Black Republic has jurisdiction over Navassa, and the action of Counsel Waring [counsel for Jones] is to determine the question of jurisdiction." (alteration in original) (quoting *Jurisdiction in Navassa*, N.Y. TIMES (Nov. 3, 1889), https://timesmachine.nytimes.com/timesmachine/1889/11/03/106210557.html [https://perma.cc/DQ6U-XMVP])).

129. *See* Guano Islands, 1 HACKWORTH DIGEST, ch. IV, § 77, at 515.

130. *See* SKAGGS, *supra* note 47, at 202.

131. *See* Jensen, *supra* note 49 ("Forty miles away, Haiti has essentially stopped clamoring for control of Navassa, and its government is unlikely to press the issue in the near future, says Miami lawyer Ira Kurzban, Haiti's legal [counsel] in the United States.").

132. Email from Ira Kurzban, Former Couns. to Haiti, to Mitu Gulati, Professor of L., Univ. of Virginia Sch. of L. (April 24, 2021) (on file with authors).

the matter, while still maintaining that Navassa belongs to Haiti and was unjustly taken.[133] If we take seriously the property model that the United States asserted through the Guano Islands Act—one in which the law protects rightful ownership and enables welfare-enhancing transfers—Haiti would have had a better ability to assert its claim in either U.S. domestic courts or international tribunals. Under the sovereignty model, the United States has little need or incentive to credibly demonstrate the value it supposedly places on the island. But in the property framework, the question is how to settle and resolve conflicting claims, including through the equivalent of damages—just as it would be between two private parties disputing a piece of land.[134] In the case of Navassa, that could mean negotiating some form of compensation with Haiti. And, as the next Section begins to show, the Supreme Court's treatment of Navassa does not preclude, and in fact enables, precisely that kind of negotiation.

C. Navassa in the Supreme Court

Roy F. Nichols notes in his history of American empire that the guano islands "raised constitutional as well as diplomatic questions. For many years any definition of the nature of the sovereignty and responsibilities of the United States, if any, was neatly side-stepped."[135] As explained above, Haiti has as yet been unable to force a direct legal evaluation of the ownership question in any tribunal, domestic or foreign. But through the back door, and without Haitian involvement, the matter did come before the U.S. Supreme Court in 1890.[136] And, like Haiti's claim to Navassa, the odds were stacked against the lawyers who attempted to question the U.S. claim.

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133. The matter garnered enough attention in 1998 that U.S. Ambassador Timothy Carney felt the need to defend U.S. sovereignty over Navassa in a speech in Port-au-Prince. *See Haiti Disputes U.S. Claims . . .*, WEBSTER'S NEWS ARCHIVES (Sept. 14, 1998), http://faculty.webster.edu/corbetre/haiti/misctopic/navassa/dispute.htm [https://perma.cc/5ULR-FKSU].

134. *See* Blocher & Gulati, *supra* note 35, at 816-23 (theorizing the use of a market mechanism to resolve disputes over sovereign territory).

135. NICHOLS, *supra* note 47, at 207.

136. Interestingly, in the following term, the Court heard another case involving Navassa. In *Duncan v. Navassa Phosphate Co.*, 137 U.S. 647 (1891), the Court rejected a claim for dower at common law filed by the widow of Duncan (the original claimant of the island). The Court concluded that her interest was an estate at will, *see id.* at 652, unlike the lower court, whose opinion—issued before *Jones*—had rejected her claim on the basis that the Guano Islands Act did not give the United States or its citizens any domain over guano islands, *see* Grafflin v. Nevassa Phosphate Co., 35 F. 474, 475 (C.C.D. Md. 1888) (cited in OFF. OF THE LEGAL ADVISER, *supra* note 103, at 389).

The case was *Jones v. United States*,[137] and as with the *Insular Cases* ten years later, the question of U.S. sovereignty over Navassa arose indirectly and was resolved in much the same manner. The specific legal question in *Jones* was whether U.S. citizens working on Navassa could be charged with murder.[138] But, much like in other territories litigation, that question quickly led the Court into fundamental questions about the scope of empire.[139] It has been said that *Jones* "lays the basis for the legal foundation for the U.S. empire because it establishes the constitutionality of the fact that the United States can claim overseas territory."[140] And yet, the *Jones* litigation also brought public attention to the horrific conditions on the island and, in so doing, contributed to its transformation.

Guano mining was dangerous, degrading work,[141] and the work on Navassa was no exception. In the 1860s, with labor hard to find, the Coopers contracted with Maryland's governor for convict labor, and may even have engaged with Antonio Pelletier, who was later executed in Haiti for participating in the slave trade.[142] But matters were little better for those who "freely" entered into contracts to work there.[143]

In fact, the issue of slavery in the territories—and specifically the guano islands—was a matter of some debate, thanks in part to a 1900 *Yale Law Journal*

137. 137 U.S. 202 (1890).

138. *See id.* at 211.

139. *See id.* at 211-14. For the most recent example of this phenomenon, see *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020), where the Justices seemed to go out of their way to avoid the *Insular Cases* in the course of deciding whether the method of selecting the members of the Financial Oversight and Management Board for Puerto Rico violated the Appointments Clause. And yet, Justice Sotomayor's concurring opinion seemed to take a position on Puerto Rico's status. *See* Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 131 YALE L.J.F. 101, 101-02 (2020).

140. Dave Davies, *The History of American Imperialism, from Bloody Conquest to Bird Poop*, NPR (Feb. 18, 2019, 1:27 PM), https://www.npr.org/2019/02/18/694700303/the-history-of-american-imperialism-from-bloody-conquest-to-bird-poop [https://perma.cc/2JF5-DYMS] (quoting Daniel Immerwahr).

141. *See* IMMERWAHR, *supra* note 79, at 53 ("Guano mining . . . was arguably the single worst job you could have in the nineteenth century."); SKAGGS, *supra* note 47, at 159 ("No nineteenth-century job . . . was as difficult, dangerous, or demeaning as shoveling either feces or phosphates on guano islands.").

142. SKAGGS, *supra* note 47, at 103.

143. Jensen, *supra* note 49 ("African-Americans were virtually enslaved on [Navassa], decades after the Civil War."). For a broader account of involuntary servitude after emancipation, see DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

article.[144] Borrowing a page from British and French imperial strategy towards slavery (banning it on the mainland, but allowing it in the colonies), the article argued that the Thirteenth Amendment did not completely forbid slavery in newly-acquired territories, which at that time included the Philippines, Puerto Rico, and Guam.[145] The argument sparked objections in the press.[146] And the following year, in *Downes v. Bidwell* (famous as part of the *Insular Cases* and discussed in more detail below),[147] the Supreme Court held that the Thirteenth Amendment did indeed apply to those "places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words."[148]

Such debates were ethereal for those living and working on Navassa in the 1880s, where conditions were abysmal and workers had no real recourse against abuse. The Supreme Court would later note in *Jones* that the population "on the island consisted of 137 colored laborers of said company, and 11 white officers or superintendents, all residents of the United States."[149] The white superintendents were, for all intents and purposes, governing their fellow citizens. Indeed, the situation on Navassa was a striking illustration of Cohen's point that property law allows private individuals to exert sovereign authority over others.[150] It was this exercise of authority—and the concomitant lack of U.S. sovereignty—that would eventually trouble President Benjamin Harrison and help precipitate the end of operations on Navassa.[151]

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144. *See* Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185 (1900). Although the law-of-the-territories scholarship in the pages of the *Harvard Law Review* in the prior two years is undoubtedly more influential (and bemoaned), *see infra* note 204 and sources cited therein, the *Yale Law Journal* contributed its share of lamentable articles to the debate as well. *See, e.g.*, Talcott H. Russell, *Results of Expansion*, 9 YALE L.J. 239, 244 (1900) ("To apply the jury system and the ordinary methods of administering law, and popular institutions, to nations like the Tagals and Negritos [both Philippine ethnic groups] is utterly impossible. If we are to *own* these countries, we must *own* them as masters and the natives must be subjects simply and not citizens." (emphasis added)). The author seems to be the son of Skull and Bones founder William Huntington Russell and a descendant of Noadiah Russell, an original founder and trustee of Yale College.

145. Shipman, *supra* note 144, at 190-91.

146. Skaggs notes that the editors of the *New York Sun* objected strenuously, pointing to the guano islands as places "subject to our jurisdiction when the Thirteenth Amendment was adopted, and under the specific provision of that amendment neither slavery nor involuntary servitude, except as a punishment for crime, could Constitutionally exist in them." SKAGGS, *supra* note 47, at 197 (quoting *The Lesson of the Humble Guano Islands*, N.Y. SUN, Nov. 8, 1900, at 6).

147. *See infra* notes 204-226 and accompanying text.

148. 182 U.S. 244, 336-37 (1901) (White, J., concurring).

149. Jones v. United States, 137 U.S. 202, 206 (1890) (quoting an indictment).

150. *See infra* notes 198-200 and accompanying text.

151. *See infra* notes 165-170 and accompanying text.

The flashpoint seems to have come on the morning of September 14, 1889.[152] Charles Wesley Roby, the island's superintendent of mines, cursed and threatened a worker named Edmund Francis, who fought back with a cutting bar, knocking Roby unconscious.[153] Roby was taken for treatment, but the disturbance grew, and soon more than 100 laborers had gathered outside the gate of a superintendent's house.[154] Throughout the day, shouts and rock-throwing gave way to exchanges of gunfire. Some of the white superintendents were killed, and a group of Black workers were charged with murder.[155]

Through the Brotherhood of Liberty, an organization aimed at ameliorating racial discrimination, community members raised funds to mount a defense, hiring Joseph Davis and Everett Waring, two of the first Black men admitted to practice in Baltimore, as their lawyers.[156] They argued, among other things, that the defendants were not subject to suit because Navassa, having never legally been acquired, was simply not part of the United States and thus not subject to its laws.[157]

The argument did not make it far with the Supreme Court. The Justices unanimously concluded that "the President, exercising the discretionary power conferred upon him by the Constitution and laws, was satisfied that the Island of Navassa was not within the jurisdiction of Hayti, or of any foreign government."[158] The recognition of de facto sovereignty was, the Justices held, a political question beyond the ability of courts to resolve:[159]

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152. SKAGGS, *supra* note 47, at 178-90 (summarizing testimony in the five separate trials carried out in 1889 and 1890).

153. *Id.* at 178-79.

154. *Id.* at 179.

155. *See* Dan Fesperman, *A Man's Claim to Guano Knee-Deep in Bureaucracy: Island Fortune in Fertilizer Has Baltimore Connection*, BALT. SUN (July 19, 1998), https://www.baltimoresun.com/news/bs-xpm-1998-07-19-1998200032-story.html [https://perma.cc/72PR-AR3K] (describing how Roby and the defendants were portrayed in the press).

156. For detail on the lawyers involved and the context, see David S. Bogen, *The Forgotten Era*, 19 MD. BAR J. 10, 10-11 (1986); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, at 144-45 (1993); and Bruce Thompson, The Civil Rights Vanguard: The NAACP and the Black Community in Baltimore, 1931-1942, at 28 (1996) (Ph.D. dissertation, University of Maryland) (ProQuest).

157. SKAGGS, *supra* note 47, at 186.

158. Jones v. United States, 137 U.S. 202, 223 (1890).

159. *See* Anthony J. Colangelo, "De Facto *Sovereignty*": Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623, 648 (2009) (calling *Jones* "[t]he first opinion specifically to state that de facto sovereignty is a political question"). As Christina Duffy Ponsa-Kraus notes, *Jones* "suggested that the United States had extended 'sovereignty' over Navassa (when it deferred to the political branches' determination of 'who is the sovereign, de jure or de facto, of a territory')." Burnett [Ponsa-Kraus], *supra* note 49, at 793.

> [I]f the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.[160]

This meant that courts could not deny the NPC's claim to Navassa under the Guano Islands Act and, thus, that the defendants were subject to prosecution in U.S. courts.[161] For our purposes, though, the key sentiment expressed by the Court was that the islands acquired under the Act were "in the possession of the United States."[162] That distinction is traceable to the Guano Islands Act and would later become central to the *Insular Cases*, as we explore in more detail below.[163]

And yet the Supreme Court's treatment of Navassa as a possession also left the door open for potential remedies. For ill and potentially for good, Congress can do things vis-à-vis territories (possessions) that it cannot do vis- à-vis states (sovereign territory). Consider the following from Felix Frankfurter, who was working on Territorial Affairs in the War Department in 1914:

> The form of the relationships between the United States and unincorporated territory is solely a problem of statesmanship. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship[s] so as to combine the advantages of

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160. *Jones*, 137 U.S. at 221; *see also id.* at 212 ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."); Colangelo, *supra* note 159, at 649 ("*Jones* therefore stands for the rule that sovereignty determinations, whether 'de jure or de facto,' are exclusively political and that the courts take notice of those determinations as made by the political branches.").

For a critique of the opinion, see Dickinson, *supra* note 128, at 456-59, which argues that "the only question which could be denominated 'political'" was the President's denial of Haiti's claim, and that "there was nothing properly called 'political'" in "the constitutionality of the statute" or "whether Navassa had been considered as appertaining to the United States pursuant to the legislation of Congress."

161. *Jones*, 137 U.S. at 223-24.

162. *Id.* at 204.

163. *See infra* notes 204-226 and accompanying text.

> local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open.[164]

Frankfurter was writing of the inhabited territories, but the point about "statesmanship" applies even more clearly to uninhabited territories like Navassa. Congress could not, for example, return Texas to Mexico. But it could return Navassa to Haiti. We will further examine such possibilities in Part III. But first, we return to Navassa's story.

D. The End of Commerce on Navassa: The Flag Flies Alone

Although *Jones* represented a loss for Waring and his legal team, the case did contribute to the end of the NPC's misrule in Navassa. Coverage of the case helped bring attention to the appalling working conditions on the island, inspiring President Harrison to write to the Secretary of the Navy, "In view of the evidence developed in the trial of the Navas[s]a . . . rioters, I am inclined to believe that there is something worthy of investigation . . . . I do not intend that any system of slavery shall be maintained on that island."[165] Effectively—and in keeping with our focus here—Harrison was troubled that the NPC, having only private-property interests, was operating as if Navassa were beyond the sovereignty of the United States (which, ironically, would have vindicated the defendants in *Jones*). He expressed concern that "the rioters were 'American citizens' who had been working 'within American territory'" and yet outside of the protection of the U.S. government.[166] "It is inexcusable that American laborers should be left within our own jurisdiction without access to any Government officer or tribunal for their protection and the redress of their wrongs."[167]

President Harrison sent a delegation to investigate the situation, which confirmed that an American worker, "Fred Carter (a [B]lack man from Washington, D.C.)," had been denied passage home after his term of work was complete.[168] In an article on May 14, 1891, the *New York Times* reported "[s]laves under our

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164. José Trías Monge, *Injustice According to Law: The* Insular Cases *and Other Oddities*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 2, at 226, 235 (quoting Mora v. Torres, 113 F. Supp. 309, 319 (D.P.R. 1953)); *see also* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1876 (2016) (describing Puerto Rico's commonwealth status as a "prime example[]" of Congress's "broad latitude to develop innovative approaches to territorial governance").

165. SKAGGS, *supra* note 47, at 191.

166. IMMERWAHR, *supra* note 79, at 55; *see also id.* (noting that President Harrison "worried that the Navassa Phosphate Company had turned part of the United States into its own corporate fiefdom, governed not by law, but by corporate regulations").

167. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 391 (quoting President Harrison).

168. SKAGGS, *supra* note 47, at 191.

flag," drawing attention to Carter's situation and other labor problems on the island.[169] Partly in response, Harrison commuted the sentences of the *Jones* defendants from death to — of all things — hard labor for life.[170]

Soon enough, the NPC faced its own form of reckoning. The island was evacuated in 1898 during the Spanish-American War,[171] and the company soon ceased its operations.[172] Although Navassa still had its guano, the development of inorganic fertilizers and the discovery of phosphate deposits in the continental United States undermined the value of Navassa's supply.[173] A small crew of workers returned to the island, mostly to maintain it.[174] And, as Skaggs put it,

> When this last Navassa work crew reportedly reached the mainland about June 12, 1901, for all practical purposes the great guano rush in the United States ended. No island, rock, or key claimed under the Guano Act was subsequently worked by Americans, although several of them — rediscovered by the U.S. government — were later occupied and exploited for other purposes.[175]

That last point is an important and ongoing part of the story. Under the terms and rationale of the Guano Islands Act, the conclusion of mining operations

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169. *Slaves Under Our Flag: A Strike at the Navassa Phosphate Island*, N.Y. TIMES, May 14, 1891, at 9, *reprinted in* SKAGGS, *supra* note 47, at 194.

170. DENNIS PATRICK HALPIN, A BROTHERHOOD OF LIBERTY: BLACK RECONSTRUCTION AND ITS LEGACIES IN BALTIMORE, 1865-1920, at 88 (2019). Explaining the pardon, President Harrison emphasized the theme of sovereignty: "They were American citizens under contracts to perform labor upon specified terms within American territory removed from any opportunity to appeal to any court or public officer for redress of any injury or the enforcement of any civil right. Their employers were, in fact, their masters." *Id.*

171. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 392. Ironically, that war marked the territorial apex of U.S. empire. *See* BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 216 (2006) ("[T]he United States never encompassed as large an area as it did between March 1899 and May 1902.").

172. Jensen, *supra* note 49.

173. *Id.*

174. *See id.* (noting that the United States built and "manned" a lighthouse on Navassa). In March of that year, the wife of Navassa's superintendent wrote to the Department of State asking that a naval vessel be sent to rescue her husband and the island's remaining workers, who she feared were starving. The dispatched naval vessel — remarkably named the USS Mayflower — reported that the men were all right. SKAGGS, *supra* note 47, at 197.

175. SKAGGS, *supra* note 47, at 197.

meant that the islands could be deannexed.[176] And some guano islands did indeed slip away in such a fashion.[177] But for others, new reasons to assert control emerged—not to protect private-property interests, but essentially to exercise the sovereign authority that Seward had disclaimed. For example, many of the islands proved valuable as government airstrips, especially in the vast Pacific.[178]

Navassa was put to use in a different way. As the D.C. Circuit would observe nearly a century later,[179] "[i]n 1913, Congress sanctioned the termination of guano mining interests on Navassa Island by appropriating $125,000 for the construction of a lighthouse."[180] Especially in anticipation of the Panama Canal's opening in 1914, there was some concern that Navassa could prove to be a dangerous obstacle to shipping.[181] Haiti again objected, calling the project an "invasion of the sovereign rights of the Republic of Haiti on the island."[182] A 1932 State Department report provides a remarkable account of Haiti's complaint and the United States's dismissive response:

> When the Haitian Government learned that the Department of Commerce was erecting a light on Navassa, it entered a formal protest . . . . The Secretary of State replied that the present administration of

176. 48 U.S.C. § 1419 (2018) (specifically noting the power of the United States to deannex islands once the guano had been removed from them).

177. *See* Davies, *supra* note 140 ("The United States still does control and own—has sovereignty over some of those guano islands. Some of them, interestingly, it sort of forgets about. Once the guano is scraped clean, it allows Britain and France to gain control over them." (quoting Daniel Immerwahr)).

178. *Unoccupied Territories: The Outlying Islands of America's Realm*, CTR. FOR LAND USE INTERPRETATION, https://clui.org/section/unoccupied-territories-outlying-islands-americas-realm-0 [https://perma.cc/W2T7-PQ2T] (describing runways on many of the islands acquired under the Act, including Midway Atoll, Baker Island, Johnson Atoll, and Howland Island). Amelia Earhart disappeared on her way to Howland Island. *See Howland Island: About the Refuge*, U.S. FISH & WILDLIFE SERV. (Feb. 18, 2014), https://www.fws.gov/refuge/Howland_Island/about.html [https://perma.cc/VDA9-HUUV].

179. Navassa's status is *still* disputed, as at least one industrious citizen continues to pursue a claim under the Guano Islands Act. For decades now, a California-based "treasure hunter," Bill Warren, has been claiming the island, which he says he purchased from a descendant of one of its final inhabitants. Charles, *supra* note 100. Warren also argues that "[n]othing in the Guano Act said you couldn't use it on an island that had been already mined," so he has filed the requisite "'affidavit of discovery, occupation, and possession' with the State Department." Jensen, *supra* note 49.

180. Warren v. United States, 234 F.3d 1331, 1336 (D.C. Cir. 2000).

181. Lawrence, *supra* note 115 ("Anticipating substantially increased maritime traffic after the Panama Canal opening in 1914, some naval authorities feared that in stormy weather Navassa would become a dangerous hazard to navigation. In 1913 Congress authorized construction of a lighthouse on the island.").

182. SKAGGS, *supra* note 47, at 201.

> Haiti had never been formally recognized by the United States, so that it was not necessary for the latter to take official notice of the protest as requested.[183]

It bears reiterating that this dismissal came more than a half century after Haiti had been officially recognized by the United States.

Three years later, President Woodrow Wilson declared that the United States would only use the island for a lighthouse and prohibited private claims to occupy the island for any other purpose.[184] Furthermore, he declared that "Navassa is now under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other Government."[185] As we describe below, the "now" in that sentence is significant—the State Department itself had long disclaimed U.S. sovereignty over Navassa.[186] But "[s]ince the date of the proclamation by President Wilson the Department of State has uniformly declared that Navassa Island forms a part of the territory of the United States."[187]

President Wilson's stance on Navassa is noteworthy in light of his advocacy for self-determination—the power of "peoples" to decide their own national affiliation.[188] Despite professing support for self-determination and sympathy for colonized peoples, Wilson showed neither in his dealing with Haiti. In 1915, he sent the U.S. Marines to take over the island, removing large amounts of currency for "safekeeping" and ensuring the election of a pro-U.S. (but otherwise unpopular) president.[189] It was also under Wilson that the United States purchased the U.S. Virgin Islands from Denmark in 1917[190]—the last direct, outright

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183. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 401-02 (citing Letter from Solon Ménos, Haitian Minister to U.S., to Robert Lansing, Sec'y of State (July 5, 1915) (811.822.8)).

184. SKAGGS, *supra* note 47, at 201.

185. *Id.* at 201.

186. *See infra* notes 230-237 and accompanying text.

187. Guano Islands, 1 HACKWORTH DIGEST, ch. IV, § 77, at 514.

188. *See* Allen Lynch, *Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration*, 28 REV. INT'L STUD. 419, 419-22 (2002).

189. Off. of the Historian, *supra* note 125 ("As a result of increased instability in Haiti in the years before 1915, the United States heightened its activity to deter foreign influence . . . . In 1915, Haitian President Jean Vilbrun Guillaume Sam was assassinated and the situation in Haiti quickly became unstable. In response, President Wilson sent the U.S. Marines to Haiti to prevent anarchy.").

190. The United States purchased the Danish West Indies from Denmark, in the process ceding U.S. claims to portions of Greenland. *See* Convention Between the United States and Denmark for Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706.

sale of sovereignty in world history[191]—and, more important for our story, another territory whose predominantly darker-skinned inhabitants did not then, and do not today, have rights equal to those on the mainland.[192]

The Navy established a radio station on Navassa after World War I.[193] The lighthouse was automated in 1929, and, during World War II, the island became the site of both a reconnaissance unit and a rescue launch designed to defend against German submarines.[194] Today, even the lighthouse is defunct, and the island is administered as a wildlife refuge controlled by the U.S. Fish and Wildlife Service.[195]

As the Guano Islands Act demonstrates, sovereignty has often followed property claims. Might property claims also help unwind sovereignty? To understand if, why, and how, we must consider in greater depth the relationship between the two concepts—a topic of considerable interest to contemporaneous scholars, though their contributions have not been connected to the law of the territories.

II. WHY NAVASSA MATTERS: RECENTERING SOVEREIGNTY AND PROPERTY

In 1927, right between when the Supreme Court handed down the last of the *Insular Cases*[196] and when Congress passed the Philippines Independence Act (which put in motion the release of the United States's largest colony),[197] Morris Cohen wrote his classic *Property and Sovereignty*.[198] It opens with the sly observation, "Property and sovereignty, as every student knows, belong to entirely

191. S*ee If States Traded Territory: A Country Market*, ECONOMIST: THE WORLD IF (May 16, 2016, 6:46 PM), http://worldif.economist.com/article/12138/country-market [https://perma.cc/S28X-LPMD] (identifying this as "the last time a country has directly sold control over territory to another"). Interestingly, the first attempt to purchase the islands was by none other than William Seward in 1867. THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 361-63 (1958) (noting "Seward's attempt to buy the Danish West Indies (Virgin Islands), which boasted an excellent naval-base harbor on St. Thomas").

192. As with Puerto Rico, residents of the U.S. Virgin Islands are considered citizens, but cannot vote in federal elections. *See* Goodwin v. Fawkes, 67 V.I. 104, 109 (2016).

193. Lawrence, *supra* note 115.

194. *Id.*

195. *Id.*

196. *See* Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914).

197. Philippine Independence Act, Pub. L. No. 72-311, Ch. 11, 47 Stat. 761 (1933), *amended by* Philippine Independence Act, Pub. L. No. 73- 127, Ch. 84, 48 Stat. 456 (1934).

198. Cohen, *supra* note 23.

different branches of the law"[199]—one dealing with private law and the other public law. Cohen proceeded to demolish that distinction, demonstrating "the actual fact that dominion over things is also imperium over our fellow human beings."[200]

Cohen's essay remains a touchstone in legal theory[201]—the "foundational text" for analyzing the relationship between property and sovereignty.[202] But unlike the public-law scholarship that preceded and helped shape the *Insular Cases*,[203] the insights of private law and theory have not been mined in scholarship on the law of the territories.

Drawing on the story of Navassa laid out above, Section II.A shows that the relationship between property and sovereignty was central to the treatment of the territories from the passage of the Guano Islands Act all the way through the *Insular Cases* and, crucially, the evolving views of the State Department's Office of the Legal Adviser. The line between the concepts was not and is not bright, but it is nonetheless immensely consequential. Supreme Court Justices and State Department lawyers treated it as meaningful, and toggled between the two frames in ways that served the interest of the mainland United States.

In Section II.B, we turn to the general—and contemporaneous—shift in international law from thinking about territory as property to treating it as an immutable part of the sovereign. This broad shift brought with it some desirable legal rules, for example by requiring colonial powers to take on the burdens as well as the benefits of governance and ownership—what the United States had tried to avoid with the territories.

And yet other elements of that shift threatened to freeze existing colonial structures in place, such as the principles of territorial sovereignty and *uti possedi-tis*, which favor governmental maintenance of existing boundaries and thus make it harder to unwind the status of the U.S. territories and other lingering colonies throughout the world. As Part III argues, recovering some aspects of the property conception can illuminate arguments and concrete remedies that might not be visible or available under the sovereignty framework.

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199. *Id.* at 8.

200. *Id.* at 13. *See also* H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 183 (1982) (describing a holder of property rights as a "small-scale sovereign").

201. For a recent discussion, see *supra* note 23 and sources cited therein.

202. Thomas W. Merrill, *Property and Sovereignty, Information and Audience*, 18 THEORETICAL INQUIRIES L. 417, 419 (2017).

203. *See* sources cited *infra* note 204.

A. Navassa and the Law of the Territories: How the Insular Cases *and the State Department Manipulated the Categories of Sovereignty and Property*

Discussions of the law of the territories tend to focus on the *Insular Cases*. Those decisions were both influenced by scholarship—principally five articles published in the *Harvard Law Review* in 1898 and 1899 by luminaries like C.C. Langdell, Abbot Lawrence Lowell, and James Bradley Thayer[204]—and have been subject to scholarly examination ever since, especially in recent years.

In the *Insular Cases*, the Supreme Court drew a line between incorporated territories, which are "part of" the United States, and unincorporated territories, which "belong[] to" it.[205] "Incorporated" territories are on their way to statehood and hence subject to the restrictions of the Constitution; "unincorporated" territories are not.[206] The latter category includes not only Puerto Rico, but the Northern Mariana Islands, Guam, the U.S. Virgin Islands, American Samoa, and the guano islands.[207] As Chief Justice Fuller put it in his dissent in *Downes v. Bidwell*, the most famous of the *Insular Cases*, "the contention [of the majority opinion] seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[208] And Sanford Levinson has argued that the *Insular Cases*,

> should be placed not only in the context of American expansionism, but also within the sadly rich history of American racism or, perhaps more to

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204. *See, e.g.*, Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899); *see also Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1617 (2017) (noting the influence of these articles and calling it a "time this journal might rather forget"); Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105, 105-06 (2018) (acknowledging the influence of the *Harvard Law Review* articles, and positing that "Lowell was only one member of a broader set of influential nonjudicial actors").

205. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

206. Edward C. Carter, III, *The Extra-Territorial Reach of the Privilege Against Self Incrimination or Does the Privilege "Follow the Flag?"*, 25 S. ILL. U. L.J. 313, 320 (2001).

207. The uninhabited atoll of Palmyra "enjoys the curious distinction of being the only American jurisdiction outside the fifty states and the District of Columbia to which the U.S. Constitution applies 'in its entirety.' This is because Palmyra possess a unique legal status within the framework of U.S. law: it is the only 'incorporated' territory of the United States." Burnett [Ponsa-Kraus], *Edges of Empire*, *supra* note 49, at 779.

208. *Downes*, 182 U.S. at 372 (Fuller, C.J., dissenting).

> the point, the history of American "ascriptivism," the view that to be a "true American," one had to share certain racial, religious, or ethnic characteristics.[209]

But it was years earlier in *United States v. Jones* that the Supreme Court upheld the validity of the Guano Islands Act and declared that the question of de facto sovereignty was a matter of presidential concern that was not for the courts to second guess.[210] That holding, as described above, laid the foundation for American empire. And indeed, *Downes* would later cite *Jones* as evidence of the country's power to acquire overseas territory.[211] *Jones* thus deserves a greater share of the attention recently given to the *Insular Cases*, not only because it provided a legal basis for the acquisition of overseas territories, but also because it illuminates how frames of property and sovereignty can be used and abused.

Jones and the Guano Islands Act on which it was based were the channels by which the conceptual ambiguity between sovereignty and property found its way into the *Insular Cases* and was used to assert U.S. control without the accompanying obligations of governance. Consider the concept of "appurtenance," which continues to haunt the law of the territories. As noted above, that legal concept—seemingly borrowed from the common law of property[212]—was written into the Guano Islands Act, rather than (as earlier drafts of the Act would have it) "sovereignty."[213] The Supreme Court relied on the concept in *Jones* and then again, a decade later, in the *Insular Cases*.[214]

The blurring and manipulation of property and sovereignty frameworks allowed the United States to project sovereign authority abroad, but property-like authority domestically. For domestic purposes, the fact that the United States owned the territories meant that the people of those territories had little political control over their fates. For external purposes, the fact that the United States simultaneously also had sovereignty meant that no foreign sovereign could merge with the territory and grant its people greater rights.

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209. Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENTARY 241, 257 (2000).

210. *See supra* Section I.D.

211. *Downes*, 182 U.S. at 304-06 (White, J., concurring) (incorporating *Jones* into a broader history of the United States's territorial acquisitions and the legal justifications for them).

212. *Appurtenance*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining appurtenance as "[s]omething that belongs or is attached to something else; esp., something that is part of something else that is more important," and noting that the term "in former times at least was generally employed in deeds and leases") (quoting 1 H.C. UNDERHILL, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 291, at 442-43 (1909)).

213. *See supra* notes 83-84 and accompanying text.

214. *Downes*, 182 U.S. at 306-07.

In the case of Navassa, this meant denying Haiti's claim to sovereignty without actually making a competing claim of U.S. sovereignty. It is a state of affairs well-captured by the *Insular Cases*' phrase "foreign . . . in a domestic sense"[215] — not fully a part of the United States and yet also effectively "domestic in a foreign sense," since the United States would not permit other nations to claim (or for that matter offer) sovereignty over the island.[216] After all, from the perspective of an imperial power, maintaining an exclusive option to exercise sovereignty is even more valuable than actually doing so, given the concomitant obligations. If it were truly "belonging to," then other would-be buyers could make bids, as with other forms of property. In her legal history of the relationship between the American-claimed guano islands and the United States, Christina Duffy Ponsa-Kraus emphasizes this point: "[T]he United States acquired territory and projected American power, to be sure, but all the while U.S. officials insisted on disclaiming sovereignty, and on denying that such places had become part of the 'territorial domain' of the United States."[217]

Of course, the story is also one of simple racism, both within the courts and in the executive branch — a manifestation of the "white man's burden."[218] Presi-

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215. *Id.* at 341.

216. *See* Erman, *supra* note 20, at 1223 (noting "the novel status that these [guano] islands were to occupy: within U.S. control vis-á-vis other nations, yet untouched by such domestic consequences of annexation as the extension of constitutional rights"). It is worth noting that in 1870, President Ulysses S. Grant and his Secretary of State, Hamilton Fish, tweaked and expanded the Monroe Doctrine, such that "hereafter no territory on this continent shall be regarded as subject to transfer to a European power." GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 259 (2008) (internal quotations omitted).

217. Burnett [Ponsa-Kraus], *supra* note 49, at 781.

218. "White Man's Burden" is Rudyard Kipling's poem about the Philippine-American War, which exhorts the United States to take colonial control of the Philippines, while warning about the pitfalls of imperial expansion. *See* Int'l Herald Trib., *1899: Kipling's Plea: In Our Pages: 100, 75, and 50 Years Ago*, N.Y. TIMES: OPINION (Feb. 4, 1999), https://www.nytimes.com/1999/02/04/opinion/IHT-1899kiplings-plea-in-our-pages100-75-and-50-years-ago.html [https://perma.cc/SM3G-5FTN] ("An extraordinary sensation has been created by Mr. Rudyard Kipling's new poem, 'The White Man's Burden,' just published in a New York magazine. It is regarded as the strongest argument yet published in favor of expansion."). Senator "Pitchfork" Benjamin R. Tillman infamously read a portion of the poem in Congress in the course of arguing that the United States should *not* take over this land of uncivilized peoples. Tillman said, among other things:

> Those peoples are not suited to our institutions. They are not ready for liberty as we understand it. They do not want it. Why are we bent on forcing upon them a civilization not suited to them and which only means in their view degradation and a loss of self-respect, which is worse than the loss of life itself?

32 CONG. REC. 1,532 (1899) (statement of Sen. Benjamin R. Tillman).

dent Theodore Roosevelt praised "the expansion of the peoples of white, or European, blood" into the lands of "mere savages."[219] William McKinley's 1900 platform justified American expansion as aimed at conferring the "blessings of liberty and civilization upon all the rescued peoples."[220] As for the Supreme Court—the same basic lineup of Justices that decided *Plessy v. Ferguson*[221]—Puerto Rico and the other new territories were "inhabited by alien races," such that governing them "according to Anglo-Saxon principles, may for a time be impossible."[222]

Because the guano islands—including Navassa—were largely uninhabited, the virulent racism that animated so much of the United States's imperial project was not prominent in discussions of the islands' status, except with regard to competing claims from countries like Haiti.[223] But when opponents of imperial expansion quailed at the prospect of sharing citizenship with the people of, for example, the Philippines, the solution was to treat the islands partially as property. Casting inhabited territories as possessions denied their residents the same rights and status as those on the mainland—precisely because they were seen as less civilized.[224] As the Justices said in an earlier case: "The people of the United

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219. President Theodore Roosevelt, Speech, *Expansion of the White Races* (Jan. 18, 1909).

220. *Republican Party Platform of 1900*, AM. PRESIDENCY PROJECT (June 19, 1900), https://www.presidency.ucsb.edu/documents/republican-party-platform-1900 [https://perma.cc/24YU-ZEC5]; *see also* Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION, *supra* note 2, at 1, 4 ("The election of 1900 largely turned upon the so-called issue of Imperialism." (quoting Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823 (1926))); José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 395 (1978) ("The expansion of American power and influence precipitated a great national debate on imperialism, a debate that moved the nation for several years before and after the Spanish-American war and dominated the presidential election campaign of 1900.").

221. 163 U.S. 537 (1896).

222. Downes v. Bidwell, 182 U.S. 244, 287 (1901); *see also* Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017, 5:45 AM), https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html [https://perma.cc/XD72-EFAF] (arguing that the *Insular Cases* were "built on the same racist worldview" as *Plessy*).

223. *See supra* notes 114-126 and accompanying text.

224. *See, e.g.*, Russell, *supra* note 144, at 239 (referring to the inhabitants of newly acquired territories as "at such a low stage of human development as to be beyond the pale of constitutional guarantees. Though belonging in some sense to the United States, they cannot be for a moment considered as citizens of the United States").

States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants."[225]

Combining this with the holding of *Jones*—that the determination of sovereignty is one for the political branches—gave enormous power to nonjudicial actors to figure out both whether a territory was subject to U.S. power and how that power would be exercised. For the guano islands, the contemporary foundational analysis would come in the form of an exhaustive State Department report that was, in a sense, the executive branch's analogue to the *Insular Cases*.[226]

In 1931, the U.S. Department of State Office of the Legal Adviser was established, with Green Hackworth as the first Legal Adviser.[227] The very next year, the Office released a nearly 1,000-page report titled *Sovereignty of Islands Claimed Under the Guano Act and of the Northwestern Hawaiian Islands, Midway and Wake*.[228] The report is remarkable for many reasons, not least its clear-eyed accounting of the United States's fundamentally ambiguous claims of sovereignty over Navassa and other guano islands. It is also a damning indictment of the guano islands enterprise in general. Indeed, the report calls for the Guano Islands Act to be repealed, "since the demand for guano has largely disappeared, and since the provisions of the Act have created opportunities for fraud and dishonest speculation with which the State Department has been wholly unable to cope."[229]

For our purposes, the State Department's self-accounting illustrates in practical terms the conceptual malleability and overlap that Cohen and other legal theorists identified between the concepts of property and sovereignty. In the words of the report, "before 1925 no unequivocal assertion of complete sovereignty was made" to any guano island. To the contrary, "there were a number of denials of sovereignty."[230] The report here points to the Department's own prior representations, including an 1873 statement to the Postmaster General that the United States "possesses no sovereign or territorial rights over the islands," a 1904 statement to the Commerce and Labor Department that U.S. jurisdiction

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225. Murphy v. Ramsey, 114 U.S. 15, 44 (1885).

226. *Cf.* Erman, *supra* note 204, at 111-13 (emphasizing the importance of executive-branch actors in shaping the principles laid out in the *Insular Cases*).

227. The *Digest of International Law*—familiar to scholars researching historical questions in international law—is commonly known as "Hackworth."

228. The relevant section is titled "The Sovereignty of Guano Islands in the Caribbean Sea". Its introduction notes, optimistically, "It is to be hoped that the information here set forth will enable the United States to determine the islands in the Caribbean Sea over which it now claims or may legally claim, sovereignty, and the bases for such claims." OFF. OF THE LEGAL ADVISER, *supra* note 103, at 374.

229. *Id.* at 149 ("The Sovereignty of the Islands of Roucador, Quito Seno, Serrana, and Seranilla.").

230. *Id.* at 325-26 ("The Swan Islands Case.").

extended "solely for the purpose of extracting guano," and a 1917 statement to the Department of the Navy that "this Government has taken no steps to extend its own sovereignty" over the guano islands.[231]

The turning point seems to have come in a dispute with Honduras regarding the Swan Islands, which were of interest to the U.S. Navy. In 1924, Secretary of State and future Chief Justice Hughes asked Attorney General John G. Sargent to investigate the matter. A 1918 opinion of the Acting Attorney General had concluded that the Swans had never been acquired under the Guano Islands Act. But Sargent—pointing to an 1863 proclamation by Secretary Seward—concluded to the contrary "that the sovereignty of the United States attached to said islands as of that date."[232] Prior to Sargent's statement, the State Department had "a wavering uncertainty—an uncertainty which characterized the attitude of this government with respect to all guano islands."[233] But "[a]fter that opinion[,] sovereignty was claimed" in the Swans and elsewhere.[234]

The story of Navassa diverges a bit from those of the other guano islands, though it, too, begins with outright denials of sovereignty. In 1905, W.S. Carter wrote to the State Department asking if he might purchase the island from the United States, to which the Department replied unequivocally, "this Government possesses no territorial sovereignty over the Island of Navassa."[235] Instead, the Department employed the now-familiar "appurtenance" terminology. Replying to a 1906 letter asking whether Navassa was still under U.S. jurisdiction, the Department of State said, "Navassa Island has not been stricken from the list of guano islands appertaining to the United States under these Acts."[236]

By this time, the island was no longer being mined for guano, and plans were being developed to build a lighthouse there. Answering an inquiry about the latter in 1907, the State Department was even more equivocal, denying even that the island "belong[ed]" to the United States, while maintaining that it "is in a position to assert full sovereignty":

> [I]t does not appear that the United States has surrendered its jurisdiction over Navassa Island under the guano acts, and . . . so far as is known to the Department, neither Haiti nor any other power has attempted to

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231. *Id.* at 326.

232. SKAGGS, *supra* note 47, at 205-06 (quoting Sovereignty Over Swan Islands, 34 Op. Att'y Gen. 507, 515 (1925)).

233. *Id.* at 206 (quoting OFF. OF THE LEGAL ADVISER, *supra* note 103, at 325).

234. *Id.*

235. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 396 ("The Sovereignty of the Guano Islands in the Carribbean Sea.").

236. Guano Islands, 1 HACKWORTH DIG. INT'L L., ch. IV, § 77, at 512.

> assert sovereignty over the island because of any supposed abandonment thereof by the United States.
>
> However, assuming that this Government still has jurisdiction over Navassa Island under the guano acts, it would seem that the Government itself has interpreted such jurisdiction to be so limited that it cannot be claimed that this or other guano islands "belong" to the United States, within the meaning of section 4660 R.S., or that the United States exercises "jurisdiction" over them within the meaning of R.S. 4661; so that there is no present authority to erect a light-house thereon by virtue of R.S. 4653-4680 defining the authority of the Light-House Board and providing for the erection of light-houses under its direction.
>
> Nevertheless, it would appear that internationally speaking this Government is in a position to assert full sovereignty over Navassa Island should such action be deemed desirable, and that no other government could reasonably object to such assertion.[237]

This explanation neatly encapsulates the netherworld that continues to ensnare Navassa and other territories. One important and often overlooked aspect of this limbo is a denial of opportunities to affiliate with other nations.[238] In effect, the territories have neither the right of voice (in determining how they are governed by the current sovereign) nor the right to exit (in determining whether they shall stay in the current relationship, to the extent their welfare is being ignored).[239] In economic terms, they are denied the option value of being able to change their current status.

What eventually broke the logjam for Navassa was domestic pressure—the United States itself needed a clearer answer as to whether the island "belong[ed] to" or was "part of" the country. In the State Department's telling, "[e]vidently the Commerce Department grew tired of this procedure"[240] and, in 1913, Congress appropriated $125,000 for the construction of a lighthouse on Navassa.[241]

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237. *Id.*

238. There is an analogy here to the legal rule forbidding American Indians from selling Native land to anyone but the federal government, Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1105 & n.167 (2000), or from affiliating with other nations. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1042-43 (2014).

239. Guy-Uriel Charles & Luis Fuentes Rohwer, *No Voice, No Exit, but Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. 133, 136-37 (2021).

240. OFF. OF THE LEGAL ADVISER, *supra* note 103, at 399.

241. Act of Oct. 22, 1913, ch. 32, 38 Stat. 224.

As noted above, President Wilson's 1916 proclamation in connection with that lighthouse is generally regarded as resolving the ambiguity—from then on, Navassa was considered subject to U.S. sovereignty.[242]

Still, ambiguity persisted. In a 1927 letter, the Department referred to Navassa as one of the "possessions of the United States, outside the territorial boundaries of the United States."[243] And in a 1933 article, Roy F. Nichols—citing a 1932 correspondence from Acting Secretary of State W.R. Castle—concluded that the Act,

> as interpreted by the State Department was not intended to invest the United States with sovereignty over any of these guano islands and the proclamation simply stated that the Secretary of State recognized the fact that the island was being occupied in the name of the United States. Presumably the legal status of the island was that of an "appurtenance" rather than a "possession."[244]

In short, the conceptual confusions and paradoxes at the heart of the *Insular Cases*—the distinction between incorporated territories ("part of") and unincorporated territories ("belong to")—also appear in the records of the political actors that *Jones* charged with resolving them. The use and abuse of property and sovereignty frames by courts and State Department lawyers demonstrates precisely why it is important to be clear about the consequences that flow from each—the distinction between property and sovereignty is fuzzy, but it matters. Cohen's goal was not to steer attention away from the distinction between property and sovereignty, but to show how they—like private and public law more broadly[245]— are deeply imbricated. The challenge is to identify which tools from which framework are up to the relevant tasks.

B. From Property to Sovereignty in International Law (and Back Again?)

While courts and the State Department were fumbling with the concepts of property and sovereignty in the context of the U.S. territories, parallel developments were afoot in international legal thought. Broadly speaking, international law began in various ways to reject the treatment of territories and colonies as

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242. *See supra* notes 184-187 and accompanying text.

243. 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 514-15 (1940).

244. Nichols, *supra* note 12, at 508 (citing Letter from W.R. Castle, Acting Secretary of State, to Roy Nichols (Sept. 1, 1932)). The same letter from Castle is cited in HACKWORTH, *supra* note 243, at 515.

245. Koskenniemi, *supra* note 5, at 361-66; *see also* DESAUTELS-STEIN, *supra* note 3, at 29 (exploring the relationship between property and sovereignty).

property, instead requiring that imperial powers accept the responsibilities of sovereignty. This development both confirmed the importance of the distinction and also contributed, we suspect, to the modern tendency to avoid the language of private law when discussing territories and colonies.

By treating them as property, colonial powers wrung economic advantage out of their far-flung territories without ever accepting them (and, more significantly, their people) as "part of" the metropole, to borrow the language of the *Insular Cases*. As Martti Koskenniemi explains, "greed and the wish for exploitation without administrative and policy costs had led European countries to employ hypocritical techniques of annexation without sovereignty."[246] Doing so allowed imperial powers to expropriate value from the overseas territories without imposing obligations to care for the people there or, worse, have those people come over to the mainland and claim rights.[247]

Little wonder, then, that human-rights lawyers in the 1920s and 1930s rejected the notion of colonies as possessions, arguing that they should instead be treated as subject to the sovereignty of their colonizers.[248] Notably, private-law theorists operating in Cohen's wake have similarly argued that sovereignty carries with it a kind of good-governance requirement that property appears to lack. Arthur Ripstein, for example, argues that

> The most important difference between [property and sovereignty] . . . is that sovereignty has an internal norm, which restricts the purposes for which it may be exercised, because the sovereign is supposed to rule on behalf of, and for the sake of the people; property, by

246. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 151 (2004).

247. *See, e.g.*, *id.* at 124-52 (describing the "protectorates" in Africa); Eric A. Posner, *The Limits of Limits*, NEW REPUBLIC (May 5, 2010), https://newrepublic.com/article/74824/the-limits-limits-0 [https://perma.cc/F94S-UC32] (describing U.S. relationships with Cuba and other territories); *see also* Bradley R. Simpson, *Self-Determination, Human Rights, and the End of Empire in the 1970s*, 4 HUMAN. 239, 251 (2013) (describing the conditions under which Australia gave independence to Nauru and Papua New Guinea); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1533-39 (2019) (describing the effects of colonial imperialism).

Sam Erman has argued that an analogous development in domestic law—the Reconstruction Constitution's expansion of citizenship and rights—paused U.S. annexation of territories for much of the late 1800s. *See* Sam Erman, *"The Constitutional Lion in the Path": The Reconstruction Constitution as a Restraint on Empire*, 91 S. CAL. L. REV. 1197, 1198-1203 (2018).

248. *See* KOSKENNIEMI, *supra* note 246, at 109-10; *see also* PRESS, *supra* note 56, at 249 (arguing that the "view of territory as a simple commodity . . . certainly looked incongruous with dominant themes of the nineteenth century: expanded civil freedoms, democratization, nationalism, parliamentarization").

> contrast, has no internal norm. The owner of property can use it for any purpose whatsoever, subject only to external restrictions.[249]

But "[f]ar from owning its subjects, in the exercise of official power a legitimate sovereign is required to act on behalf of its subjects."[250] Larissa Katz similarly argues that "all conceptions of public authority—certainly Fullerian, Kantian or Razian accounts—have a conception of public justification."[251] One sees similar arguments in the recent push for a fiduciary understanding of governance.[252]

But such sovereignty-based rules may have significant costs for colonized peoples and other sometimes-marginalized populations. One is the basic principle of territorial sovereignty which, with some very narrow potential exceptions,[253] gives nations the power to exclude all outsiders. When governments oppress their own people, or reject the needs of the tens of millions of refugees fleeing such oppression, invocations of territorial sovereignty are often treated as a trump card.[254]

Another principle that receives somewhat less attention is that of *uti possidetis juris*, which operates to keep sovereign borders in place, even when those borders

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249. Arthur Ripstein, *Property and Sovereignty: How to Tell the Difference*, 18 THEORETICAL INQUIRIES L. 243, 244 (2017).

250. *Id.* at 248; *see also id.* at 255 ("A sovereign does not own its subjects; although they are in its charge, it is not in charge of them.").

251. Larissa Katz, *Property's Sovereignty*, 18 THEORETICAL INQUIRIES L. 299, 323 (2017); *see also* RICHARD JOYCE, COMPETING SOVEREIGNTIES 4 (2013) (arguing that this justification obligation extends only to the community for which the sovereignty claims authority to speak); Anna Stilz, *Nations, States, and Territory*, 121 ETHICS 572, 578 (2011) (arguing that states "have territorial rights because their jurisdiction serves the interests of their subjects").

252. *See, e.g.*, EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 28-30 (2011); Laura S. Underkuffler, *Property, Sovereignty, and the Public Trust*, 18 THEORETICAL INQUIRIES L. 329, 343 (2017).

253. *See supra* notes 27-28 and sources cited therein (discussing self-determination and humanitarian intervention).

254. *See* Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53 (2016).

were drawn by colonial administrators with no real regard for underlying realities or popular preferences.[255] Whereas a property conception would more readily enable transfer and change, *uti possidetis* reflects a "bias . . . towards stability"[256] that is often defended on the basis that it will prevent violent conflict.[257]

And yet, international law has never been able to rid itself entirely of the principles and challenges of property and private law. This is partly because governments can and do still own property, some of it inhabited. In U.S. law, the constitutional basis for this proprietary power is the Property Clause[258]—the same enumerated authority that gives Congress control over Puerto Rico, Guam, Navassa, and the like. As we have explored in other work,[259] current international law and relations involve innumerable voluntary transfers of territory between states—including leases and other transactions that directly or indirectly

255. Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 20 (Dec. 22); *see generally* Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. INT'L AFFS. 11, 11 (2006) (identifying "territorial preservation of existing boundaries" as a central tenet of the international-political system); Malcolm Shaw, *The Heritage of States: The Principle of* Uti Possidetis *Today*, 67 BRIT. Y.B. INT'L L. 75, 76 (1996) ("The principle of *uti possidetis juris* developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new States at the moment of independence and converting existing lines into internationally recognized borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimating functions.").

256. R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 70 (1963) ("[T]he bias of the existing law is towards stability . . . . This is right, for the stability of territorial boundaries must always be the ultimate aim.").

257. Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554 ¶¶ 19, 26 (Dec. 22) (recognizing the conflict between *uti possidetis* and self-determination, and concluding that maintenance of the status quo was "the wisest course" so as to "prevent the . . . stability of new States being endangered by fratricidal struggles"). The wisdom of this course is debatable, given the prevalence of border conflicts. *See* JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS 102 (Derek Gregory & Linda McDowell eds., 1998); PAUL K. HUTH, STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT 69-103 (1996) (discussing the prevalence of territorial disputes).

258. U.S. CONST. art. IV, § 3, cl. 2.

259. *See generally* Blocher & Gulati, *A Market*, *supra* note 35 (exploring the voluntary exchange of sovereign territory).

limit or transfer sovereign control.[260] These are market transactions, with sovereignty itself the resource being transferred. They blur the lines between public and private law.[261]

C. *Decolonization and its Discontents*

The central tensions of sovereignty and property thus stubbornly persist, not only as a problem for legal theory but for practical, daily governance in the U.S. territories and beyond. There is no single solution to these challenges—to accounting for self-determination in a world of territorial sovereignty[262] or to theorizing nations' control over resources. We argue in the following Part that one potential path forward is to recover some aspects of the property framework. International law was right to reject the notion that colonies are property of their colonizers. But treating them as sovereign territory either of the colonizer—"part of" in the language of the *Insular Cases*—or as fully independent are not the only options, practically or conceptually. Instead, we can shift the entitlement: the

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260. Jochen von Bernstorff, *The Global 'Land-Grab', Sovereignty and Human Rights*, 2 ESIL REFLECTIONS, Oct. 18, 2013, at 1, 3, https://esil-sedi.eu/wp-content/uploads/2013/10/ESIL-Reflections-von-Bernstorff_0.pdf [https://perma.cc/DB2C-HYSH] (noting that when governments enter into large-scale land deals with foreign investors, "territorial sovereignty is affected for instance if large parts of the territory [are] leased to foreign governments for a period of 99 years, which is a standard clause in these land deals").

261. The privatization debate involves some of the same themes, though with sovereign control changing hands between public and private actors. *See generally* MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (exploring increasing privatization in spheres formerly dominated by governments); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003) (presenting various viewpoints and topics dealing with privatization); Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 UCLA L. REV. 1687 (2002) (addressing increasing privatization).

262. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 373 (2003) ("[T]he defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders." (quoting Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace,"* 6 ILSA J. INT'L & COMPAR. L. 455, 465 (2000))); *see* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 190 (1995) ("In the case of such transfers, the States involved are duty-bound to ascertain the wishes of the population concerned, by means of a referendum or plebiscite, or by any other appropriate means that ensure a free and genuine expression of will. It follows, of course, that any interstate agreement that is contrary to the will of the population concerned would fall foul of the principle of self-determination." (footnote omitted)); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 201-02 (1991); *cf.* Sergio Dellavalle, *The Dialectics of Sovereignty and Property*, 18 THEORETICAL INQUIRIES L. 269, 280 (2017) ("At the dawn of the nineteenth century, the crisis of the dynastic conception of sovereignty brought about a redefinition of the notion in order to include a more active participation of the governed. As a result, political sovereignty gave way to *popular* sovereignty.").

territories and colonies own their sovereignty, and they should be able to decide — as with other valuable legal rights — whether to keep or transfer that power of sovereign control.

Our goal in doing so is to approach decolonization as an ongoing process, one that is not only about legal rights and political status, but about entitlements and corrective justice. It is remarkable that "[i]n no more than two decades between the 1950s and 1970s, vast colonial empires that had taken centuries to assemble almost totally disappeared. All the colonial powers witnessed, and sometimes expedited and encouraged, the disintegration of their global realms."[263] But it would be a mistake, we think, to celebrate uncritically this disintegration — and even the transformation of colonies into independent countries — as if granting sovereignty and independence to former colonies were all that justice requires. There is good reason to think that, in many cases, the granting of independence was a boon to the colonizers — who wanted to shed their territories, having extracted what value they could[264] — and opposed by the colonized,[265] who had (and have) a wide range of practical reasons to prefer their current status.[266]

Political self-determination is a crucial part of this process, but it is only part. After all, in the alternate narrative of decolonization just described, the colonial powers used the tools of private law to acquire and extract value from their colonies, and then flipped to a public-law frame (political independence) when doing so was in their economic interests. The latter is a welcome development, to

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263. ALDRICH & CONNELL, *supra* note 25, at 113.

264. THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA: WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912, at 673 (1991) ("[A]n irreversible change had occurred in the world's attitude to colonies in the twenty-seven years since the end of the First World War. . . . Both the men of God and the men of business had begun to see that formal empire was counter-productive.").

265. *See* ALDRICH & CONNELL, *supra* note 25, at 246 ("Although it has been argued that, especially in the British case, precipitous decolonization was a result of 'every remaining dependency . . . impatiently demanding equal independence and receiving it in very short order', in fact, the converse was often true, and not only in the smallest colonies.").

266. *See Id.* at 164 ("In every contemporary territory, powerful reasons exist for choosing continued political ties with metropolitan powers; they range from concerns over security (from local civil or political unrest rather than external aggression), to dependence on transfer payments (in various forms) and access to migration opportunities."); GERT OOSTINDIE & INGE KLINKERS, DECOLONISING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE 217 (2003) ("As far as Westminster was concerned, all of the former British colonies had to go. The fact that at present a handful of Caribbean 'Overseas Territories' still come under the sovereignty of the United Kingdom should not, therefore, be attributed to the ardent wishes of Westminster, but rather to the stubbornness with which these islands have refused to accept independence.").

be sure—at least where it's preferred by the colonies themselves—but it effectively allows the colonial powers to benefit economically on both ends, while leaving unaddressed the harm of the initial taking and period of exploitation. A private-law-based vision of corrective justice, "with its emphasis on vindicating property entitlements and disgorging ill-gotten gains,"[267] adds another lens that makes other harms more visible and potentially subject to redress. As Adrienne Davis notes—considering the possibility of private law approaches to Black reparations—[a]lthough corrective justice is often criticized for its conservatism, that is, its concern with restoring initial entitlements, paradoxically, because of its emphasis on the economics of justice, corrective justice may be more susceptible to economic justice than other doctrinal discourses."[268]

In short, we do not suppose that the primary wrong of colonialism was the taking of property without justification, nor that compensation alone would make colonies whole. And we are attentive to the concern that thinking in terms of private law might be taken to distort or even trivialize the harms of colonialism—an argument sometimes made against private-law approaches to Black reparations.[269] But it is important to grapple with the role of private law not only in acquiring colonies, but in understanding the relevant entitlements, harms, and potential remedies. Navassa, being an unoccupied territory, makes those themes particularly legible, since there are no individual rights holders on the island. And, as we explore in the following Part, the private-law frame has broad implications even for inhabited territories.

III. FROM PROPERTY TO STATUS TO CONTRACT: PRIVATE-LAW PRINCIPLES IN THE LAW OF THE TERRITORIES

In the 1850s, as the Guano Islands Act was being conceptualized and enacted,[270] Henry Sumner Maine was delivering lectures at London's Inns of the

267. Davis, *supra* note 8, at 338.

268. *Id.*

269. *See, e.g.*, Davis, *supra* note 8, at 337 (noting the concern that employing "monetary compensatory principles . . . legitimates and normalizes economic relief for injuries inflicted, the flip side of a variant of commodification anxiety that can pervade reparations discourse"); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 656-57 (2003) (arguing that reliance on an unjust enrichment framing could undermine the push for reparations, which should be focused on distinct moral harms).

270. *See supra* Section II.A.

Court that would become the basis of his opus, *Ancient Law*.[271] That work is most famous for the dictum that "the movement of the progressive societies has hitherto been from status to contract."[272] To be sure, Maine was writing in a different context and about different legal developments;[273] our goal here is simply to focus on the potentially liberating power of the freedom to enter into one's preferred arrangements. Might that freedom be the underlying goal for the law of the territories, rather than any particular status? And what are the risks?[274]

Our goal is to analyze the concepts of sovereignty and property to show that the latter can help illuminate issues of incentive, transferability, unjust enrichment, and negotiation that the sovereignty framework obscures, to the distinct detriment of the world's lingering colonies. To make this concrete, we close with three possible ways in which conceptualizing sovereignty as property—and as owned by colonized people themselves—might facilitate the ongoing project of decolonization, including in the United States.

First, the property framework can better enable negotiated economic settlements for lingering colonies or other forms of contested sovereign territory.[275] As the stories of Navassa and countless other territories and colonies demonstrate, the current map of sovereign control represents no immutable facts about the world—sovereign control (largely demarcated by national borders) can and sometimes should change. Thinking about sovereignty as a potentially transferable entitlement—a kind of property—opens up possibilities for negotiation that

271. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (J.H. Morgan ed., J.M. Dent & Sons Ltd. 1917) (1861). For an explanation of the work's influence, see J.H. Morgan, *Introduction* to *id.* at vii, which argues that *Ancient Law*'s "epoch-making influence may not unfitly be compared to that exercised by Darwin's Origin of Species."

272. *Id.* at 101.

273. Maine was exploring the move from ancient law's focus on families—each member of which was subject to the absolute control of the head—to the "liberation" of individuals to assume and exert their own powers and responsibilities. Katharina Isabel Schmidt, *Henry Maine's "Modern Law": From Status to Contract and Back Again?*, 65 AM. J. COMPAR. L. 145, 146-52 (2017).

274. Indeed, Maine's own "account of primitive society would be used to justify the conscious retreat from freedom of contract and the defense of custom under the rubric of indirect rule" in the British colonies. KARUNA MANTENA, ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM 17 (2010).

275. Blocher & Gulati, *supra* note 35, at 815-19, 830-32 (describing other disputes over islands and how a property-like framework could help resolve them).

are disfavored under the sovereignty framework, with its commitment to stability and discomfort with commodification.[276]

In the particular case of Navassa, the United States might recognize that Haiti has, at the least, a plausible conflicting claim. To resolve that claim (to quiet title, in effect) the United States could pay restitution to the Haitian people. The payment could be in money — tens of billions of dollars, according to our back-of-the-envelope calculation.[277] But it could also take the form of visas and a stop to the ongoing deportations of those seeking refugee status.[278] The point is to get back to thinking in terms of exchanging valued resources or, for that matter, disgorging ill-gotten gains or remedying unjust enrichment.[279]

Some of the guano islands were divested in roughly this fashion — effectively returning to a basic model of negotiation and transfer. For example, the Swan Islands dispute, which inspired Attorney General Sargent to make his aggressive claim of sovereignty,[280] was eventually resolved at President Nixon's insistence in 1972 with an "accord whereby the United States would acknowledge Honduran sovereignty over the Swans without totally abandoning its property."[281] And that same year, the United States disclaimed sovereignty of three other islands, in effect legitimizing Colombia's claim to them, "provided that fishing privileges of American citizens about these places would not be restricted."[282]

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276. *See, e.g.*, Stacie E. Goddard, *Trump Just Said Buying Greenland Would Be a 'Large Real Estate Deal.' He's Making a Dangerous Mistake*, WASH. POST (Aug. 17, 2019), https://www.washingtonpost.com/politics/2019/08/17/why-denmark-wont-sell-off-greenland [https://perma.cc/ZB4R-9L4X] (describing the modern move away from the commodified understanding of sovereignty); E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher & Gulati*, 1 COLUM. HUM. RTS. L. REV. ONLINE 1 (2017), http://hrlr.law.columbia.edu/files/2018/07/ETendayiAchiumeTheFactofX-1.pdf [https://perma.cc/3W8N-ZEJW].

277. Blocher & Gulati, *supra* note 15 (conservatively estimating the restitutionary payments owed at between $10 and $260 billion).

278. Joe Parkin Daniels, '*Who Wouldn't Want Out?*' *Migrants Deported to Haiti Face Challenge of Survival*, GUARDIAN (Oct. 13, 2021, 6:30 PM, ET), https://www.theguardian.com/global-development/2021/oct/13/haiti-migrants-deported-survival [https://perma.cc/ZR8V-HRLH].

279. Again, there is a parallel to the debate over reparations. *See* Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84 B.U. L. REV. 1257, 1259 (2004) ("[T]he moral-expressive content of the claim in unjust enrichment gets the wrong of slavery exactly right."); Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1143 (2004) ("[L]aw's treatment of mundane claims for restitution for wrongful enrichment and of ordinary cases of legal transition incorporate important lessons that can, and indeed should inform the settlement of such difficult social issues as the current debate on Slavery reparations.").

280. *See supra* notes 232–234 and accompanying text.

281. SKAGGS, *supra* note 47, at 208.

282. *Id.* at 203.

A second possibility under the property framework would be for the international legal system to use the laws governing private enterprise in contexts where sovereign actors have either chosen the private-enterprise model or failed to live up to the justifications underlying the public-law model and the immunities it provides.

The evolution of the law on sovereign immunity in the United States illustrates this possibility. For much of U.S. history, foreign states were exempt from litigation in domestic courts as a matter of comity. This changed in the mid-twentieth century, with state-owned companies from the communist states engaging in private-market activities while simultaneously claiming sovereign immunity.[283] The result was that, starting in 1952 with the Tate Letter, the United States moved away from "absolute" immunity to "restrictive" immunity in those cases where the foreign state was behaving less like a sovereign and more like a private actor.[284] This view was then put into statute in the United States (and later in the United Kingdom) with the passage of the Foreign Sovereign Immunities Act of 1976.[285] Foreign sovereigns were entitled to immunity, but not if they chose to act as private actors.[286] In the latter situation, the rules governing private actors — including domestic court oversight and legal liability — apply.

How might a private-law property model apply to the controversy over Navassa? Imagine a domestic court concluding that since the United States itself treated the guano islands as property, the usual rules of property law should apply. De facto sovereignty might be a political question, but whether a person or entity has sufficiently asserted control over a piece of unclaimed property is bread-and-butter common law for courts to decide.[287] Haiti would presumably emphasize continuity and continguity (essentially that the island falls within the

283. *See, e.g.*, Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COM. REGUL. 375, 410-17 (2013).

284. Looking beyond the United States, one finds that the practice of deeming sovereign immunity waived when the sovereign was acting in a private commercial capacity goes back much earlier, at least to 1873. *See id.* at 410.

285. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11).

286. 28 U.S.C. § 1605(a) (2018); *see also* Lee C. Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 CHI. J. INT'L L. 333, 338-39 (2005) (explaining that the Foreign Sovereign Immunities Act of 1976 restricted sovereign immunity for foreign-sovereign borrowers).

287. This language from a guano islands case could easily be taken from a property casebook:

> The sufficiency of actual and open possession of property is to be judged in the light of its character and location. It is hard to conceive of a more isolated piece of land than Palmyra, one of which possession need be less continuous to form the basis of a claim.

United States v. Fullard-Leo, 331 U.S. 256, 279-80 (1947) (footnotes omitted).

natural territorial unity of Haiti), which would be set against "the acquisitive prescription by the US, notwithstanding the internal inconsistency of its approach over time."[288] On this model, the United States would have to grapple directly with Haiti's claim to the island, just as it would (sovereign immunity aside) if it had taken private property from a private actor. And resolution of that claim could take many forms, from the return of the property to the payment of damages—familiar tools of private law—or even the grants of visas or citizenship.[289]

Treating grabs of sovereign control as property takings brings attention to more examples of colonial harm that beg for recompense. More egregious than the taking of Navassa was the U.S. occupation of Haiti between 1915 and 1934.[290] Driven by a combination of U.S. financial and geopolitical interests, virulent racism and a disregard for the welfare of the Haitians, the United States took control of Haiti until it no longer suited its interests.[291] Conceptualizing the occupation as the taking of Haiti's property by the United States, and assuming the illegality of that taking, one might ask: How much is owed for the unlawful taking?

Given the long history of how the territories have been treated by their colonial-era masters, it is natural to wonder how plausible it is that legal arguments can make any difference. Here, we take heart from the recent Chagos litigation.[292] There, not one but three international tribunals have given Mauritius an extraordinary victory against the United Kingdom (and, in effect, the United States) in its claims that some of its islands were improperly taken a half century ago and that the failure to return them amounts to incomplete decolonization—a matter over which the U.N. General Assembly has authority.[293]

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288. Spadi, *supra* note 15, at 125 (identifying these as the strongest arguments on either side).

289. *See* Amanda Frost, *Reparative Citizenship*, 26 CITIZENSHIP STUD. (forthcoming 2022) (on file with authors).

290. *See supra* notes 122-125 and accompanying text.

291. There are many accounts of this horrific occupation. *See, e.g.*, LAURENT DUBOIS, HAITI: THE AFTERSHOCKS OF HISTORY 204-64 (2012); Peter James Hudson, *The National City Bank of New York and Haiti, 1909-1922*, 115 RADICAL HIST. REV. 91 (2013); Stephen Pampinella, "*The Way of Progress and Civilization*": *Racial Hierarchy and US State Building in Haiti and the Dominican Republic (1915-1922*), 6 J. GLOB. SEC. STUD. 1 (2021).

292. *See* THE INTERNATIONAL COURT OF JUSTICE AND DECOLONISATION: NEW DIRECTIONS FROM THE *CHAGOS* ADVISORY OPINION (Thomas Burri & Jamie Trinidad eds., 2021); Philippe Sands, *Britain Holds on to a Colony in Africa, with America's Help*, N.Y. TIMES (Apr. 1, 2021) [hereinafter Sands, *Africa*], https://www.nytimes.com/2021/04/01/opinion/uk-mauritius-china-us.html [https://perma.cc/M9HD-LFWH]; Philippe Sands, *Britain's Colonial Legacy on Trial at the Hague*, N.Y. REV. (June 23, 2020), https://www.nybooks.com/daily/2020/06/23/britains-colonial-legacy-on-trial-at-the-hague [https://perma.cc/G3XQ-BHW2].

293. Sands, *Africa*, *supra* note 292.

What if Mauritius and the people of Chagos were now permitted to ask a range of other nations how much they would pay to have use of the archipelago?[294] The United Kingdom would have to bid, just like the other suitors (e.g., the United States), in order to keep its military base on Diego Garcia, the largest island in the Chagos Archipelago.[295] And maybe, as a result, borders would change. But, if the prospect of that change would yield greater benefits for the people of Mauritius and Chagos, why not?

Third, and along those same lines, consider the possibility of sovereignty auctions—opportunities for inhabited territories to accept bids from other nations wishing to integrate them into their sovereign territory. These auctions would be the choice of the people because the entitlement—sovereignty itself—is theirs to retain or transfer as they wish. Under current practice, by contrast, the power to determine transfer of sovereignty is assumed to rest with the same colonial powers that have long asserted possession over these territories and their inhabitants while simultaneously keeping them at arm's length. Current international law permits such sales, and indeed, many accounts suggest that the residents of the territory need not give their consent.[296] That suggestion makes little sense if we take seriously the notion that the era of colonialism is over.

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294. To be clear, we think that the people of Chagos would *also* have to agree to allow other nations to use the archipelago. Blocher & Gulati, *supra* note 35, at 817. But the standard understanding of international law is actually *less* restrictive and would not require such approval. 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 684 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("The hardship involved for the inhabitants of the territory who remain and lose their old citizenship and are handed over to a new sovereign whether they like it or not, created a movement in favour of the claim that no cession should be valid until the inhabitants had by a plebiscite given their consent to the cession. . . . But it cannot be said that international law makes it a condition of every cession that it should be ratified by a plebiscite." (footnotes omitted)).

295. *See* Blake Herzinger, *The Power of Example: America's Presence in Diego Garcia*, INTERPRETER (Feb. 15, 2021), https://www.lowyinstitute.org/the-interpreter/power-example-american-presence-diego-garcia [https://perma.cc/Y3UC-EB3K] (recommending the United States to enter a lease with Mauritius).

296. OPPENHEIM, *supra* note 294, at 684; *see also* Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L L. 808, 811 (2006) ("[S]tates generally are free to agree on the disposition of disputed . . . territory . . . as they see fit. . . . [S]tates are still under no general duty to consult . . . the population of a disputed territory with respect to its future status."); *cf.* Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 10 (2000) ("If the territory is to be disposed of by collective dispositive powers, it seems equitable that the collective dispositive powers exercise such a right of disposition by giving adequate consideration to any existing claims to the territory held by a previously dispossessed state.").

Consider President Donald Trump's suggestion that the United States give Puerto Rico to Denmark in return for Greenland.[297] The idea is preposterous, but it is important to be clear about why. What Trump and his advisers got wrong was not the idea of transfer, but the holders of the relevant entitlements. The decision to sell—like the broader right of self-determination—lies with the people of Greenland and Puerto Rico, not Denmark (which rightly disclaimed any such authority)[298] and the United States. A private-law property model allows the true owners to collaborate with those who could generate maximal value. For Greenland, that might be the United States. But the United States would have to pay Greenlanders for agreeing to a merger, and the price could be a substantial combination of rights and money, especially if other bidders turned out to be interested.[299] Greenland offers a location of strategic value to the world's superpowers, and it was Chinese interest that spurred Trump's claim, so we know there would be interested bidders.[300]

Now, imagine applying this model to the populated U.S. territories such as Guam, the Virgin Islands, and American Samoa. They all bring considerable value to the United States—often of the military kind, but also relating to fishing rights and possibilities for deep-sea mining. An auction would help the territories capture that value and could perhaps help make up for years of economic and social underdevelopment relative to the mainland.[301] Maybe the threat of market competition would encourage the mainland to pay the price for having vassal states. Imagine, for example, each one of the 50,000 or so inhabitants of

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297. *See* Tarisai Ngangura, *Ex-Staffer: Trump Wanted to Trade "Dirty Puerto Rico" for Greenland*, VANITY FAIR (Aug. 19, 2020), https://www.vanityfair.com/news/2020/08/ex-staffer-trump-wanted-to-trade-dirty-puerto-rico-for-greenland [https://perma.cc/DR5P-WKJL]; *see also* Iben Fejerskov Larsen, "While We Owe Much to America I Do Not Feel that We Owe Them the Whole Island of Greenland" 10 (2021) (M.A. Thesis, Aalborg University), https://projekter.aau.dk/projekter/files/422788714/FejerskovLarsen_thesis_2021.pdf [https://perma.cc/5HU7-DRT5] (researching "President Trump's proposal to purchase Greenland").

298. *See* Selena Simmons-Duffin, *What Do Greenlanders Think of Trump's Interest in Buying Greenland?*, NPR (Aug. 23, 2019), https://www.npr.org/sections/goatsandsoda/2019/08/23/753479744/what-do-greenlanders-think-of-trumps-interest-in-buying-greenland [https://perma.cc/MS9Y-ZZZZ].

299. *See* Joseph Blocher & Mitu Gulati, *Sure, Trump Can Buy Greenland. But Why Does He Think It's Up to Denmark?*, POLITICO MAG. (Aug. 23, 2019), https://www.politico.com/magazine/story/2019/08/23/donald-trump-greenland-purchase-sovereignty-denmark-227859 [https://perma.cc/9CPN-TE4R].

300. *See* Aaron Mehta & Valerie Insinna, *Greenland's Not For Sale, But It Is Strategically Important*, DEF. NEWS (Aug. 16, 2019), https://www.defensenews.com/global/europe/2019/08/16/greenlands-not-for-sale-but-it-is-strategically-important [https://perma.cc/XCZ2-GZQ5].

301. On the relative underdevelopment of the territories as compared to the U.S. mainland, see Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1264-81 (2019).

American Samoa—an important military location[302]—being offered a million dollars, a European Union passport, and a house on the French Riviera to have their island ally with the European Union instead of the United States. What might China pay? Or Russia? Or the United States, if it had to compete instead of just asserting sovereignty? For that matter, what about the Native American territories, historically conceptualized as "domestic dependent nations" under a supposedly benevolent trust relationship with Congress?[303] How much better would the United States treat the tribes if they had the right to choose the nation with which they affiliate?

Innumerable devils lurk in the details of such a plan, including figuring out who specifically must approve it (a supermajority of the territory's population, surely, but what percent and who counts in the population?), what forms of compensation should be favored or permitted, whether or under what conditions the territory's current political affiliate can veto the deal, and so on. We have sketched some answers in prior work.[304] In general, we would require approval from the impacted region (in this case, Chagos) and the parent nation (in this case, Mauritius), except where the parent nation is oppressing or denying equal rights to the people of the region, in which case we argue that the region's own right of self-determination becomes primary. We would rely on a mixture of property and liability rules, giving

> price-setting power to three different parties, depending on how well a region is governed: to the parent nation and region in cases of good governance, to the region itself in cases of outright oppression or genocide, or to the global community (with a right of review through a court like the ICJ) in cases of governance that denies representation or equal rights.[305]

In any event, we cannot elaborate all of those details here, so we cannot completely dispel the devils. But neither do we think that they should be an insurmountable deterrent. After all, territories—in the United States and elsewhere—are already governed by a multiplicity of legal regimes. As Puerto Rico's recent

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302. David Overson, *Army Reserve Established Pacific Stronghold in American Samoa*, U.S. ARMY RSRV. (Apr. 29, 2019), https://www.usar.army.mil/News/News-Display/Article/1827056/army-reserve-established-pacific-stronghold-in-american-samoa [https://perma.cc/Z5FF-HJET] ("American Samoa has historically played a pivotal role in the security of the Pacific.").

303. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 470-71.

304. *See* Blocher & Gulati, *supra* note 35, at 816-23.

305. *Id.* at 818-19 (footnotes omitted).

experience has shown, it is complicated to answer even seemingly binary questions like whether the people of Puerto Rico prefer statehood.[306] Should only those living on the island have a vote? What turnout is required?

The auction model is simply one possibility opened up by the property frame. Our point here is not that certain transfers should happen or even to suggest how they should happen. Rather, the point is to clarify what might flow from recognizing that territories and other colonies own their sovereignty. Doing so opens up the possibility of private-law-style remedies to the persistence of U.S. colonialism. Establishing that entitlement would allow for negotiated settlements and transfers drawing on private-law models—deconstructing the colonial framework with the same tools used to make it.

There are practical obstacles to the full effectuation of these moves, and one might ask whether the colonized can really use the tools of the colonizer in pursuit of decolonization or whether those tools are even practicable. We have elaborated and addressed some of what we think are the most serious objections in prior work,[307] and we do not think that the language of private law is some kind of panacea. But neither are we satisfied with what public law and arguments about sovereignty have been able to deliver; after more than a century, the *Insular Cases* remain good law and the United States maintains its colonies. Our goal here is to bring more legal tools to bear in the ongoing project of decolonization.

CONCLUSION

Sovereignty and property "have always operated together so as to create the structure of power that is, at any moment, the real government of the world."[308] It follows that any attempt to understand empire or the role of territoriality in political theory must face those concepts squarely. We have tried to do so here, and to show how doing so might have benefits for broader debates in the law of the territories.

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306. *See, e.g.*, Christina D. Ponsa-Kraus, *The Battle Over Puerto Rico's Future*, VERFASSUNGSBLOG (Apr. 21, 2021), https://verfassungsblog.de/the-battle-over-puerto-ricos-future [https://perma.cc/9JFC-ZUQM]. Puerto Rico's experience is hardly unique. *See* Ashley Westerman, *New Caledonia Might Be About to Break from France. Here's Why the World Is Watching*, NPR (Dec. 11, 2021), https://www.npr.org/2021/12/11/1063074122/new-caledonia-might-break-from-france-in-third-independence-referendum-on-sunday [https://perma.cc/S6EP-7Q5A] (describing difficulties surrounding New Caledonia's referendum on independence from France).

307. Blocher & Gulati, *supra* note 35, at 823-42 (describing and addressing the four strongest critiques of a market for sovereign control—those rooted in war, colonialism, antidemocracy, and impossibility—as well as some caveats and complications).

308. Koskenniemi, *supra* note 5, at 389.

As for Navassa, economic value—the thing that justified its initial acquisition through the property framework of the Guano Islands Act—is long gone. The island is not even open to the public.[309] What remains is sovereignty alone: the governing authority originally brought to the island to protect private-property claims. The "dominion" that the Act's drafters said was no part of it,[310] and which the United States long disclaimed,[311] is now all it has left. As in countless other far-flung colonies and territories, it is the residue of an economically motivated empire that is no longer economically valuable. The sovereignty framework cements the status quo, in which the United States refuses to relinquish property to Haiti or even meaningfully negotiate some kind of settlement. Reckoning with the United States's lingering colonies requires the full array of legal tools, including the private-law concepts used to build the empire in the first place.

309. U.S. FISH & WILDLIFE SERV., NAVASSA: NATIONAL WILDLIFE REFUGE, https://www.fws.gov/southeast/pubs/facts/navassa.pdf [https://perma.cc/6NPU-MP35] ("The refuge is closed to the public. Access is extremely hazardous.").

310. *See supra* notes 78-79 and accompanying text.

311. *See supra* notes 226-237 and accompanying text.

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CHRISTINA DUFFY PONSA-KRAUS

The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories

ABSTRACT. The *Insular Cases* have been enjoying an improbable—and unfortunate—renaissance. Decided at the height of what has been called the "imperialist" period in U.S. history, this series of Supreme Court decisions handed down in the early twentieth century infamously held that the former Spanish colonies annexed by the United States in 1898—Puerto Rico, the Philippines, and Guam—"belong[ed] to, but [were] not a part of, the United States." What exactly this meant has been the subject of considerable debate even as those decisions have received unanimous condemnation. According to the standard account, the *Insular Cases* held that the "entire" Constitution applies within the United States (defined as the states, the District of Columbia, and the so-called "incorporated" territories) while only its "fundamental" limitations apply in what came to be known as the "unincorporated" territories (today, Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa). Scholars unanimously agree that the *Insular Cases* gave the Court's sanction to U.S. colonial rule over the unincorporated territories—and that the reason for it was racism. Yet courts and scholars have recently sought to hoist the *Insular Cases* on their own racist petard—by "repurposing" them to defuse constitutional objections to certain distinctive cultural practices in the unincorporated territories. Adopting the standard account of the *Insular Cases*, according to which they created a nearly extraconstitutional zone, proponents of repurposing argue that the relative freedom from constitutional constraints that government action enjoys in the unincorporated territories can and should be exploited now to vindicate their peoples' right to cultural self-preservation. This Article disagrees. Although I share the view that the Constitution should not ride roughshod over the cultural practices of the people of the unincorporated territories, I do not agree that the Constitution necessarily must bend to any such practices it finds there or that the *Insular Cases* present a legitimate—let alone desirable—doctrinal vehicle for preserving such practices. Instead, constitutional doctrines available outside of the *Insular Cases* present the most promising—and the only legitimate—doctrinal means for making the constitutional case in favor of cultural accommodation. Against the repurposing project, I argue that the *Insular Cases* gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories, and that no amount of repurposing, no matter how well-intentioned—or even successful—can change that fact. On the contrary: repurposing the *Insular Cases* will prolong the crisis. They should be overruled.

AUTHOR. George Welwood Murray Professor of Legal History, Columbia Law School. I'm grateful to Adriel Cepeda Derieux, Rose Cuison-Villazor, Erin Delaney, Jody Kraus, Kal Raustiala, and Neil Weare for their generous feedback, to Valeria Flores and Daimiris García for their excellent research assistance, and to the editors of this Special Issue for their superb work. I dedicate this Article to my mother, Edda P. Duffy *née* Ponsa Flores.

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INTRODUCTION

The *Insular Cases* have been enjoying an improbable—and unfortunate—renaissance. Decided at the height of what has been called the "imperialist" period in U.S. history, this series of Supreme Court decisions handed down in the early twentieth century infamously held that the former Spanish colonies annexed by the United States in 1898—Puerto Rico, the Philippines, and Guam—"belong[ed] to . . . but [were] not a part of the United States."[1] Although previous U.S. territories were "incorporated" into the United States upon annexation, these new ones had been annexed but not incorporated.[2]

What exactly this meant has been the subject of considerable debate even as those decisions have received widespread condemnation.[3] According to the standard account, the *Insular Cases* held that the entire Constitution applies within the United States—defined as the states, the District of Columbia, and the incorporated territories—while only its fundamental limitations[4] apply in what came to be known as the "unincorporated" territories. According to an alternative account (to which I subscribe), the *Insular Cases* did not carve out a

1. Downes v. Bidwell, 182 U.S. 244, 287 (1901). The issue of exactly which decisions belong under the rubric of the *Insular Cases* has been the subject of some disagreement, but there is consensus that the series begins with nine decisions handed down in 1901 and that the most important one was *Downes*. *See, e.g.*, JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 44-50 (1997); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 73-142 (2001); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 72-91 (2009); BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 257 (2006); Christina Duffy Burnett [Ponsa-Kraus], *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 40-84 (1985).

2. *Downes*, 182 U.S. at 287. The Court first used the term "unincorporated" with respect to U.S. territories in *Rassmussen v. United States*, 197 U.S. 516, 525 (1905). Today, the unincorporated U.S. territories include Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/HRD-91-18, U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION 43-52 (1991).

3. *See* SPARROW, *supra* note 1, at 99-110 (describing a range of views on the significance of the *Insular Cases*, and concluding that "[a] majority of the Court *did* agree to a decision that avoided a confrontation with Congress and happened to be consistent with the United States's new imperial policy"); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1665 (2020) (describing the *Insular Cases* as "much-criticized").

4. "Limitations" here refers to rights, such as the Bill of Rights and constitutionally protected unenumerated rights, and limitations on government power expressed in absolute terms, such as the prohibitions on bills of attainder, ex post facto laws, and titles of nobility in Article I, Section 9. *See* U.S. CONST. art. I, § 9.

largely extraconstitutional zone of territory subject to formal, internationally recognized U.S. sovereignty where none of the Constitution applies except for certain fundamental limitations. Instead, when it comes to which constitutional provisions apply where, the *Insular Cases* stand for a more modest twofold proposition. First, provisions defining their geographic scope with the phrase "United States" may or may not include unincorporated territories. Second, either way, fundamental limitations certainly apply within unincorporated territories, though what counts as "fundamental" may vary from one unincorporated territory to the next.[5]

Although what it means to be "unincorporated" remains contested to this day, every account of the *Insular Cases* agrees that they also stand for a considerably less modest proposition: that the federal government has the power to keep and govern territories indefinitely, without ever admitting them into statehood (or deannexing them, for that matter).[6] Before 1898, territories annexed by the United States were presumed to be on a path to statehood.[7] However, the

5. As I have noted in earlier scholarship challenging the standard account, that account is so ubiquitous that a comprehensive list of examples would take too much space. *See* Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 808 n.40 (2005) (listing selected examples); *see id.* at 870-77 (describing and challenging the standard account). This Article challenges the standard account with a particular focus on current efforts to rehabilitate the *Insular Cases*. For other challenges to it, see, for example, Andrew Kent, Boumediene*,* Munaf*, and the Supreme Court's Misreading of the* Insular Cases, 97 IOWA L. REV. 101 (2011); and GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 72-94 (1996). For a welcome effort to explore new approaches to the *Insular Cases*, see RECONSIDERING THE *INSULAR CASES*: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Tomiko Brown-Nagin & Gerald L. Neuman, eds. 2015). For work that transcends this debate and takes the scholarship on the *Insular Cases* and the U.S. territories in exciting and generative new directions, see the other Articles in this Special Issue: Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390 (2022); James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and the "Law of the Territories,"* 131 YALE L.J. 2542 (2022); and Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652 (2022).

6. I have argued that the *Insular Cases* also introduced into U.S. constitutional law a doctrine of territorial deannexation. *See* Burnett [Ponsa-Kraus], *supra* note 5 (explaining that the annexation of Puerto Rico, the Philippines, and Guam gave rise to a debate among lawyers and legal scholars over whether it was constitutionally permissible to deannex U.S. territory [i.e., grant it independence] and arguing that the *Insular Cases* answered that question in the affirmative). I do not discuss the deannexationist aspect of the *Insular Cases* in this Article because it is relevant here only insofar as it occupies the same position as statehood—that is, as a status that can be postponed indefinitely.

7. *See generally* PETER ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (Univ. Notre Dame Press, 2d ed. 2019) (1987) (describing the debates over statehood in several territories subject to the Northwest Ordinance and the widely shared assumption that territorial status led to statehood and citizenship was incomplete without statehood);

annexation in 1898 of three territories populated largely by nonwhite people gave rise to a public debate over whether the United States, for the first time in its history, could continue to hold a territory indefinitely without eventually admitting it as a state.[8] The Court found a way. It simply invented, out of whole cloth, the distinction between incorporated territories, which were on their way to statehood, and unincorporated territories, which might never become states, and placed these newly annexed territories in the latter category.[9] The distinction between incorporated and unincorporated territories thus served as the cornerstone of a racially motivated imperialist legal doctrine[10]: the idea of the unincorporated territory gave sanction to indefinite colonial rule over majority-nonwhite populations at the margins of the American empire.[11]

Since the Founding, territories had been subject to U.S. sovereignty but denied federal representation. The political illegitimacy of unrepresentative federal rule over their inhabitants had been justified by the shared understanding, confirmed by consistent practice, that territorial status was a temporary necessity that would end when a territory became a state.[12] But by giving constitutional

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THE UNITING STATES: THE STORY OF THE FIFTY UNITED STATES 1-3 (Benjamin F. Shearer ed., 2004) (illustrating how territorial status consistently led to statehood in the Union); GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1-2 (1984) (analyzing the process of admission into statehood).

8. Earlier territories had nonwhite inhabitants as well, but on these contiguous lands, the United States pursued a combined policy of white settlement and forceful removal. *See* PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION (2017); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010).

9. Balzac v. Porto Rico, 258 U.S. 298, 311 (1922) (explaining the relationship between incorporation and statehood, which *Downes* had implied, two decades after *Downes*). Legal historian Sam Erman has located the origins of *Downes*'s doctrine in the legislative and administrative context. *See* Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105, 113 (2018). As scholars of the *Insular Cases* have long observed, Abbott Lawrence Lowell published an article in the *Harvard Law Review* shortly before the Court decided *Downes* in which he made the case for distinguishing between two classes of territories, those incorporated and those not, see Abbott Lawrence Lowell, *The Status of Our Territories: A Third View*, 13 HARV. L. REV. 155, 176 (1899). *See, e.g.*, TORRUELLA, *supra* note 1, at 25-32 (describing the debate among several leading legal scholars over the constitutional status of the territories annexed in 1898).

10. *See, e.g.*, Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J.F. 284, 291 (2020).

11. On the *Insular Cases*' departure from the original meaning of the Territory Clause, according to which territorial status was understood as temporary, see Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772 (2022).

12. *Balzac*, 258 U.S. at 311. See generally sources cited *supra* note 7, all of which support the proposition that, before 1898, territories annexed by the United States were widely presumed to be on a path to statehood.

sanction to the new and subordinate category of unincorporated territories, which might never become states, the *Insular Cases* raised the possibility that the United States could, if it so desired, govern unincorporated territories indefinitely despite the fact that their residents had neither representation in the federal government nor the assurance that such representation would be forthcoming upon their territory's eventual admission as a state. After the *Insular Cases*, that possibility became a reality that has persisted for nearly 125 years.

The unincorporated territory was a judicial innovation designed for the purpose of squaring the Constitution's commitment to representative democracy with the Court's implicit conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority-white, Anglo-Saxon polity.[13] With the creation of the unincorporated territory, the Court implicitly embraced the view that the theory of political legitimacy underlying the Constitution allowed for an exception, born of practical necessity and motivated by racism, permitting a representative democracy to govern people deemed inferior indefinitely without representation. The raison d'être of the *Insular Cases* was, therefore, to provide the constitutional foundation for perpetual American colonies.

But recent efforts to "repurpose" the *Insular Cases* have breathed new life into those reviled decisions.[14] Adopting the standard account of the *Insular Cases*, according to which they created a nearly extraconstitutional zone for the unincorporated territories, proponents of repurposing argue that precisely because the *Insular Cases* swept aside most constitutional restraints upon government action in those territories, they now — counter-intuitively — hold the key to the survival of the unique and diverse cultures of these places: today, Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands (NMI), and American Samoa.[15]

These territories, all unincorporated, remain subject to U.S sovereignty, and overwhelming majorities of their populations apparently want to keep it that

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13. On the popularity of the idea of Anglo-Saxon superiority and its relationship to U.S. imperialism at the turn of the twentieth century, see, for example, Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 1. On how scholars, legislators, and bureaucrats lay the groundwork for the doctrine, see sources cited *supra* note 9.

14. *See infra* notes 20-23 and accompanying text.

15. For a general introduction to the law of the unincorporated territories, see ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989).

way.[16] At the same time, several of them have certain traditional cultural practices that could be in tension or outright conflict with the U.S. Constitution.[17] The practices at issue include, for example, racial restrictions on the alienation of land in the Pacific U.S. territories, which are meant to protect native land ownership where land is scarce and central to cultural identity.[18] Ordinarily—in what most people think of as the United States—racial restrictions on the alienation of land would clearly violate the Equal Protection Clause.[19] But here the repurposed *Insular Cases* come into play. If, as the standard account has it, these decisions relegated the unincorporated territories to a nearly extraconstitutional zone, then the Constitution does not stand in the way of territorial cultural practices deserving of protection. Or so the argument goes.

A recent *Harvard Law Review* Special Issue features several contributions explaining the repurposing view and arguing that it might offer the best way to protect the distinctive cultures of the unincorporated territories.[20] As one of

16. This is certainly the case in Puerto Rico, where the independence movement has never gained the support of a majority of the electorate and has polled in the single digits since the mid-twentieth century. *See* TRÍAS MONGE, *supra* note 1 (providing a history of U.S.-Puerto Rico relations, including a discussion of the island's status plebiscites, up to the early 1990s); Edgardo Meléndez, *The Politics of Puerto Rico's Plebiscite*, 24:3/4 CARIBBEAN STUD. 117 (1991) (explaining the 1967 plebiscite); PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, PROCESO PLEBISCITARIO: POLITICAL STATUS REFERENDUM 1989-1991 (1992) (3 vols.) (explaining the 1993 plebiscite); Rep. Don Young & Rep. George Miller, *Results of the 1998 Puerto Rico Plebiscite*, 106th Cong. 1st Sess. (1999) (explaining the 1998 plebiscite); R. SAM GARRETT, CONG. RSCH. SERV., R44721 (June 12, 2017) (explaining the 2012 and 2017 plebiscites). As for other territories, none has a significant independence movement and only Guam has held plebiscites. For a study of self-determination in Guam that discusses its plebiscites, see Guam Commission on Decolonization (Carlyle G. Corbin et al.), *Giha Mo'ona: A Self-Determination Study for Guam* (2021), https://decol.guam.gov/wp-decol-content/uploads/2021/12/Giha-Mona-%EF%BF%BD-A-Self-determination-Study-for-Guahan-Digital-1.pdf [https://perma.cc/L4WZ-54S7].

17. I say "several" because Puerto Rican cultural practices do not conflict with the Constitution and I am not aware of any cultural practices in the U.S. Virgin Islands that conflict with the Constitution. In Puerto Rico, resistance to statehood does reflect a concern that statehood could threaten Puerto Rico's culture and, in particular, its language, but any such threat would not come from the Constitution. On the cultural practices at stake in the other territories, see the sources cited *infra* notes 20-23, and the discussion of the relevant litigation, *infra* Parts III, IV.

18. *See* sources cited *infra* notes 20-23; *see also* discussion *infra* Part III (describing cases concerning whether the application of certain constitutional provisions in the unincorporated territories would threaten cultural practices there).

19. *See* Shelley v. Kraemer, 334 U.S. 1, 20-23 (1948) (holding that judicial enforcement of racially restrictive covenants violates the Equal Protection Clause).

20. *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1632 (2017) (Territorial Federalism) [hereinafter *Territorial Federalism*]; *id.* at 1680 (American Samoa and the

them explains, "[w]here the doctrine [of the *Insular Cases*] once served colonial interests in an era of mainland domination of the territories, a revisionist argument would see it repurposed today to protect indigenous cultures from a procrustean application of the federal Constitution."[21] Another advocate of the repurposing project argues that judicial adoption of the repurposing view is "defensible and perhaps even necessary" in order to protect culture and promote self-government in the U.S. territories.[22] An early defender of repurposing, Stanley Laughlin, sums up the argument like this:

> The genius of the [doctrine of the *Insular Cases*] is that it allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that their cultures are substantially different from those of the mainland United States and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures.[23]

As these quotations make clear, the repurposing project aims to achieve not one but two interrelated goals: cultural accommodation *and* continued U.S. sovereignty. That is, if the sole goal were the protection of culture, then separation from the United States through independence would render irrelevant any tension with the U.S. Constitution and no repurposing would be necessary. But since support for independence in the territories is minimal at best, it becomes necessary to reconcile the cultural practices at issue with the U.S. Constitution. Enter the standard account of the *Insular Cases*, providing support for the idea that constitutional obstacles can be swept aside in the unincorporated territories.

Citizenship Clause: A Study in *Insular Cases* Revisionism); *cf.* Rose Cuison-Villazor, *Problematizing the Protection of Culture and the* Insular Cases, 131 HARV. L. REV. F. 127 (2018) (offering a more tentative argument for the repurposing view).

21. *See Territorial Federalism*, *supra* note 20, at 1686. I use the term "repurposing" rather than "revisionist" because my argument is that this account does not revise the standard account, but rather accepts it and builds upon it.

22. Russell Rennie, Note, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. REV. 1683, 1707 (2017).

23. Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005). For another work making a version of the repurposing argument, see Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 92-97 (2001). *Cf.* Ian Falefuafua Tapu, *Who Really Is a Noble?: The Constitutionality of American Samoa's Matai System*, 24 UCLA ASIAN-PAC. AM. L.J. 61, 79-89 (2020) (assessing the constitutionality of a feature of American Samoan culture that has not been the subject of a constitutional challenge, but that may conflict with the Nobility Clause of the U.S. Constitution, U.S. CONST. art. I, § 9, cl. 8, and arguing both that it survives under the *Insular Cases* and that it survives without them).

This Article makes the case against the repurposing project.[24] My argument is that the *Insular Cases* gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories and that no amount of repurposing, no matter how well-intentioned—or even successful—can change that fact. On the contrary: repurposing the *Insular Cases* will prolong the crisis.

The felt imperative to derail the recently annexed territories from the statehood track, while still permitting the United States to retain them, drove the Court to abandon a settled understanding that otherwise would have constrained it: that annexed territories would eventually become states. The famously unclear and erroneous reasoning of the *Insular Cases* is famously unclear and erroneous precisely because it simply could not be reconciled with that settled understanding. To accomplish the end of giving constitutional sanction to permanent colonies, the Court had to carve out an exception to settled constitutional law. The doctrine of territorial incorporation it produced has long been the source of serious judicial confusion and even incoherence.[25] The cases and scholarship seeking to repurpose the *Insular Cases* now pursue a defensible end, but in the process they not only inherit but dramatically exacerbate a legacy of resorting to shoddy legal reasoning in pursuit of an end that otherwise appears out of reach.[26]

My case against the repurposing project begins with a refutation of the standard account, but it does not end there. Refuting the standard account is

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24. For other work criticizing the repurposing project (not always described with that phrase), see, for example, Cepeda & Weare, *supra* note 10; and Juan R. Torruella, Commentary, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 66 (2018), which describes the *Insular Cases* as the first of four "experiments" with Puerto Rico's status, criticizes all of them, and argues against a proposal for yet another experiment as set forth in *Territorial Federalism*, *supra* note 20. In an earlier article, I argued against the repurposing view in the context of Puerto Rico. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 871-77. When it comes to Puerto Rico, the advocates of repurposing do not look to the *Insular Cases* for support for cultural accommodation, since, as noted above, *see supra* note 17, Puerto Rican cultural practices do not conflict with the Constitution. Instead, they look to the *Insular Cases* for support for the proposition that Congress has the power to enter into a binding "compact" with Puerto Rico short of statehood. My argument in *Untied States*, *see* Burnett [Ponsa-Kraus], *supra* note 5, was that Congress does not have such power. *See also* Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J.F. 101 (2020) (criticizing the "compact theory"); Torruella, *supra* (same).

25. *See* Brief of Former Federal and Local Judges as Amici Curiae Supporting the First Circuit's Ruling on the Appointments Clause, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649 (2020) (Nos. 18-1334, -1496, -1514, -1521, -1475), 2019 WL 4201255.

26. I should note that I do not take a position or intend to imply one with respect to Federal Indian law, though analogous issues arise in that context. For a thorough exploration of the parallels between the law of the territories, Federal Indian law, and civil-rights law, see Rolnick, *supra* note 5.

necessary because its error with respect to the applicability of constitutional provisions forms the basis for the repurposing project, which relies on the idea of a nearly extraconstitutional zone to pursue the goal of cultural accommodation. This keeps the *Insular Cases* alive—and as long as the *Insular Cases* remain alive, the Court's imprimatur will remain on permanent colonialism. But refuting the standard account is not sufficient because even on the alternative account, the *Insular Cases* constitutionalized permanent colonialism by introducing the unincorporated territory into American constitutional law. What defines unincorporated territories is that they can remain territories, subject to U.S. sovereignty and federal laws but denied representation in the federal government, forever. So while I argue that the *Insular Cases* did not create a nearly extraconstitutional zone, and I explain and clarify what they did hold, I do not argue that the solution to the problem of the *Insular Cases* lies in a correct interpretation of them. Instead, it lies in overruling them and erasing the doctrine of territorial incorporation from American constitutional law.[27]

Ironically, it may be possible to achieve the objective of cultural accommodation in the territories by employing ordinary constitutional doctrines, such as standard equal-protection doctrine or the plenary power jurisprudence under the Territory Clause.[28] I argue below that many, perhaps all, of the claims advanced under the rubric of the repurposing project could and should be decoupled from the *Insular Cases* jurisprudence and reframed and adjudicated under precisely these doctrines.[29] However, even if one believes, as the advocates of repurposing do, that it would be tragic not to find a way to accommodate cultural practices in the U.S. territories, those ends cannot justify their doctrinal means, because the cost of resorting to such means is the perpetuation of a system of permanent colonies. In my view, even if certain diverse cultural practices in the territories cannot be reconciled with the Constitution, this fact would not justify the repurposing of the *Insular Cases*.

To put it bluntly: arguing that we need to repurpose the *Insular Cases* to accommodate culture is like arguing that we need to repurpose *Plessy v. Ferguson* to

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27. I am far from alone in calling for the overruling of the *Insular Cases*. *See, e.g.*, Adriel Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows to Be True: Why* Stare Decisis *Is Not an Obstacle to Overruling the* Insular Cases, 53 COLUM. HUM. RTS. L. REV. 721 (2022); Cepeda & Weare, *supra* note 10, at 287; Alan Mygatt-Tauber, Overruling the Insular Cases on Their Own Terms (Nov. 1, 2021) (unpublished manuscript), https://ssrn.com/abstract=3959267 [https://perma.cc/4QDM-QU9X].

28. U.S. CONST. art. IV, § 3, cl. 2 ("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 . . . .").

29. *See infra* Part III.

accommodate benign racial classifications.[30] We do not. We must not. Just as we cannot turn a blind eye to the racist premise driving *Plessy*, even if doing so appeared necessary to constitutionalize benign racial classifications, neither can we tolerate, let alone expiate, the racist premise of the *Insular Cases*, and the flagrant political illegitimacy it licenses, in order to pursue the independently laudable goal of preserving important cultural practices in U.S. territories. Like *Plessy*, the *Insular Cases* are bad law. They cannot be redeemed, even by conscripting them into service for the noble goal of protecting their victims from a certain harm. Democratic representation is an inviolable commitment of the Constitution's own bedrock conception of political legitimacy. Perpetual territorial status violates it.

Part I explains the *Insular Cases*, criticizing the standard account and clarifying what those decisions held. My goal here, in short, is to refute the claim that forms the basis of the repurposing project: that the *Insular Cases* relegated the unincorporated territories to a nearly extraconstitutional zone. While those decisions did introduce the distinction between incorporated and unincorporated territories into the Court's constitutional law on the territories, the standard account misunderstands it.[31] The doctrine of territorial incorporation does not mean, as the standard account holds, that the "entire" Constitution applies in the incorporated territories while "only" its fundamental limitations apply in the unincorporated territories.

Part II describes several Supreme Court decisions relying on the *Insular Cases* since the original series came down between 1901 and 1922.[32] Each of them concerns a constitutional challenge originating in formally foreign territory where the United States exerts some form of control. One involves trials of civilians on U.S. military bases abroad; another, a search by U.S. agents of a Mexican national's home in Mexico; still another, the detention of persons labeled enemy combatants in Guantánamo, a place the Court concluded is subject to de facto U.S. sovereignty though located in de jure foreign (Cuban) territory.[33] Together, these cases kept alive the standard account of the *Insular Cases* by endorsing an

30. Neil Weare, *Why the* Insular Cases *Must Become the Next* Plessy, HARV. L. REV. BLOG (March 28, 2018), https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy [https://perma.cc/4Y54-F7TQ].

31. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 808 n.40 (citing articles offering the standard account).

32. As noted above, there is some disagreement as to which cases belong on the list. *See supra* note 1. However, not only is there consensus that *Downes v. Bidwell*, 182 U.S. 244 (1901), is the leading one, but also that the original series culminates in a case called *Balzac v. Porto Rico*, 258 U.S. 298, 304-05, 309, 311 (1922), discussed below. *See infra* note 223.

33. Reid v. Covert, 354 U.S. 1 (1957); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Boumediene v. Bush, 553 U.S. 723 (2007).

understanding of those cases according to which constitutional provisions do not apply abroad if it would be "impracticable and anomalous" to apply them. Developed in the context of foreign territory, the impracticable-and-anomalous test soon made its way into the jurisprudence on the Constitution in the domestic yet unincorporated territories.

Part III describes, examines, and criticizes the evolution of the Supreme Court's latter-day spin on the *Insular Cases* in a series of lower-court decisions involving constitutional challenges in the unincorporated territories. These courts have expressly taken up the repurposing project, relying on the *Insular Cases* and engaging in avowedly teleological reasoning with a view toward finding ways to accommodate cultural practices that might otherwise violate constitutional requirements. A close reading of these cases illustrates the pitfalls of the repurposing project, which proceeds as if, whenever a constitutional challenge arises in an unincorporated territory, the laws of constitutional physics are suspended. Endorsing the standard account of the *Insular Cases*, these decisions expand upon a poorly reasoned approach to the question of which constitutional provisions apply where, while leaving untouched the politically illegitimate status of the territories. Creating the illusion of solicitude toward territorial self-determination, they inadvertently and perversely entrench federal power while prolonging the subordination of territorial inhabitants.

Part III also argues that the repurposing project is not only misguided, but gratuitous. Even if one believes the United States must find ways to accommodate territorial cultural practices in tension with the Constitution, the fact is that even without the *Insular Cases*, constitutional law contains sufficient flexibility to accommodate most, if not all, of the cultural practices at issue. In most, if not all, of the cases discussed here, either the courts could have reached the same results without reliance on the *Insular Cases* or the opposite result would have posed no threat to territorial cultural practices.

Part IV turns to a recent development in the repurposing project, examining current litigation over whether the Citizenship Clause of the Fourteenth Amendment applies in the unincorporated territory of American Samoa. Two federal courts of appeals have now relied on an updated version of the impracticable-and-anomalous test to hold that the Citizenship Clause of the Fourteenth Amendment does not apply in American Samoa.[34] These courts reasoned that extending the Citizenship Clause to American Samoa would be anomalous because, according to the territory's elected representatives, most American

34. Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015); Fitisemanu v. United States, 1 F.4th 862 (10th Cir.), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021).

Samoans do not want it to apply.[35] Neither of these courts conducted a factual inquiry into or a legal analysis of the territorial cultural practices at issue in order to determine whether the application of the Citizenship Clause would actually threaten them. Instead, they took the word of the territory's elected representatives with respect to the purported wishes of a territorial majority and, on that basis, held that a constitutional provision did not apply in an unincorporated territory—in effect holding a constitutional provision inapplicable by popular demand.[36] This, I argue, is the *Insular Cases* run amok.

Part V illustrates how the *Insular Cases* sow doubts about the applicability of constitutional provisions in the unincorporated territories even when there is no plausible argument that they are relevant. Here I describe two examples. First, I examine recent litigation in Puerto Rico involving the Appointments Clause, in which the *Insular Cases* repeatedly came up despite a consensus among the parties and courts involved that the question presented did not turn on their validity. The case, *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment LLC*, involved a challenge to the selection mechanism for the members of the Board, which Congress created in 2016 to handle Puerto Rico's economic crisis.[37] The selection mechanism does not require Senate confirmation, and the plaintiffs challenged it as a violation of the Appointments Clause of the Constitution, which requires Senate confirmation of all Officers of the United States. The question was not whether the Appointments Clause applies in Puerto Rico; it was whether the officers of the Board are Officers of the United States. But because the challenge arose in an unincorporated territory, doubts over whether the Appointments Clause "applies" there inevitably came up at various stages in the litigation. The First Circuit opinion in *Aurelius* described the *Insular Cases* as a "dark cloud" over the case.[38] The Supreme Court allotted ten minutes of oral argument for a discussion of the *Insular Cases*, during which a Puerto Rican lawyer implored the Court to overrule them, while several Justices

35. *Tuaua*, 788 F.3d at 310; *Fitisemanu*, 1 F.4th at 880. In *Fitisemanu*, Judge Lucero's opinion for the Court gave this reason. The concurring judge explained that "although I agree with much of Judge Lucero's reasoning endorsing consideration of the wishes of the American Samoan people, I would leave that consideration to the political branches and not to our court." *Id.* at 883 (Tymkovich, C.J., concurring). The dissent disagreed that the wishes of the American Samoan people should determine whether the Citizenship Clause applies. *See id.* at 902-06 (Bacharach, J., dissenting). For a detailed discussion of *Tuaua* and *Fitisemanu*, see *infra* Part IV.

36. *Tuaua*, 788 F.3d at 310; *Fitisemanu*, 1 F.4th at 880.

37. 140 S. Ct. 1649 (2020).

38. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 855 (1st Cir. 2019).

expressed puzzlement over why they had even come up.[39] The opinion upholding the selection mechanism confirmed their irrelevance to the issue in *Aurelius*, questioning their validity and refusing to extend them beyond their facts, but understandably did not overrule them.[40]

The second example is the case of *United States v. Vaello Madero*, an equal-protection challenge to Puerto Rico's exclusion from the Supplemental Security Income (SSI) program, which provides aid to persons who are needy and disabled or elderly.[41] Once again, the applicability of the relevant constitutional guarantee of equal protection was not in question. Once again, the *Insular Cases* came up anyway, this time in the Respondent's argument that they constitute evidence of a history of racism against Puerto Ricans that should lead to strict scrutiny of the challenged classification. Once again, the oral argument featured a confused and confusing exchange about the *Insular Cases*, with one Justice wondering what they had to do with *Vaello Madero* and another demanding to know why the Court should not overrule them altogether.[42] The Deputy Solicitor General expressed puzzlement over the idea that the Court would overrule cases on which the government did not even rely.[43] Meanwhile, the Respondent decried the racism of the *Insular Cases*, but stopped short of asking the Court to overrule them.[44]

As their perplexing appearance in *Vaello Madero* suggests, the *Insular Cases* deserve to be overruled, and soon. But when the Court finally overrules them, it must do so clearly and unequivocally, in a case that squarely presents the doctrine of territorial incorporation and requires the Court to weigh in on its validity. That case, I argue at the end of Part V, is *Fitisemanu v. United States*.[45]

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39. Transcript of Oral Argument at 82, 86-87, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334); *see also* Cepeda Derieux & Weare, *supra* note 10 (describing the exchange at oral argument); Ponsa-Kraus, *supra* note 24, at 127-28 (same).

40. *Aurelius*, 140 S. Ct. at 1665.

41. United States v. Vaello Madero, 142 S. Ct. 1539 (2022). Justice Gorsuch concurred in *Vaello Madero* specifically to criticize the *Insular Cases* and call on the Court to overrule them at some point. *See Vaello Madero*, 142 S. Ct. at 1554-57 (Gorsuch, J., concurring). Justice Sotomayor dissented but specifically noted her agreement with that call. *See id*. at 1560 n.4 (Sotomayor, J., dissenting). I discuss the role of the *Insular Cases* in *Vaello Madero* below, *see infra* Part V.B.

42. Transcript of Oral Argument at 8-11, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303).

43. *Id*. at 8, 11.

44. Brief for Respondent at 2-3, *Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303) (attributing the *Insular Cases* to "concern that [inhabitants of the territories] belonged to 'uncivilized' and 'alien races' who were 'unfit' to handle the full rights and duties of citizenship"). For a detailed discussion of *Vaello Madero*, see *infra* Part V.B.

45. Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021), *reh'g en banc denied*, 2021 WL 6111908 (Dec. 27, 2021), *petition for cert. filed* (U.S. Apr. 27, 2022) (No. 21-1394).

The haunting of *Aurelius* and *Vaello Madero* by the *Insular Cases* was yet another instance of the unending constitutional uncertainty to which the people of the unincorporated territories have been subjected for nearly a century and a quarter. To them, the *Insular Cases* are an oppressive omnipresence constantly sowing doubt about the applicability of constitutional guarantees. Yet to the Justices—the only people in a position to do something about it—they have so far registered as a mere oddity, albeit a distasteful one.[46] These wrongly decided racist, imperialist decisions have run amok long enough. The Court should overrule them once and for all.

I. THE *INSULAR CASES* REVISITED

The status of the Constitution in the territories of the United States was ambiguous and contested even before the *Insular Cases*, though the territories' status as states-in-waiting was not.[47] Throughout the nineteenth century, Congress governed the territories through organic acts, which either required territorial legislatures to pass laws consistent with the applicable provisions of the Constitution or expressly "extended" the Constitution, again insofar as applicable, to a

46. As noted above, *see supra* note 41, Justices Gorsuch and Sotomayor recently went further in *Vaello Madero*, arguing that the Court should overrule the *Insular Cases*.

47. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 824-34. Alaska may have been an exception, though the question of its future status was not definitively answered until the *Insular Cases* distinguished between incorporated and unincorporated territories and placed Alaska on the incorporated side of the line. *See* Rassmussen v. United States, 197 U.S. 516 (1905). The treaty for the annexation of Alaska did differ from earlier treaties in that the earlier ones promised to "incorporate" the inhabitants of annexed territories "into the Union" and "admit" them to the enjoyment of the rights and privileges of citizenship, whereas the Alaska treaty omitted the reference to incorporation into the Union. *Compare* Treaty with France for the Cession of Louisiana, U.S.-Fr., art. III, Apr. 30, 1803, 18 Stat. 232, 233 ("The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States . . . .") (other treaties used the same language), *with* Treaty Concerning the Cession of the Russian Possession in North America by His Majesty the Emperor of all the Russias to the United States of America, U.S.-Rus., Mar. 30, 1867, 15 Stat. 539, 542 ("The inhabitants of the ceded territory . . . , with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States . . . ."). The language excepting "uncivilized native tribes" from the grant of citizenship in Alaska had some precedent in the Treaty of Guadalupe Hidalgo annexing Mexican territory in 1848 after the war with Mexico, which required Mexicans living in the territory to make an election between Mexican and U.S. citizenship within one year but discussed "savage tribes" in a separate provision. *See* Treaty of Peace, Friendship, Limits, and Settlement with Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922, 929-32.

given territory.[48] Because Congress "extended" the Constitution, or parts of it, to the territories, it was unclear whether these provisions would have applied *ex proprio vigore* (i.e., of their own force). Cases considering constitutional challenges in the territories produced conflicting decisions, at times holding that a given provision applied of its own force, at other times stating that a statute had applied the relevant constitutional guarantee to the territory, and occasionally leaving the question open.[49]

The debate over slavery in the territories underscores the uncertain status of the Constitution there.[50] Famously, John C. Calhoun and Daniel Webster debated the issue in terms of whether the Constitution "followed the flag" to the territories.[51] Calhoun argued that it did, and therefore protected slavery there, as a form of property.[52] Webster argued that it did not, and that it therefore did not prevent Congress from regulating or even abolishing slavery in the territories.[53] Chief Justice Taney's opinion in the *Dred Scott* case agreed with the view expressed by Calhoun in what has come to be known, ironically, as the most anti-imperialist passage the Supreme Court has ever uttered:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.[54]

While the Civil War and the Reconstruction Amendments rejected the *Dred Scott* decision insofar as it held that no Black person, whether slave or free, had ever been or could ever be a U.S. citizen, the status of the Constitution in the

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48. *See, e.g.*, Act of Mar. 2, 1853, ch. 90, § 6, 10 Stat. 172, 175 ("[T]he legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."); Act of Sept. 9, 1850, ch. 51, § 17, 9 Stat. 453, 458 ("[T]he Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah."); *see also* Boumediene v. Bush, 553 U.S. 723, 755-56 (2008) ("When Congress exercised its power to create new territories, it guaranteed constitutional protections to the inhabitants by statute."); *see* Burnett [Ponsa-Kraus], *supra* note 5, at 824-34, 825 n.127 (discussing and providing a full list of relevant statutes).

49. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 824-34.

50. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 152-87 (1978) (describing the historical controversy over slavery in the territories).

51. *Id.* at 145.

52. *See id.* at 156.

53. *See id.* at 155-56.

54. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 446 (1857). The passage is "anti-imperialist" in the sense of rejecting the existence of perpetual U.S. territories.

territories remained uncertain. Subsequent cases on the applicability of the Constitution in the territories picked up where they had left off, sometimes holding that constitutional rights applied *ex proprio vigore* and other times holding that they applied by virtue of statutory extension.[55]

This is where doctrine stood when the United States intervened in Cuba's War of Independence against Spain in 1898, entering the conflict just in time to seal Cuba's victory.[56] The political and popular debate surrounding the United States's intervention in this conflict pitted imperialists against anti-imperialists on the question of whether the United States could annex territory without committing to admitting it into statehood.[57] That debate took constitutional form as a disagreement over whether the United States could govern territory unrestrained by the Constitution, or, in a revival of the catchy but overly simplistic turn of phrase associated with the earlier debate over slavery in the territories, whether the Constitution "followed the flag" to the new territories.[58]

That contentious question came to the Supreme Court in the form of *Downes v. Bidwell*, a case involving a dispute over the imposition of duties by the customs collector of New York on a shipment of oranges from Puerto Rico.[59] The question before the Court was whether the phrase "United States" as used in the Uniformity Clause included Puerto Rico (and, by implication, the other new territories).[60] If so, the duties would have arguably violated the uniformity requirement.[61] The Court's answer was that the phrase did not encompass Puerto Rico.[62] Although subject to U.S. sovereignty, the new territories were not part of the United States for purposes of uniformity.

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55. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 824-34.

56. *See* Joint Resolution of Apr. 20, 1898, ch. 24, 30 Stat. 738. *See generally* HUGH THOMAS, CUBA, OR THE PURSUIT OF FREEDOM 356-414 (2d ed. 1998) (1971) (recounting the history of the war from the United States's intervention to its end in the U.S. occupation of Cuba).

57. *See, e.g.*, SPARROW, *supra* note 1, at 40-56 (describing the constitutional debate between imperialists and anti-imperialists in the wake of the war with Spain).

58. *See id.* at 2-3.

59. 182 U.S. 244 (1901).

60. *Id.* at 249; *see* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

61. *Downes*, 182 U.S. at 249. For a discussion of the debate among lawyers and legal scholars concerning the meaning of the phrase "United States," see Christina Duffy Burnett [Ponsa-Kraus], *The Constitution and Deconstitution of the United States*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-98, at 181, 183-89 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

62. *Downes*, 182 U.S. at 250-51; *id.* at 342 (White, J., concurring).

Justice Brown, who had authored the *Plessy* decision several years earlier, wrote the opinion for the Court. Despite the opinion's official designation, however, no other Justice joined it; the opinion "for the Court" was really an opinion for Brown alone. Brown explained that the phrase "United States" included only the states of the Union and the District of Columbia, and that, with few exceptions, the Constitution was reserved to them.[63] It did not apply in the territories unless "extended" there by Congress.[64] Brown's reasoning came to be known as the "extension theory."

In a concurrence that would eventually gain the assent of a unanimous Court, Justice White rejected the proposition that the Constitution as such did not apply in the territories: "In the case of the territories," he wrote, "as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[65] White then drew a different line around the phrase "United States" in the Uniformity Clause, reasoning that it included states, the District of Columbia, *and* any territory that had been "incorporated" into the United States following its annexation.[66] Since neither the treaty of peace with Spain nor subsequent congressional legislation had formally "incorporated" Puerto Rico, the Philippines, or Guam into the United States, those territories were not part of the United States — at least for purposes of uniformity.[67] They were, instead, "foreign to the United States in a domestic sense," as he put it in an infamously incomprehensible turn of phrase.[68] White's reasoning came to be known as the doctrine of territorial incorporation, and the affected territories acquired the label of "unincorporated territories."[69] Two other

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63. *Id.* at 250-51, 270.

64. *Id.* at 278-79, 286-87.

65. *Id.* at 292 (White, J., concurring).

66. *Id.*

67. *Id.* at 339-42. Justice White relied on the use of the term "incorporate" in earlier treaties of annexation, *see supra* note 47, as support for the proposition that there had always been a distinction between incorporated and unincorporated territories, though the treaty language in question obviously referred to a promise of statehood, not to a separate category of territory. *See Downes*, 182 U.S. at 319, 324-35 (White, J., concurring). Apparently wishing to place Alaska on the incorporated side of the line (as he eventually did in his *Rassmussen v. United States* opinion, *see* Rassmussen v. United States, 197 U.S. 516, 523 (1905)), he asserted that the treaty for the annexation of Alaska made the same promise, *see Downes*, 182 U.S. at 319 (White, J., concurring), even though it had not used the term "incorporate."

68. *Downes*, 182 U.S. at 341.

69. *Id.* at 342 (explaining that, for purposes of uniformity, Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession").

Justices joined White's concurrence and a third, concurring separately, agreed with it in substance.[70]

Both Justices Brown and White observed in dicta that fundamental constitutional limitations restrained Congress anywhere — even in unincorporated territories.[71] Courts and scholars adhering to the standard account have since interpreted these statements restrictively, as if they stood for the proposition that *only* fundamental constitutional limitations, and nothing else in the Constitution (except for the Territory Clause, of course), apply in the unincorporated territories.[72]

But this interpretation misreads these passages. Read carefully and contextually, the passages have a very different implication: namely, they assure the reader that the holding in *Downes* would *not* affect fundamental constitutional limitations. When Justice White referred specifically to fundamental limitations, his meaning was expansive, not restrictive. As he put it, "[E]ven in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed" anywhere.[73] Neither Brown nor White provided an exhaustive list of applicable provisions, though Brown's examples included the prohibitions on bills of attainder, ex post facto laws, and titles of nobility, along with:

> the rights to one's own religious opinion and to a public expression of them . . . ; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government.[74]

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70. Justices Shiras and McKenna joined. *See id.* at 287. Justice Gray concurred separately. *See id.* at 344-45 (Gray, J., concurring).

71. *Id.* at 282-83 (plurality opinion); *id.* at 291 (White, J., concurring).

72. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 808 n.40 (2005) (listing selected examples of scholarship adopting the standard account); *see id.* at 870-77 (describing and challenging the standard account).

73. *Id.* at 291 (White, J., concurring).

74. *Id.* at 277, 282-83 (plurality opinion). Brown "suggest[ed], without intending to decide, that" these were "natural rights, enforced in the Constitution by prohibitions against interference with them." *Id.* at 282. Note that he included equal protection on the list well before it had been "reverse" incorporated into the Due Process Clause under *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Soon after *Downes*, the Puerto Rico Supreme Court interpreted the equal-protection guarantee as applicable in Puerto Rico. *See Ex parte* Bird, 5 P.R. 241, 261 (1904); *see also*

To be sure, these statements assume that some provisions apply and some do not. But as Justice White insisted, this is true anywhere—not just in unincorporated territories. To cite just one example, at the time *Downes* was decided, most of the Bill of Rights did not apply against the states, either.[75] In other words, to interpret these opinions as creating a nearly extraconstitutional zone substantially oversimplifies and overstates what they held.

Still, the *Downes* majority held that the Uniformity Clause did not apply in the newly annexed territories on the unprecedented ground that either some of these territories (White) or all of them (Brown) were not part of the United States, giving rise to strongly worded dissents by Chief Justice Fuller and Justice Harlan. Both principally disagreed with the opinion for the Court, but each separately criticized White's concurrence and its novel doctrine of territorial incorporation.[76] They decried it as not only wrong, but entirely unprecedented and utterly confusing.[77] Expressing consternation at the idea that there were two categories of U.S. territory with two different relationships to the Constitution, they insisted that the new territories, like all previous ones, had become part of the United States upon their annexation and that the same constitutional requirements applied to them as had always applied to all territories.[78]

Despite the vigorous disagreement among the Justices, the holding in *Downes* and the other *Insular Cases* soon put an end to the popular and political debate. The imperialists had won the day—that much was clear.[79] A majority of the Court had taken their side by allowing the United States to annex and govern territory subject to at least one fewer constitutional requirement than might otherwise apply. The Constitution, it seemed, did not "follow the flag" to these new territories—or at any rate, that famous turn of phrase was a memorable way of summing up in a headline what the Court had done. Courts and scholars later struggling to make sense of the decisions settled on a more legalistic way of saying essentially the same thing, repeatedly describing the cases as having drawn a line between places where the "entire" Constitution applies (i.e., states, the

Examining Bd. of Eng'rs, Architects & Surveyors v. de Otero, 426 U.S. 572, 600 (1976) (citing *Downes*, 182 U.S. at 283-84; Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922)) (interpreting the *Insular Cases* as having recognized the applicability of due process and equal protection in Puerto Rico).

75. I have developed this point in detail in Christina Duffy Burnett [Ponsa-Kraus], *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009).

76. *Downes*, 182 U.S. at 372-73 (Fuller, C.J., dissenting); *id.* at 389-91 (Harlan, J., dissenting).

77. *Id.*

78. *Downes*, 182 U.S. at 368-69 (Fuller, C.J., dissenting); *id.* at 376 (Harlan, J., dissenting).

79. *See* SPARROW, *supra* note 1. As Daniel Immerwahr describes it, the United States faced a "trilemma." It could have only two of three: republicanism, white supremacy, or overseas expansion. It chose white supremacy and overseas expansion. *See* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 96 (2020).

District of Columbia, and incorporated territories) and places where only its "fundamental" limitations apply (i.e., the unincorporated territories).[80]

Over the two decades following *Downes*, lower courts and the Supreme Court decided a series of additional cases concerning the applicability of constitutional rights in the unincorporated territories. These cases consistently held that constitutional rights applied in the territories, with the exception of federal grand-jury and jury-trial rights.[81] As to those specific provisions, the Court held that they did not apply in the unincorporated territories of their own force (i.e., unless Congress extended them by statute), whereas they *did* apply in incorporated territories (such as Alaska and Hawaii).[82]

The case of *Balzac v. Porto Rico*, decided five years after Congress extended U.S. citizenship to Puerto Ricans by statute, culminated the series.[83] *Balzac* concerned a challenge to the denial of the jury-trial right in a local Puerto Rican court.[84] If the grant of citizenship had incorporated Puerto Rico, the federal jury-trial right would apply there. But the *Balzac* Court held that even the collective naturalization of the people of Puerto Rico had not incorporated the territory of Puerto Rico.[85] It thus clarified one aspect of the doctrine of territorial incorporation. Whereas Justice White's concurrence in *Downes* had not explained what the act of incorporation looked like, but had assumed that it would be a consequence of citizenship, *Balzac* made clear that Congress must expressly state its

80. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 821.

81. Andrew Kent has compiled a comprehensive list that identifies whether each right applied via military or executive order, local legislation, Congressional statute, or court decision. *See* Andrew Kent, *The Jury and Empire: The* Insular Cases *and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 454-65 (2018).

82. Hawaii v. Mankichi, 190 U.S. 197, 217-18 (1903) (holding that the right to trial by jury did not apply to Hawaii between its annexation in 1898 and its incorporation in 1900 but applied thereafter); Rassmussen v. United States, 197 U.S. 516, 525 (1905) (holding that the right to trial by jury applied to Alaska because it was an incorporated territory). As I have argued elsewhere, *see* Burnett [Ponsa-Kraus], *supra* note 5, 824-52, the distinction between incorporated and unincorporated territories, and the uncertainty as to which provisions would be held applicable in the latter, creates the impression of a dramatic difference between the two categories of territory for purposes of which federal rights apply. But in fact, until the *Insular Cases*, it had not been entirely clear that every provision of the Bill of Rights applied *ex proprio vigore* in any territory. Instead, the Court had flipped back and forth on the question—as *Downes* itself acknowledged. *See Downes*, 182 U.S. at 253-54. This point is relevant here because it helps explain the origin of the idea that the unincorporated territories are in a nearly extra-constitutional zone—that is, it comes from the alleged contrast between them and the incorporated territories, where the "entire" Constitution supposedly applies, though the reality is more complicated.

83. 258 U.S. 298 (1922).

84. *Id.* at 300.

85. *Id.* at 305.

intent to incorporate a territory, and that citizenship alone did not accomplish it.[86] At the same time, *Balzac* confirmed that the applicability of fundamental limitations on government power in the unincorporated territories depended on a case-by-case analysis.[87]

The standard account interprets *Balzac* as further evidence that the *Insular Cases* relegated the unincorporated territories to a nearly extraconstitutional zone. Yet despite the stubborn persistence of the standard account, the proposition that most of the Constitution does not apply in the unincorporated territories does not accurately describe those controversial decisions.

On the one hand, the doctrine of territorial incorporation broke with the past in several respects. The Court—never mind the Constitution—had never distinguished between two classes of territories, one a part of the United States and the other merely belonging to it. On the contrary, the Court had stated on more than one occasion that the United States included the states, the District, *and* the territories, without offering any hint that there might be more than one category of territory—let alone a category of territories fully subject to U.S. sovereignty but somehow outside the United States.[88] Before *Downes* was decided in 1901, territories annexed by the United States had also been on their way to statehood, an assumption that had been confirmed by consistent practice.[89] After 1901, this was no longer the case. By delinking annexation from eventual statehood, the Court gave its imprimatur to indefinite—potentially permanent—territorial status. Moreover, *Downes* dispelled doubts about whether annexed territories could be deannexed: they could, and a close reading of Justice White's concurrence reveals that he was at pains to make it clear.[90] Still, the doctrine of territorial incorporation made it possible to postpone deannexation, too, indefinitely.

On the other hand, significant as the *Insular Cases*' break with the past was, it did not translate into the proposition that the entire Constitution applies

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86. *Downes*, 182 U.S. at 306; *Balzac*, 258 U.S. at 305.

87. *Balzac*, 258 U.S. at 306.

88. *See* Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820) (explaining, albeit in dicta, that term "United States" encompasses "our great republic, which is composed of States and territories"); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873).

89. As noted earlier, in 1883, a court described the territories as "inchoate state[s]." *Ex parte* Morgan, 20 F. 298, 305 (W.D. Ark. 1883). In 1909, the Supreme Court omitted that phrase from its quotation of the Arkansas court in a case involving one of the new unincorporated territories. New York *ex rel.* Kopel v. Bingham, 211 U.S. 468, 475 (1909). I thank Neil Weare for pointing this out to me. As for the possible exception of Alaska, as noted earlier, *see supra* note 47, the question of its future status remained unanswered until the *Insular Cases* put it on the statehood track.

90. *See* Burnett [Ponsa-Kraus], *supra* note 5, at 853-60 (offering a close reading of Justice White's concurrence in *Downes* and a deannexationist interpretation of the doctrine of territorial incorporation).

within the United States narrowly defined, while only its fundamental provisions apply in territories belonging to, but not a part of, the United States.

For one thing, with very few exceptions, fundamental constitutional limitations constrain government action in the unincorporated territories as they do elsewhere in the United States. What counts as fundamental depends on the specific territory at issue, but the *Insular Cases* and their progeny repeatedly arrived at the same answer: nearly every right they considered turned out to be fundamental in every unincorporated territory, with the exception of the federal rights to an indictment by a grand jury and a jury trial.[91] Once one accounts for the fact that federal grand-jury and jury-trial rights did not apply against states at that time either, the proposition that the "entire" Constitution applies in the United States while "only" its fundamental provisions apply in the unincorporated territories begins to look pretty shaky.[92]

For another, even *Downes*'s holding concerning the Uniformity Clause[93] had dubious significance in light of a decision handed down just a few years after *Downes*: *Binns v. United States*.[94] In *Binns*, the Court relied on Congress's plenary power over all territories, without distinguishing between incorporated or unincorporated territories, to uphold an excise tax on licenses in the incorporated territory of Alaska that would otherwise have violated uniformity.[95] Rejecting

91. See *Balzac*, 258 U.S. 298, 304-05, 309, 311 (1922) (holding that the federal right to a jury trial does not apply in a local court in Puerto Rico); Ocampo v. United States, 234 U.S. 91, 98 (1914) (holding that the right to an indictment by grand jury does not apply to the Philippines); Dowdell v. United States, 221 U.S. 325, 332 (1911) (same); Dorr v. United States, 195 U.S. 138, 149 (1904) (concluding that Congress is not required to guarantee the right to trial by jury in unincorporated territories like the Philippines). For a comprehensive list showing which rights were held applicable in the unincorporated territories and how, *see* Kent, *supra* note 81, at 454-65. The Supreme Court of Puerto Rico later held that the Nineteenth Amendment did not apply on the island either, but the U.S. Supreme Court never weighed in on that question. *See* Morales v. Bd. of Registration, 33 P.R. 76 (1924).

92. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the right to a trial by jury into the Fourteenth Amendment). The right to an indictment by a grand jury still does not apply against the states. To be sure, the Court's reasoning with respect to why grand-jury and jury-trial rights did not apply in the unincorporated territories was undeniably different from its reasoning with respect to why those rights did not apply against the states (i.e., racist and imperialist). Even so, there were parallels as well, as explored in Andrew Kent's illuminating article. *See generally* Kent, *supra* note 81, at 394-412 (describing criticisms of and opposition to juries in the early twentieth-century United States).

93. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

94. 194 U.S. 486 (1904).

95. *Id.* at 486; Mygatt-Tauber, *supra* note 27; SPARROW, *supra* note 1, at 148; Burnett [Ponsa-Kraus], *supra* note 5, at 836-37.

the relevance of the doctrine of territorial incorporation to the question in *Binns*, the Court explained that Congress had the power to legislate for Alaska as if it were the local legislature because Alaska was a territory and that the deviation from uniformity was permissible because the taxes raised revenue for Alaska's benefit.[96] As for other constitutional provisions defining their geographic scope with the phrase "United States," we do not have a definitive answer because, until recently, no case other than *Downes* had raised the question of whether a constitutional provision defining its geographic scope with the phrase "United States" included the unincorporated territories.[97]

In short, the proposition that the *Insular Cases* created a nearly extraconstitutional zone for the unincorporated territories is neither warranted by what those decisions actually say nor desirable as a matter of policy today. It misdescribes and overstates their holdings with respect to the applicability of the Constitution in the unincorporated territories, exacerbating their profoundly flawed reasoning. Worse, it diverts attention from the real problem with these decisions—namely, that they sanction the practice of maintaining perpetual colonies that are subject to congressional plenary power over their autonomy and self-government but denied representation in the federal government.

By embracing the view that the *Insular Cases* created a nearly extraconstitutional zone under U.S. sovereignty, the standard account has given rise to an unwarranted expansion of their holdings with respect to the applicability of the Constitution in the territories. It is as if the *Insular Cases* had swept aside all but a few constitutional obstacles to government action in these places. The result has been unclear and poorly reasoned case law. Over the past several decades, courts confronting constitutional challenges in the unincorporated territories have taken advantage of the apparent constitutional void supposedly left by the *Insular Cases*. Citing an unabashedly results-oriented justification, they have rationalized their overly creative constitutional interpretation as essential to the pursuit of cultural accommodation. This is the *Insular Cases* "repurposed." But

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96. *Binns*, 194 U.S. at 491-92. The same was true of the duties in *Downes*. *See* Foraker Act, Pub. L. No. 56-191, § 4, 31 Stat. 77, 78 (1900); *see also* Rassmussen v. United States, 197 U.S. 516, 525 (1905) (explaining *Binns* as follows: "[T]he court declared it to be settled that Alaska had been undoubtedly incorporated into the United States, and hence conceded that the license complained of was invalid if levied by Congress under the general grant in the Constitution of the power of taxation. The legislation in question was, however, sustained on the exceptional ground that Congress had therein merely exerted its authority as a local legislature for Alaska.").

97. *See, e.g.*, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (holding that the Citizenship Clause, which guarantees citizenship to persons born or naturalized "in the United States," does not apply in the unincorporated territory of American Samoa); Fitisemanu v. United States, 1 F.4th 862 (10th Cir.) (same), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021) (en banc). I discuss these cases in detail below. *See infra* Part IV.

all of this repurposing has left untouched, if not ever more deeply entrenched, the permanent colonial system the *Insular Cases* created.

II. THE *INSULAR CASES* REVIVED

After *Balzac*, the Supreme Court did not discuss the *Insular Cases* again until the 1950s. When it did, the circumstances involved not U.S. territories, but U.S. military bases abroad. The question in *Reid v. Covert* and *Kinsella v. Krueger* was whether the rights to an indictment by a grand jury and a trial by jury applied to the capital murder trials of U.S. citizen civilian spouses of American servicemembers living on U.S. military bases in foreign territory—in those cases, Great Britain and Japan respectively.[98] The Court held that they did not.[99] But it then took the rare step of rehearing the cases.[100] It reversed itself the following year in a decision consolidating the two cases under the caption *Reid v. Covert*.[101]

Six Justices rejected the validity of what was arguably the most directly relevant precedent on the question of the Constitution abroad: *In re Ross*.[102] A decade before the *Insular Cases*, *In re Ross* held that an American sailor tried for murder on a U.S. vessel off the coast of Japan did not have the right to a trial by

98. The events in *Reid v. Covert* took place on a U.S. military base in Great Britain, Reid v. Covert, 354 U.S. 1, 3 (1957); those in *Kinsella v. Krueger* on a base in Japan, *id.* at 4.

99. Kinsella v. Krueger, 351 U.S. 470 (1956), *withdrawn sub nom. Reid*, 354 U.S. at 5; Reid v. Covert, 351 U.S. 487 (1956), *withdrawn*, 354 U.S. 1, 5 (1957). For both *Reid* and *Kinsella*, Justice Frankfurter wrote a separate opinion titled "Reservation of Mr. Justice Frankfurter" in which he questioned the relevance of the cases involving domestic territory to a constitutional challenge involving foreign territory and withheld judgment in the case on the ground that the Court needed more time to consider the issues. *See Reid*, 351 U.S. at 492 (Frankfurter, J., reserving judgment); *Kinsella*, 351 U.S. at 481-85 (same). Three dissenting Justices, who together with Justice Brennan would later constitute the plurality in the 1957 *Reid*, agreed that the Court needed more time and announced that they would issue their dissent the following Term—an announcement rendered moot by the grant of the petition for rehearing. *See Reid*, 351 U.S. at 492 (Warren, C.J., dissenting).

100. Reid v. Covert, 352 U.S. 901, 901-02 (1956) (granting petition for rehearing); Kinsella v. Krueger, 352 U.S. 901, 901-02 (1956) (granting petition for rehearing).

101. 354 U.S. 1, 5 (1957). Justice Harlan changed his vote. Justice Frankfurter had postponed voting in both cases. *See Reid*, 351 U.S. at 492 (Frankfurter, J., reserving judgment); *Kinsella*, 351 U.S. at 481-85 (same). Between the first and second decisions, Justice Reed retired and Justice Whittaker joined the Court, but he did not participate in the decision on rehearing. *See Reid*, 354 U.S. at 41.

102. 140 U.S. 453 (1891); *see Reid*, 354 U.S. at 10-12 (plurality); *Reid*, 354 U.S. at 56 (Frankfurter, J., concurring in result); *Reid*, 354 U.S. at 67 (Harlan, J., concurring in result).

jury.[103] That case had espoused a theory known as "strict territoriality," according to which constitutional rights stop at the border: they do not even protect U.S. citizens abroad.[104] The Justices in the *Reid* plurality and the two concurring Justices rejected *In re Ross*.[105] However, they disagreed over what to make of the more ambiguous and confusing *Insular Cases*.

The 1956 decisions had partially relied on the case law concerning the Constitution in the U.S. territories as far back as the early nineteenth century, including the *Insular Cases*, but had not clearly explained why cases involving domestic territory should govern a situation involving foreign territory.[106] Citing the *Insular Cases* as part of that case law, they had drawn from the Court's jurisprudence on the territories the proposition that constitutional provisions do not always apply everywhere.[107] But on rehearing, five of the Justices took the position that the question of whether constitutional provisions apply abroad, even to U.S. citizens on U.S. military bases, raises distinct issues from the question of whether they apply on domestic territory.[108]

The four Justices who signed onto Justice Black's plurality opinion rejected the relevance of the territorial cases. As for the *Insular Cases* specifically, the

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103. *Ross*, 140 U.S. at 464. The sailor was actually British, but the Court reasoned that "[w]hile he was an enlisted seaman on the American vessel, which floated the American flag, he was . . . an American, under the protection and subject to the laws of the United States equally with the seaman who was native born." *Id.* at 479.

104. *See* RAUSTIALA, *supra* note 1, at 59-68; NEUMAN, *supra* note 1, at 82.

105. *See Reid*, 354 U.S. at 10-12 (plurality) ("The Ross approach . . . has long since been directly repudiated by numerous cases."); *id.* at 56 (Frankfurter, J., concurring in result) ("[*In re Ross*] expressed a notion that has long since evaporated."); *cf. id.* at 67 (Harlan, J., concurring in result) (agreeing with Frankfurter, but opining that *In re Ross* "still [has] vitality").

106. *See* De Lima v. Bidwell, 182 U.S. 1, 194, 199 (1901) (finding that Puerto Rico was not foreign territory and therefore not covered by the federal statute imposing tariffs on goods from foreign countries). The failure to address directly the relevance of the territorial cases was likely due to the U.S. legal system's lack of a theory regarding the geography of the Constitution that has any real purchase, leaving these cases, and the *Insular Cases* in particular, as a handy citation for the vague idea that some territory has a different relationship to the Constitution than does other territory. I thank Kal Raustiala for this observation.

107. *See* Kinsella v. Krueger, 351 U.S. 470, 474 (1956); *Reid*, 351 U.S. at 488 ("Appellee's principal argument on the merits is answered by our decision in *Kinsella v. Krueger*." (citation omitted)).

108. *See Reid*, 354 U.S. at 8-9, 12-14 (rejecting the proposition that certain provisions of the Bill of Rights do not apply outside "the continental United States" and the 1956 decisions' reliance on the *Insular Cases* specifically); *id.* at 53-54 (Frankfurter, J., concurring in result) (reasoning that the territorial cases did not "control" *Reid* and *Kinsella* but allowing that they were relevant insofar as they exemplify a method of "harmonizing" seemingly inconsistent constitutional provisions). The different considerations obtaining abroad include, saliently, the presence of another sovereign, such as a host government, with its own legal system and its own interests in the enforcement of its laws on its own territory. For a thorough analysis of the issues at stake, see, for example, RAUSTIALA, *supra* note 1, at 3-8, 127-247.

plurality strongly criticized them and would have overruled them, expressing the view that "neither the cases nor their reasoning should be given any further expansion."[109] Unfortunately, even as the plurality rightly criticized the *Insular Cases*, it contributed to the erroneous impression that unincorporated territories were somehow foreign, by distinguishing the facts in the *Insular Cases* from those in *Reid* on the ground that the latter concerned U.S. citizens without noting that, by then, the inhabitants of unincorporated territories were U.S. citizens as well.[110]

The two dissenting Justices would have left standing the 1956 decisions, including their reliance on territorial case law.[111] Meanwhile, Justices Harlan and Frankfurter concurred, specifically stating that the *Insular Cases* remained valid.[112] Even then, Frankfurter agreed with the plurality that the *Insular Cases* were not relevant in *Reid*. On the one hand, he explained, the question of whether and how constitutional provisions apply abroad "involves . . . considerations not dissimilar to those involved in a determination under the Due Process Clause,"[113] and the *Insular Cases* themselves involved an analysis "similar[] to analysis in terms of 'due process.'"[114] On the other hand, those cases "d[id] not control the present cases"[115] because they concerned Congress's power under the

109. *See Reid*, 354 U.S. at 14.

110. *Id.* ("The 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions[,] whereas here the basis for governmental power is American citizenship."). Per *Gonzales v. Williams*, 192 U.S. 1, 10, 15 (1904), the inhabitants of annexed territory became at least U.S. nationals upon annexation. In 1917, Congress collectively naturalized the people of Puerto Rico. *See* Jones-Shafroth Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917). In other words, by the time *Reid* was decided, the people of Puerto Rico had been U.S. citizens for 40 years; the people of the U.S. Virgin Islands for 30; those of Guam for 5; and American Samoans were U.S. nationals as they are now. The people of the Northern Mariana Islands (NMI) would become U.S. citizens later, when the United States and the NMI entered into the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976).

111. *See Reid*, 354 U.S. at 14 (Clark, J., dissenting) ("Mr. Justice Burton and I remain convinced that the former opinions of the Court are correct and that they set forth valid constitutional doctrine under the long-recognized cases of this Court."); *id.* at 86-87 (noting that "[t]erritorial courts have been used by our Government for over a century and have always received the sanction of this Court until today," and complaining that "in light of all of the opinions of the former minority here," the use of a system of territorial or consular courts to try civilians living on military bases "is now out of the question").

112. *Id.* at 50-53 (Frankfurter, J., concurring in result); *id.* at 67 (Harlan, J., concurring in result).

113. *Id.* at 44.

114. *Id.* at 53.

115. *Id.*

Territory Clause, whereas "[o]f course the power sought to be exercised in Great Britain and Japan does not relate to 'Territory.'"[116]

Justice Harlan, however, not only considered the territorial cases relevant in *Reid*, but he went further, breathing new life into the *Insular Cases* in particular by citing them in support of a test that would later gain favor among advocates of the repurposing project in the unincorporated territories: the so-called "impracticable and anomalous" test.[117] Observing that the *Insular Cases* still had "vitality,"[118] Harlan explained that "properly understood, . . . [they] stand for . . . a wise and necessary gloss on our Constitution"[119]:

> The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of . . . the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.[120]

The opening sentence of the quoted passage echoes Justice White's effort to distinguish his approach from Justice Brown's seemingly more extreme

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116. *Id.*

117. *Id.* at 74 (Harlan, J., concurring in result). In *Boumediene v. Bush*, 553 U.S. 723, 759-61 (2007), the Supreme Court cited the case *Johnson v. Eisentrager*, 339 U.S. 763 (1950), along with *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)—one of the leading *Insular Cases*—in which the Court reaffirmed the doctrine of territorial incorporation, and *Reid v. Covert*, 354 U.S. at 74-75, in support of its use of a version of the "impracticable and anomalous test," also known as the functional approach. *Boumediene*, 553 U.S. at 759. While *Eisentrager* did take into account practical considerations, it did not use the terms "impracticable and anomalous" nor purport to set forth a test for determining the extraterritorial applicability of constitutional provisions. I have criticized the impracticable-and-anomalous test before. *See generally* Burnett [Ponsa-Kraus], *supra* note 75 (arguing that the test misinterprets the *Insular Cases* and that courts should look to the case law on Fourteenth Amendment incorporation for guidance in cases concerning the applicability of rights in the unincorporated territories).

118. *Id.* at 67 (Harlan, J., concurring in the result). Harlan claimed he agreed with Frankfurter, *see id.*, but although his concurrence was substantially consistent with Frankfurter's, he did not distinguish the *Insular Cases* but instead relied on them as the precedent from which he derived his impracticable-and-anomalous test, *see id.* at 74.

119. *Id.* at 67, 74.

120. *Id.* at 74. Justice Harlan used the words "impracticable" and "impractical" interchangeably, though arguably they do not mean the same thing. I use the term "impracticable" (except when quoting text that uses the term "impractical") because it more accurately describes Harlan's analysis.

extension theory in *Downes*. Recall, White explained that "when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[121] Similarly, Harlan rejected the view that the Constitution did or did not apply in any given place, including foreign territory, insisting instead that the applicability of any particular provision depended on the circumstances.

Insofar as he rejected the standard account, Justice Harlan offered an accurate understanding of the *Insular Cases*. But insofar as he relied on the *Insular Cases* in a constitutional challenge originating in a foreign context—implying, erroneously, that the unincorporated territories themselves were foreign—he too contributed to the persistent misconception of those territories as somehow outside the ambit of the Constitution. By translating the reasoning in the *Insular Cases* into the "impracticable and anomalous" test, he effectively turned the question of whether a constitutional provision applied in a particular place into a question of policy. Even as he insisted that the constitution is always "operative," he drew from the *Insular Cases* a test that makes sense only if constitutional provisions do not apply of their own force, and should only be "applied" by the courts if the logistical obstacles to their application are not insurmountable. Whatever its merits in the context of foreign territory, this revised interpretation of the *Insular Cases* bolstered the erroneous understanding of those decisions as having created a nearly extraconstitutional zone on domestic territory. Soon enough, Harlan's test would make its way into the jurisprudence on the Constitution in the unincorporated territories.[122]

Describing his test, Justice Harlan explained that, "for me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[123] Harlan's test is best understood as calling for an inquiry into whether the application of a constitutional provision abroad would be logistically impossible or lead to absurd results. In a footnote, he elaborated on what he meant by the statement that a court must consider "the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[124] There, he contrasted the consequences of the holding in *Reid* itself, which concerned capital crimes, with the arguably insurmountable challenges that would arise from providing jury trials for lesser crimes

121. Downes v. Bidwell, 182 U.S. 244, 292 (1901) (White, J., concurring).

122. *See infra* Part III.

123. *Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result).

124. *Id.*

committed on military bases.[125] Applying the test to the facts at issue in *Reid*, he concluded that it would not be impracticable and anomalous to provide jury trials to American civilians accused of capital crimes on U.S. military bases abroad.[126]

Justice Harlan's test kept the *Insular Cases* alive in Supreme Court jurisprudence despite the fact that five out of the eight Justices in *Reid* believed they did not govern the applicability of the Constitution abroad. When the impracticable-and-anomalous test next appeared in a Supreme Court opinion, it yet again involved foreign territory and yet again appeared in a concurrence signed by only one Justice: this time, Justice Kennedy.[127]

In *United States v. Verdugo-Urquidez*, the question was whether the prohibition against unreasonable searches and seizures and the warrant requirement of the Fourth Amendment applied to the search of a Mexican national's home in Mexico City conducted jointly by federal and Mexican agents after the suspect had been apprehended and brought to the United States by federal authorities.[128] In an analysis that came to be known as the "substantial connections" test, the Court held that the Fourth Amendment did not apply to searches of noncitizens' homes abroad because the reference to "people" in the Fourth Amendment did not include a person involuntarily brought to and held in the United States.[129] But Justice Kennedy wrote separately to disagree with the Court's approach. Instead, he advocated for the adoption of Justice Harlan's test.[130]

Echoing the assertion in the *Reid* concurrences that the *Insular Cases* had continuing validity, he noted that "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[131] Like Justice Harlan in *Reid*, Justice

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125. As it happens, the Court soon faced this question, could not find a way to distinguish between capital and other crimes, and held that the right to a trial by jury applied on U.S. military bases abroad even for lesser crimes. *See* RAUSTIALA, *supra* note 1, at 148.

126. *Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result).

127. Between *Reid* and *Verdugo-Urquidez*, courts deciding constitutional challenges involving the unincorporated territories started using versions of Justice Harlan's test. *See infra* Part III.

128. 494 U.S. 259, 262 (1990).

129. *Id.* at 265-66, 274-75. The plurality also noted that Verdugo-Urquidez had not been in the United States for very long—only days—when the search took place, declining to decide "[t]he extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example." *Id.* at 271-72.

130. *See id.* at 277 (Kennedy, J., concurring). Justice Kennedy did not cite the territorial cases following *Reid*, *see supra* note 127, but he did cite the *Insular Cases*, along with *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

131. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

Kennedy neglected to explain clearly why the *Insular Cases* should be relevant to the United States's ability to exercise power abroad—or necessary to sustain that power, insofar as it is indeed undoubted.[132] Kennedy went on to apply the impracticable-and-anomalous test, concluding that it would be impracticable and anomalous for the Warrant Clause to apply in Mexico due to a series of considerations analogous to the logistical obstacles that concerned Harlan in *Reid*: "The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials" were all reasons why the Warrant Clause would be impracticable and anomalous to apply abroad.[133]

Justice Kennedy's concurrence in *Verdugo-Urquidez* kept the impracticable-and-anomalous test alive at the Supreme Court. His subsequent opinion for a majority of the Court in *Boumediene v. Bush* cemented its place in the Court's jurisprudence, albeit with some modification.[134] In *Boumediene*, Kennedy relied on both the *Insular Cases* and Justice Harlan's *Reid* concurrence, and employed Harlan's test as one factor in a three-pronged analysis of the applicability of the writ of habeas corpus in Guantánamo Bay. This time, the place in question had more in common with the unincorporated territories, though its status was by no means identical to theirs. Guantánamo is not domestic territory, but neither is it unambiguously foreign. Although Guantánamo is formally foreign under the de jure sovereignty of Cuba, the Court found (and it would be difficult to deny) that the United States has de facto sovereignty there.[135]

Like Justices Harlan and White, the *Boumediene* Court rightly rejected the standard account: "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[136] But also like them, it went on to articulate a test that gave substantially greater weight to the logistical obstacles to applying a constitutional provision than the *Insular Cases* had done. The Court observed that Harlan's *Reid* concurrence "read the Insular Cases to teach that whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it,' and, in particular, whether judicial enforcement of the

132. Recall, Justice Harlan's explanation of their relevance amounted to the observation that the *Insular Cases* stood for a useful "gloss" on the Constitution: "that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

133. *Verdugo-Urquidez*, 494 U.S at 278 (Kennedy, J., concurring).

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

135. *See id.* at 755.

136. *Id.* at 765.

provision would be 'impracticable and anomalous.'"[137] It then adopted a three-pronged analysis considering (1) "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made," (2) "the nature of the sites where apprehension and then detention took place," and (3) "the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[138] In its analysis of the third factor, the Court explained that while extending the writ of habeas corpus to Guantánamo would require some expenditure of resources and could divert the attention of military personnel from other pressing tasks, it would not compromise the military mission at the base.[139] Nor would it cause friction with the host Cuban government because no Cuban court had jurisdiction over the detainees or military personnel at Guantánamo.[140] With that, the Court concluded that it would not be impracticable and anomalous to extend the writ.[141]

Boumediene improved upon Justice Harlan's test by clarifying that it constituted one factor in a multipronged test.[142] While Harlan had certainly considered the citizenship status of civilians living on U.S. military bases abroad and the status of such bases as places subject to U.S. control by permission of a foreign sovereign, his concurrence had been unclear as to the weight he assigned each of these considerations; instead, he described the relevant test as the single question whether the asserted right would be "impracticable or anomalous" to apply. In contrast, *Boumediene* more clearly considered both citizenship and sovereignty status, along with the practical considerations of the impracticable-and-anomalous test, in determining whether a constitutional guarantee applied in a given circumstance.

Still, the decision gave the weight of a Supreme Court majority to the *Insular Cases* while only exacerbating the confusion those decisions had already caused with respect to the applicability of the Constitution in unincorporated territories. In a passage discussing the *Insular Cases*, Justice Kennedy observed that "[i]t may well be that that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional

137. *Id.* at 759 (quoting *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)).

138. *Id.* at 766.

139. *Id.* at 769.

140. *Id.* at 770.

141. *See id.* at 770.

142. *See id.* at 766.

significance."[143] Yet the remark went without elaboration, so *Boumediene* ultimately left the standard account standing.[144]

Meanwhile, the Court's endorsement of the impracticable-and-anomalous test in the extraterritorial context kept it alive in the unincorporated territories, where several courts adopted it as an updated version of the standard account. Now, whether a constitutional provision applied in an unincorporated territory depended on whether it was "impracticable or anomalous" to apply there — despite the undisputed fact that the test originated in a case involving foreign jurisdictions, whereas these were all domestic territories, subject to U.S. sovereignty and inhabited by U.S. citizens or U.S. nationals. As Part III describes, both before and after *Boumediene*, the standard account not only survived but thrived, as courts addressing constitutional challenges in the unincorporated territories took advantage of the creative license the *Insular Cases* afforded and deployed various versions of the impracticable-and-anomalous test in pursuit of the goal of cultural accommodation.

III. THE *INSULAR CASES* REVVED UP

Beginning a little over a decade after *Reid* and continuing to this day, a series of courts confronting constitutional challenges arising in the unincorporated territories have adopted the standard account of the *Insular Cases* and applied an updated version of those decisions' constitutional exceptionalism with a new aim: that of accommodating territorial cultures.[145] Scholarly advocates of

143. *Id*. at 758.

144. Kennedy quoted the following sentence from *Torres v. Puerto Rico*: "Whatever the validity of the [*Insular Cases*] in the particular context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment — or any other provision of the Bill of Rights — to the Commonwealth of Puerto Rico in the 1970s." *Boumediene*, 553 U.S. at 758 (quoting Torres v. Puerto Rico, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring)). Thus, *Boumediene* belongs on the list of Supreme Court opinions calling into question the validity of the *Insular Cases* but declining or lacking the votes to overrule them. *See Reid*, 354 U.S. at 14; *Torres*, 442 U.S. at 475-76 (Brennan, J., concurring); Harris v. Rosario, 446 U.S. 651, 652-53 (Marshall, J., dissenting); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020); United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring); *id*. (Sotomayor, J., dissenting). This is probably for the best, since when the Court overrules the *Insular Cases*, it should do so unequivocally, in a case that squarely presents the doctrine of territorial incorporation. *See infra* Part V.

145. Two recent Ninth Circuit decisions did not do the same, but they did not question the standard account, either. Both of them interpreted restrictions in voting based on ancestry as racial restrictions and held that they violated the Fifteenth Amendment in unincorporated territories, but in each case, the court noted that Congress had "extended" the Fifteenth Amendment to the relevant territory, an observation consistent with the standard account. *See* Davis v.

repurposing the *Insular Cases* have applauded these efforts and themselves contributed to the development of an understanding of the *Insular Cases* that repurposes them in the service of the same aim.[146]

Even if one accepts that the goal of cultural accommodation in the unincorporated territories is a laudable one, the entire project is ill-advised. That it is unabashedly results-oriented is bad enough. Worse, it keeps the *Insular Cases* alive and thriving on the misguided theory that they can be salvaged by well-intentioned judges. This is simply wrong. They cannot be salvaged. The *Insular Cases* are unsalvageable because regardless of which view one subscribes to—whether the standard or the alternative account—the *Insular Cases* created permanent colonies, which could remain subject to Congress's plenary power and denied voting representation in the federal government forever. Salvaging these cases prolongs a colonial territorial status, whether most of the Constitution applies or not.

Recall that the *Insular Cases* are problematic in two ways. First, the quality of their legal reasoning is singularly—one might say disqualifyingly—low, as scholarship on them consistently recognizes.[147] They were the epitome of making it up as one goes along. Second, their abysmal legal reasoning, problematic in large part because it was itself unabashedly results-oriented, served an indefensible goal. Justice White introduced into constitutional law an unprecedented,

Guam, 932 F.3d 822, 825, 829, 843 (9th Cir. 2019); Davis v. Commonwealth Election Comm'n, 844 F.3d 1087, 1095 (9th Cir. 2016). While the courts in the two *Davis* cases could have relied on the *Insular Cases* to hold that the Fifteenth Amendment means something different in the unincorporated territories than it does in the states, the choice not to do so is also consistent with the *Insular Cases*. *Cf.* Kepner v. United States, 195 U.S. 100, 124-25 (1904) (holding that the bar on double jeopardy in the organic act for the Philippines was coextensive with the constitutional bar). For a discussion of the *Davis* cases that compares their approach to the one used in the context of Federal Indian law, where analogous classifications have been upheld as political rather than racial classifications, see Cuison-Villazor, *supra* note 20, at 140-45.

146. *See supra* notes 15-20 and accompanying text.

147. *See, e.g.*, Michael Ramsey, *The Supreme Court, FOMB v. Aurelius Investment, and the Insular Cases*, ORIGINALISM BLOG (June 4, 2020, 6:00 AM), https://originalismblog.typepad.com/the-originalism-blog/2020/06/the-supreme-court-and-the-insular-casesmichael-ramsey.html [https://perma.cc/6TL5-FYD9] ("The *Insular Cases* are an abomination . . . . The 'territorial incorporation' doctrine has no basis in the Constitution's text or any context or pre- or early post-ratification history."); Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 71-72 (2013) (describing Justice White's reasoning in *Downes* as "cryptic and indecipherable"); GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 196-97 (2004) ("[T]here is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired . . . . The doctrine of 'territorial incorporation' that emerged from [the] *Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history.").

ungrounded, and incoherent doctrine for the express purpose of enabling the indefinite subordination of territories inhabited by racial minorities, denying them the implicit promise of statehood that territories had always enjoyed, and preserving the option of deannexing them—anything to avoid equality and representation.[148] That is what unincorporation was *for*. That is *all* it was for. The *Insular Cases* are a quintessential example of bad law made for a bad purpose.

Courts that have relied on the *Insular Cases* to decide constitutional challenges in the unincorporated territories have made matters worse. For one thing, these courts have followed the standard account, which, as I have explained, exacerbates the first problem by turning a modest holding affecting a few constitutional provisions at most into a dramatic holding affecting every constitutional challenge involving an unincorporated territory. For another, because the standard account is a badly distorted version of an already unclear and confusing doctrine, the decisions elaborating on it are themselves, predictably, unclear and confusing. Worse, none of these efforts changes the brutal reality that the residents of unincorporated territories remain trapped in a subordinate status with no clear end in sight. On the contrary, despite its good intentions, the repurposing project gives a patina of legitimacy to an illegitimate state of affairs.

These cases are problematic for an additional reason: the entire repurposing exercise is gratuitous. As I argue in this Part, most, if not all, of the cases relying on the *Insular Cases* to avoid a purported threat to a territorial cultural practice could have produced the same results without relying on them. Meanwhile, as I argue in Part IV, the one constitutional challenge in which the *Insular Cases* were essential to the result was gratuitous for yet another reason: a different result would not pose a greater threat to any of the cultural practices at issue.

To be clear, my goal is *not* to find a way to reach the same results. While I do not take issue with the value of protecting territorial cultures, I do take issue with doing so at the cost of endorsing and sustaining a legal framework that constitutionalized permanent colonialism. For that reason, the repurposing exercise should be abandoned wholesale. But abandoning it need not entail the loss of culture.

In this Part, I develop and defend the argument that the repurposing project is both ill-advised and gratuitous by examining a series of cases that pursued it and one that eschewed it. I begin with a case in which a court adopted the impracticable-and-anomalous test but nevertheless concluded that the right to a trial by jury applied in American Samoa.[149] I then look at two cases in which it

148. On the deannexationist interpretation of the *Insular Cases*, see Burnett [Ponsa-Kraus], *supra* note 5; and text accompanying *supra* note 6. On the consequences of overruling the *Insular Cases* for this aspect of those decisions, see *infra* Conclusion.

149. *See infra* Section III.A.

adopted a version of the test.[150] One of these upheld a deviation from the federal right to a trial by jury in the NMI;[151] the other upheld racial restrictions on the alienation of land in the NMI.[152] Next, I examine a case in which a court relied on the updated version of the fundamental rights test to uphold the unequal apportionment of the NMI Senate.[153] Finally, I discuss a case in which a court declined to rely on the *Insular Cases* but nevertheless upheld racial restrictions on the alienation of land in American Samoa.[154] In Part IV, I turn to two cases holding that the Citizenship Clause does not apply in American Samoa. In these two cases, admittedly, reliance on the *Insular Cases* was essential to the result. However, it should not have been. Moreover, the result was not essential to cultural accommodation.

Together, all of these cases illustrate the ways in which the *Insular Cases* have engendered an ambiguous, confusing, and unnecessary approach to constitutional challenges involving unincorporated territories, all while leaving their subordinate status intact.

A. Constitutional Exceptionalism Retooled

Justice Harlan's test first appeared in the constitutional case law on the unincorporated territories in *King v. Morton* (remanded for factual development and reheard as *King v. Andrus*), a case concerning the right to a trial by jury in the U.S. territory of American Samoa.[155] In *King v. Morton*, the D.C. Circuit Court of Appeals endorsed the repurposing project, expressly adopting a modified version of Harlan's test for the specific purpose of protecting American Samoan culture from the threat that extending the right to a trial by jury might pose. Ultimately, the district court decided it posed no threat. But in the process, it breathed new life into the *Insular Cases*.

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150. *See infra* Sections III.B-C.

151. *See infra* Section III.B.

152. *See infra* Section III.C.

153. *See infra* Section III.D.

154. *See infra* Section III.E.

155. 520 F.2d 1140, 1147-48 (D.C. Cir. 1975), *remanded sub nom.* King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977). For discussions of federal jurisdiction over American Samoa, see James T. Campbell, Note, *Island Judges*, 129 YALE L.J. 1888, 1896-99 (2020); Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM. L. & POL'Y J. 325, 327-33 (2008); and U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-655, AMERICAN SAMOA: ISSUES ASSOCIATED WITH POTENTIAL CHANGES TO THE CURRENT SYSTEM FOR ADJUDICATING MATTERS OF FEDERAL LAW 1-7, 9-14, 16-55 (2008).

James King, a U.S. citizen and resident of American Samoa, was charged with tax-related offenses in violation of Samoan law.[156] As proceedings began in the Trial Division of the High Court of American Samoa, King moved for a jury trial.[157] The court rejected the motion on the ground that American Samoan law did not provide for jury trials and that the right to a jury trial under the U.S. Constitution did not apply to unincorporated territories.[158] King then initiated an action in federal court against the U.S. Secretary of the Interior challenging the denial of his motion.[159] The district court dismissed for lack of jurisdiction,[160] but the Court of Appeals for the D.C. Circuit reversed.[161] Meanwhile, King was tried and convicted in the Trial Division of the High Court of American Samoa and his conviction was affirmed.[162]

Before the D.C. Court of Appeals, King argued that although the *Insular Cases* had held that the right to a trial by jury did not apply in certain unincorporated territories because it was not fundamental, the Supreme Court had implicitly overruled that holding in *Duncan v. Louisiana*, a Fourteenth Amendment incorporation decision holding that the federal right to a trial by jury applies against the states because it is fundamental.[163] As King's argument recognized, at the time of the *Insular Cases*, the Court had not yet held that the right to a trial by jury was fundamental even in the states.[164] But in *Duncan*, it did, and King argued that *Duncan*'s holding applied equally to American Samoa. But the Court of Appeals disagreed with this approach, declining to follow *Duncan* and instead following the *Insular Cases* and *Reid*.[165] The Court of Appeals was partially right and partially wrong.

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156. *King*, 520 F.2d at 1142.

157. *Id.*

158. *Id.*

159. *Id.* at 1143. An Executive Order vests authority to administer American Samoa in the U.S. Secretary of the Interior. *See* Exec. Order No. 10,264, 3 C.F.R. 765 (1949-1953). American Samoa has a constitution approved by the Secretary of the Interior, which only Congress may amend. *See* 48 U.S.C. § 1662a (2018).

160. *Id*.

161. *Id*. at 1148.

162. *Id.* at 1142-44.

163. *Id.* at 1146-47; *see* Duncan v. Louisiana, 391 U.S. 145, 149 (1968); *see also* cases cited *supra* note 91 (listing a series of *Insular Cases* holding jury-related rights inapplicable in unincorporated territories).

164. *King*, 520 F.2d at 1146-47.

165. *Id*. at 1147.

To be sure, Fourteenth Amendment incorporation and territorial incorporation are not the same doctrine. But they overlap.[166] Fourteenth Amendment incorporation doctrine concerns the applicability of provisions of the Bill of Rights against the states.[167] Territorial incorporation doctrine concerns, in relevant part, the applicability of fundamental limitations, including provisions of the Bill of Rights, in the unincorporated territories.[168] Both doctrines require courts to ask whether a right is fundamental in the relevant context. Under Fourteenth Amendment incorporation doctrine, the answer to the question applies to all states. Under the doctrine of territorial incorporation, the answer to the question can vary from one unincorporated territory to the next (though as explained above, the only federal constitutional rights that the *Insular Cases* held inapplicable in any unincorporated territory were grand-jury and jury-trial rights).[169]

The court of appeals was right in reasoning that, as long as the *Insular Cases* remained good law, *Duncan* alone would not answer the question of whether a right is fundamental in an unincorporated territory. However, it was wrong to deny the relevance of *Duncan* entirely. Explaining its view, the court interpreted King's argument as if relying on *Duncan* would mean simply applying to American Samoa *Duncan*'s conclusion that the right to a trial by jury is "fundamental," period, without any inquiry into Samoan culture. As the *King* court put it:

> The decision in the present case does not depend on key words such as "fundamental" or "unincorporated territory" . . . but can be reached only by applying the principles of the earlier cases, as controlled by their respective contexts, to the situation as it exists in American Samoa today. As Mr. Justice Harlan wrote in *Reid v. Covert*, "the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a

166. *See* Burnett [Ponsa-Kraus], *supra* note 75, at 1020-42. As noted above, Justice Frankfurter made a similar observation in *Reid*. *See Reid*, 354 U.S. at 54 (Frankfurter, J., concurring).

167. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545-53 (6th ed. 2019).

168. As explained in the Introduction and Part I, it also concerns the applicability of provisions defining their geographic scope with the phrase "United States," and it allows for indefinite territorial status.

169. The question is not relevant in incorporated territories because the *Insular Cases* held that provisions of the Bill of Rights applied in these territories because these territories were incorporated, not because the provisions were "fundamental." *See* Hawaii v. Mankichi, 190 U.S. 197, 217-18 (1903) (holding that the right to trial by jury, which was not fundamental, did not apply in the territory of Hawaii between its annexation in 1898 and its incorporation in 1900, but did apply there after Hawaii's incorporation); Rassmussen v. United States, 197 U.S. 516, 525 (1905) (holding that the right to trial by jury applied in the territory of Alaska because Alaska was incorporated).

> necessary condition of the exercise of Congress'[s] power to provide for the trial of Americans overseas."[170]

The conclusion, the *King* court explained, must "rest on a solid understanding of the present legal and cultural development of American Samoa."[171] Such an understanding must be based on "facts," not "opinion[s]," concerning the *fa'a Samoa* or Samoan way of life, including the *matai* system, where the term *matai* refers to the leaders of extended families or *aiga*.[172] The Court identified the factual issues that the lower court should examine:

> [I]t must be determined whether the Samoan mores and matai culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a case in accordance with the instructions of the court without becoming unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practicable. In short, the question is whether in American Samoa "circumstances are such that trial by jury would be impractical and anomalous."[173]

The problem here is not the idea that a court must conduct a factual inquiry into the relevant context, but rather the suggestion that *Duncan* does not require such an inquiry. It does. An accurate reading of *Duncan* would have recognized that *Duncan* itself requires a fact-based, contextual inquiry into whether a right is fundamental in the context of an actual legal system. To be sure, such a holding with respect to one state automatically applies in all of them. Arguably, a complete rejection of constitutional exceptionalism would require that it automatically apply to the unincorporated territories as well.[174] But one can concede the

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170. *King*, 520 F.2d at 1147 (citing Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)). By "earlier cases," the *King* court meant the *Insular Cases*, along with *Reid*. *See id.* (citing "*Balzac*, *Dorr*, *Hawaii*, and the *Insular Tariff Cases*," along with *Reid*, as the relevant precedents on the applicability of jury trials in American Samoa).

171. *Id.*

172. For a description of the *matai* system, see Tapu, *supra* note 23, at 74-76.

173. *King*, 520 F.2d at 1147 (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring)). As noted above, *see supra* note 120, Justice Harlan used the terms "impracticable" and "impractical" interchangeably in his *Reid* concurrence.

174. This would actually be consistent with what Justices Brown and White said about fundamental rights in *Downes*. Recall that they both stated that fundamental rights would of course apply in the unincorporated territories. The holdings in subsequent *Insular Cases* that federal jury-trial rights did not apply in these territories did not conflict with those earlier statements because the Court did not consider federal jury-trial rights fundamental in any context at that time. *See supra* notes 71-75 and accompanying text.

proposition that the states' legal systems, as a group, differ sufficiently from territorial legal systems that the inquiry with respect to the former cannot resolve the question for the latter, and still apply *Duncan* in the unincorporated territories.

As the *Duncan* Court explained, the Court's approach to Fourteenth Amendment incorporation had changed over time, from an abstract inquiry into the nature of a right to a concrete inquiry into the role of the right in the context of an actual legal system:

> Earlier [cases] . . . asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the protection. . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.[175]

In other words, to follow *Duncan* would not have been to depend on "key words" like "fundamental." Rather, it would have been to ask whether, in the context of the American Samoan legal system, the right to a trial by jury is fundamental—whether it is necessary to ensure ordered liberty in the context of American Samoa's legal system. Instead, seeing a constitutional challenge from an unincorporated territory, the *King* court resorted to constitutional exceptionalism, requiring the district court to apply the impracticable-and-anomalous test. In the process, it gratuitously perpetuated the problematic idea that the unincorporated territories exist in a nearly extraconstitutional zone.

A further problem with the *King* opinion is that it purported to adopt Justice Harlan's test, but actually revised it in a manner designed to serve the purpose of cultural accommodation—thus not only relying on but further expanding and entrenching the erroneous standard account of the *Insular Cases*. Recall that

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175. *Duncan*, 391 U.S. at 149 n.14. When *Duncan* refers to "earlier" cases, it is referring to earlier Fourteenth Amendment incorporation cases, whereas when *King* does, *see supra* text accompanying note 170, it is referring to the *Insular Cases* and *Reid*. Ironically, the revised approach in *Duncan* actually brought the Fourteenth Amendment incorporation cases closer to the original approach in the *Insular Cases*, which asked whether a right was fundamental in a particular territorial legal system rather than the more abstract question of whether "a civilized system could be imagined that would not accord the protection," while several territorial cases following *King* would adopt an inquiry more like the abstract one, asking whether a right was "fundamental in an international sense." *See infra* Sections III.B-D.

Harlan's impracticable-and-anomalous test had already (mis)translated the idea that fundamental rights apply in unincorporated territories into the proposition that whether a constitutional guarantee applies abroad depends on whether it would be impracticable and anomalous to apply it. When Harlan used the phrase "impracticable and anomalous," it referred to arguably insurmountable obstacles standing in the way of the application of a right abroad. If logistical challenges rendered vindication of a right effectively impossible, the right would be inapplicable.

But in *King*, the impracticable-and-anomalous test became a disjunctive, and therefore two-pronged, inquiry.[176] What became the "impracticable" prong still concerned the kinds of logistical challenges that Justice Harlan had in mind: challenges involving costs, administrability, institutional constraints—in short, challenges that would make the vindication of a right effectively impossible. But what became the "anomalous" prong brought into the analysis something else: namely, consideration of the effects that application of a given constitutional provision would have upon the culture of a territory—even if the right were otherwise "practicable" to apply.[177]

Stanley K. Laughlin, Jr. describes the disjunctive version of the impracticable-and-anomalous test as follows: the impractical branch asks "[whether] the [territory's] culture [would] defeat the constitutional provision" while the anomalous branch asks "whether enforcement of the constitutional provision would damage the culture."[178] I agree entirely with Laughlin's description, but disagree with Laughlin on the legitimacy and desirability of this version of the test. A leading advocate of the repurposing project, Laughlin defended this approach in a relatively recent piece titled *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*.[179] It is not a coincidence that the title leads with a normative claim and tacks on a constitutional claim almost as an afterthought. The avowedly results-oriented repurposing project begins with the proposition that territorial cultural practices must be accommodated—while U.S. sovereignty is maintained—and then looks for ways around the constitutional constraints on the exercise of sovereignty that would otherwise apply but might stand in the way of cultural preservation.

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176. *See also* Laughlin, *supra* note 23, at 353-54, 360 (describing the *King* Court's version of Justice Harlan's test as "disjunctive").

177. *King*, 520 F.2d at 1147. *See also* Stanley K. Laughlin, Jr., *The Application of the Constitution in the United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 341-42 (1980) ("[T]he doctrines properly analyzed . . . call for individualized determinations of the impact that any constitutional provision would have on the culture of a particular territory.").

178. Laughlin, *supra* note 23, at 353-54, 360.

179. *Id.* at 331.

On remand, the district court in *King* held a trial to examine the relevant features of Samoan culture and reached the conclusion that trials by jury would be neither impracticable nor anomalous there.[180] Discussing the anomalous prong first, it described the relevant cultural practices or "'Fa'a Samoa' (the Samoan way of life)," including the "'aiga' or extended family, the 'matai' or chieftal [sic] system, the land tenure system under which nearly all land is communally owned, and the custom of 'ifoga' whereby one family renders formal apology to another for a serious offense committed by one of its members."[181] Noting that the "major cultural difference between the United States and American Samoa is that land is held communally in Samoa," the court concluded that jury trials "would have no foreseeable impact on that system."[182] With respect the other aspects of Samoan culture that the Court reviewed, it noted that these by now exercised "waning influence" in American Samoa in any event, so that even if jury trials did have an impact, it would be part of a cultural transformation already underway: "The institutions of the present government of American Samoa reflect not only the democratic tradition, but also the apparent adaptability and flexibility of the Samoan society. It has accommodated and assimilated virtually in toto the American way of life."[183] In other words, it was Samoan culture in its then-current state of Americanization that must be protected. That culture would not be threatened by jury trials.[184]

As for whether jury trials would be impracticable, the district court discussed the guidance American Samoan law could provide on the question.[185] On the one hand, it noted that American Samoa has its own constitution with a bill of rights echoing the Federal Bill of Rights except for grand-jury and jury-trial-related requirements.[186] On the other hand, it relied on the testimony of a justice

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180. King v. Andrus, 452 F. Supp. 11, 13-17 (D.D.C. 1977).

181. *Id.* at 13.

182. *Id.* at 15.

183. *Id.* For a discussion of the culture of American Samoa attentive to the issue of reconciling culture with constitutional requirements, see Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 70-76 (2001). Hall discusses the custom of "*Ifoga*" mentioned by the district court in *King v. Andrus*. *See* Hall, *supra* note 23, at 87 n.55 (citing La'auli Filoiali'I & Lyle Knowles, *The Ifoga: The Samoan Practice of Seeking Forgiveness for Criminal Behavior*, 53 OCEANIA 384 (1983)).

184. Cuison-Villazor, *supra* note 20, at 146-50, discusses the challenge of reconciling the goal of preserving culture with the reality that culture changes over time, including in ways that reflect the influence of other cultures.

185. *King*, 452 F. Supp. at 16.

186. *Id.* The omission of these rights echoed their omission from the organic acts of the Philippines and Puerto Rico. *See* Act of July 1, 1902, ch. 1369, 5 Stat. 691, 692-93 (providing a judiciary

of the American Samoan High Court that "there ha[d] been no difficulty in administering the system of criminal justice which is similar to our own in so many respects," including in its use of adversary proceedings, witness testimony, and cross-examination.[187] Moreover, American Samoa's substantive criminal law was a "virtual transplant of the American."[188] Working jury trials into that system should not pose insurmountable difficulties, the district court reasoned. It thus concluded that the denial of the right to a criminal trial by jury in American Samoa was unconstitutional because it was neither anomalous nor impracticable to apply the right there.[189]

Had the *King* court applied *Duncan*, it could have conducted the very same trial and reached the very same conclusion without resorting to constitutional exceptionalism and thereby giving aid and comfort to the *Insular Cases*. Taking into account the same factual context, the *King* court could have explained that the right to a trial by jury applies in American Samoa because, given American Samoa's current legal system, it is now fundamental there, as it is in the states.[190] Instead, it insisted that a constitutional challenge from an unincorporated territory must be handled differently, thus gratuitously exacerbating the conceptual confusion that the *Insular Cases* consistently engender while perpetuating their problematic legacy of constitutional exceptionalism in such territories. It is as if, when it comes to the Constitution in the unincorporated territories, all bets are off. We have now entered the nearly extraconstitutional zone. Whatever happens next, it has to be different—because these places are different and their people are different. They are them, not us. That is the exclusionary logic of the standard account of the *Insular Cases*, and it took the form of the *King* court's revisionist version of the impracticable-and-anomalous test from *Reid*.

The *King* court made clear that its preferred approach served the purpose of cultural accommodation. But one need not be naïve about the extent to which courts can be apolitical to insist that it is simply not an appropriate exercise of the judicial role to carve out exceptions to rules of constitutional analysis with a view toward achieving policy aims that a court itself concludes cannot be reconciled with constitutional guarantees—to decide that if a policy aim cannot be coexist with a constitutional guarantee, then the constitutional guarantee does not "apply" at all—even if the policy aim is the laudable one of protecting the cultures

for the Philippines, but not imposing a grand-jury or jury-trial requirement); Act of April 12, 1900, ch. 191, 34 Stat. 77, 84-86 (same for Puerto Rico).

187. *King*, 452 F. Supp. at 16.

188. *Id.*

189. *Id.* at 17.

190. *Cf.* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968) ("The question thus is whether given this kind of system [i.e., the legal system at issue in a given case] a particular procedure is fundamental.").

of the U.S. territories.[191] But this is precisely what the *King* court did, instructing the district court to look into not only whether American Samoa's culture would render it impossible to implement the right to a trial by jury but whether implementation of the right would damage American Samoan culture, in order to determine whether the right to a jury trial applies in American Samoa.

King's new version of the impracticable-and-anomalous test further entrenched the standard account of the *Insular Cases* as having created a nearly extraconstitutional zone — now defined as a zone in which constitutional guarantees do not apply if it is logistically impossible or threatening to local culture to apply them. But as we have seen, the *Insular Cases* did not create a nearly extraconstitutional zone. What they did was invent the idea that one category of territories was subordinate and could stay that way forever. Continuing to cite them keeps that abhorrent idea alive.

B. Constitutional Exceptionalism Reinvented

The federal right to a trial by jury was at issue again in *Northern Mariana Islands v. Atalig*, this time in the NMI.[192] The NMI became a trust territory of the United States after World War II, along with several other Pacific territories.[193] Several decades later, the others entered into free-association compacts with the United States.[194] But the NMI instead entered into a "Covenant [t]o Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (the "Covenant") opting to become a U.S. territory in order to secure U.S. citizenship for its people.[195]

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191. Though as we have seen, the cultural practices at issue here turned out not to be inconsistent with a constitutional guarantee — rendering the *King* court's constitutional exceptionalism gratuitous as well as misguided.

192. 723 F.2d 682 (9th Cir. 1984).

193. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301; Howard Loomis Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583, 584-86 (1984); Howard L. Hills, *Free Association for Micronesia and the Marshall Islands: A Transitional Political Status Model*, 27 U. HAW. L. REV. 1, 10 (2004).

194. *See* 48 U.S.C. § 1901 (2018) (approval of compact with the Marshall Islands and Micronesia); 48 U.S.C. § 1931 (2018) (approval of compact with Palau).

195. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1801 note (Text of the Covenant)); *see* HOWARD P. WILLENS & DEANNE C. SIEMER, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANAS AND THE UNITED STATES 7-9, 21 (2002). Despite its elegant title (which implies that the agreement between the United States and the NMI has some sort of higher-law status analogous to a

At the time of the *Atalig* decision, juries were not foreign to the NMI. As the *Atalig* court explained, NMI law itself provided for jury trials in criminal cases involving offenses punishable by more than five years' imprisonment or a fine of $2,000.[196] The deviation from the federal standard was authorized by the Covenant, which in section 501(a) provides that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law."[197] The question in *Atalig* was whether section 501(a) violates the Fifth and Sixth Amendments to the U.S. Constitution.[198]

Like *King*, *Atalig* declined to follow *Duncan*; but unlike *King*, it did not adopt Justice Harlan's test, either.[199] Instead, it offered its own gloss on what it described as the fundamental rights test from the *Insular Cases*. The *Atalig* court began by rejecting "two possible approaches": the first, "that the entire Constitution applies by its own force—*ex proprio vigore*—in any place where the United States functions as a sovereign," and the second, "that the Constitution applies in the NMI only to the extent provided for and agreed to in the Covenant."[200] Next, it explained that "[t]he *Insular Cases* suggest a middle way": an approach based on a recognition of the difference in the meaning of "fundamental" in the states and the unincorporated territories.[201]

In order to determine whether a right is fundamental under *Duncan*, the Ninth Circuit explained, a court would ask whether it "is necessary to an *Anglo-American* regime of ordered liberty."[202] But in the unincorporated territories, a court must ask instead whether the right is among those that form "the basis of

constitutional text) and language in it that purports to require the mutual consent of the United States and the NMI for any alterations, *see* Covenant, Art. I, § 105, the Covenant is a federal statute, enacted by Congress and signed into law by the President, *see* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 2, at 1 n.1.

196. *Atalig*, 723 F.2d at 684.

197. Covenant § 501(a), 90 Stat. at 267. As noted in the text, the people of the NMI chose (via a self-determination process culminating in a plebiscite) to become a "commonwealth," with a "Covenant" establishing its relationship to the United States, in part in order to secure U.S. citizenship for themselves. Other trust territories for which the United States had been responsible chose to become free associated states, a status of formal independence with a treaty establishing certain reciprocal rights and obligations with the United States (not including U.S. citizenship). *See* sources cited *supra* notes 193-194.

198. *Atalig*, 723 F.2d at 683-84, 688-90.

199. The *Atalig* court cites *Reid* several times, but cites the plurality opinion for the Court and Justice Frankfurter's concurrence, not Justice Harlan's. *See id.* at 688 n.20, 689 & n.22.

200. *Id.* at 688.

201. *Id.* at 688-89.

202. *Id.* at 689 (quoting Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968)).

all free government."[203] That question should sound familiar: it is a version of the question the Court asked in the early Fourteenth Amendment incorporation cases, as *Duncan* itself explained when it described the question in the earlier cases as that of "[whether] a civilized system could be imagined that would not accord the particular protection."[204] Indeed *Atalig* quoted *Dorr v. United States*, one of the *Insular Cases*, making essentially the same statement with respect to the territories: that fundamental rights in the territories are those that form the basis of "all free government[s]."[205]

What this reveals—though the *Atalig* court itself seems unaware of it—is just how substantial the overlap between the Fourteenth Amendment incorporation jurisprudence and the territorial incorporation jurisprudence was at the time of the *Insular Cases*. That is, at the time of the *Insular Cases*, the Court asked the same question in states and unincorporated territories when determining which rights were fundamental (while in incorporated territories, the entire Bill of Rights applied). The answers could be different—though they were not for jury-trial rights, which until *Duncan* were not fundamental in either the states or unincorporated territories. But the question was the same. The *Atalig* court thus struck a blow against the standard account of the *Insular Cases*, but did not seem to know it. Meanwhile, it gave sustenance to the *Insular Cases* by declining to follow *Duncan* and citing the *Insular Cases* instead.

Justifying its decision to follow the *Insular Cases*, the *Atalig* court explained that they enable it "to afford Congress flexibility in administering offshore territories and to avoid imposition of the jury system on peoples unaccustomed to common law traditions."[206] To follow *Duncan*'s approach, the court added, "would deprive Congress of that flexibility," with the unwelcome consequence of "extend[ing] almost the entire Bill of Rights to such territories" and thereby "repudiat[ing] the *Insular Cases*"—something that the *Atalig* court believed itself neither prepared nor permitted to do.[207] These observations further illustrate the confusion that the standard account of the *Insular Cases* engenders and that the repurposing project exacerbates.

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203. *Id.* at 690 (quoting Dorr v. United States, 195 U.S. 138, 147 (1904)).

204. *Duncan*, 391 U.S. at 149-50 n.14 (quoted above in the discussion of *King*, *see supra* text accompanying note 175).

205. *Atalig*, 723 F.2d at 690 (quoting *Dorr*, 195 U.S. at 147). *See also supra* text accompanying notes 166-175, on the odd, ironic, and inadvertent way in which these territorial cases adopt an approach that echoes the early Fourteenth Amendment incorporation cases, which *Duncan* rejects as too abstract, while *Duncan* adopts a more contextual approach that echoes that of the original *Insular Cases*.

206. *Id.*

207. *Id.*

To be sure, the *Insular Cases* afford Congress flexibility insofar as they allow a court to ask case-by-case whether a given constitutional limitation is fundamental in a given unincorporated territory. That much the *Atalig* court got right. However, as we have seen, applying *Duncan* would not deprive a court of that flexibility because it would not require conformity with an Anglo-American legal system. It would simply require a court to determine whether the right to a trial by jury is fundamental in the context of the NMI's legal system. Moreover, to hold the right to a trial by jury applicable in the NMI would hardly amount to the "imposition of the jury system on peoples unaccustomed to common law traditions"[208] since the NMI already had juries, as the court noted at the outset.

The most striking confusion in this passage, however, is in the comment about the Bill of Rights. The notion that a court should avoid a decision that would "extend almost the entire Bill of Rights to such territories" is very much in line with the repurposing project. But the comment fails to consider that most of the Bill of Rights *already* applies in the NMI. As the *Atalig* court observed in an earlier footnote, section 501 of the NMI's Covenant with the United States "provides that except for the rights to jury trial and grand-jury indictment, each of the first nine Amendments and section 1 of the Fourteenth Amendment will apply in the NMI."[209]

The premise of this language on extending the Bill of Rights is the standard account of the *Insular Cases*: since those decisions created a nearly extraconstitutional zone for the unincorporated territories, the argument goes, Congress may fill the vacuum (or choose not to) by extending constitutional provisions by statute. As I have argued, the *Insular Cases* did not actually withhold any fundamental limitation from the unincorporated territories except for the rights to a grand-jury indictment and a trial by jury. But even if one accepts the standard account, the *Atalig* court's reasoning here is deeply problematic. Under the circumstances, all it could mean by the quoted statement is that it wants to preserve the possibility that those protections would be withdrawn from the NMI in the future (presumably with the NMI's consent, though if we are following the standard account of the *Insular Cases*, then surely Congress has the power to make the decision unilaterally).[210]

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208. *Id.* at 690 (citing *Dorr*, 195 U.S. at 148).

209. *Id.* at 690 n.27.

210. The Covenant purports to require mutual consent for revisions to it, *see* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 105, 90 Stat. 263, 264 (1976) (codified at 48 U.S.C. § 1801 (2018)), but this is a statement of congressional policy, not power. If Congress has the power to withhold or extend constitutional provisions, then surely it has the power to withdraw a provision it has extended.

If that is indeed what the court means, it should say so and explain why. However, as it stands, the *Atalig* court not only engaged in the purely ends-based reasoning that characterizes constitutional exceptionalism in the territories, but also pursued a variety of ends that do not even fit the description of the purported end of cultural accommodation. For one thing, the court substituted its own judgment for the NMI's judgment concerning what is or is not consistent with NMI culture—a criticism one might make about any one of the cases that engage in constitutional exceptionalism, but that has particular force in *Atalig* because the court's statement about the Bill of Rights, while dictum, directly contradicted the NMI's judgment as expressed in the Covenant. For another, it decided that cultural accommodation includes the preservation of a territory's option to change its mind about what constitutional rights apply or do not apply going forward—a prerogative in tension with the purported imperative of protecting territorial culture. And it held a constitutional right inapplicable to ensure that other constitutional rights would not become applicable—reasoning that bears no relationship to any recognizable or legitimate method of constitutional interpretation.

Yet again, constitutional exceptionalism held sway in a case from an unincorporated territory. Yet again, it led to confusion and error. Yet again, it was gratuitous. And yet again, it contributed to the perpetuation of a legal framework with deeply problematic origins that was designed to produce a subordinate status that continues to this day.

C. Constitutional Exceptionalism Remixed

Another Ninth Circuit decision, *Wabol v. Villacrusis*, offers an even more striking illustration of the pitfalls of constitutional exceptionalism in the territories: confusion and error, all of it gratuitous, none of it even making a dent in the problem of indefinite territorial status.[211]

The *Wabol* case concerned an equal-protection challenge to racial restrictions on the alienation of land in the NMI. Under the Covenant and federal statutes, persons born in the NMI are U.S. citizens.[212] The Covenant recognizes a

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211. 958 F.2d 1450 (9th Cir. 1992).

212. Persons from the NMI who became citizens of the United States by virtue of the Covenant were given the choice to become either U.S. citizens or noncitizen U.S. nationals when the NMI and the United States entered into the Covenant, *see* Covenant § 302, 90 Stat. at 266, though it is unclear whether anyone chose the latter status. For a study of blood quantum laws that discusses the NMI, see generally Rose Cuison-Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 828-31 (2008). As Rose Cuison-Villazor explains, such laws have been upheld in the Indian law context as political

subcategory consisting of persons of NMI descent, defined in the NMI Constitution as anyone "who is a citizen or national of the United States and who has at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof."[213] As noted in the discussion of *Atalig*, Section 501 applies most of the Bill of Rights and Section 1 of the Fourteenth Amendment to the NMI. Still another, Section 805, authorizes the NMI to restrict the acquisition of long-term interests in local land to persons of NMI descent despite the applicability of the Equal Protection Clause.[214] A notwithstanding clause purports to resolve this tension.[215]

The plaintiffs in *Wabol* entered into a lease granting a long-term interest in land to persons not of NMI descent as defined in the Covenant.[216] Seven years later, they sued to have the lease voided under the Covenant. The defendant countered that Article XII of the NMI Constitution, incorporating Section 805

rather than racial classifications; sometimes upheld and other times struck down in the territorial context; and struck down in the state context. *See* Davis v. Commonwealth Election Comm'n, 844 F.3d 1087, 1093-95 (9th Cir. 2016) (striking down racial classifications in voting qualifications); Davis v. Guam, 932 F.3d 822, 840-43 (9th Cir. 2019) (same); Rice v. Cayetano, 528 U.S. 495, 499 (2000) (striking down a law limiting non-Native Hawaiians' right to vote for trustees of a Hawaiian state agency); Morton v. Mancari, 417 U.S. 535, 553-54 (1974) (upholding laws privileging persons with one-quarter American Indian blood); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 14 (1980) (upholding racial restrictions on the alienation of land in American Samoa on the ground that the preservation of Samoan culture constituted a "compelling . . . interest" and the restrictions at issue were "necessary" to achieve that interest). The *Davis* decisions are discussed above. *See supra* note 145. The *Craddick* decision is discussed below. *See infra* Section III.E.

213. N. MAR. I. CONST. art. XII, § 4. The original version of Section 4 defined the blood quantum requirement for Northern Marianas descent (NMD) as "at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian or a combination thereof." The NMI Constitution may be amended by legislative initiative upon the approval of a majority of the votes cast. *Id.* art. XVIII. In 2014, a majority of the votes cast approved House Legislative Initiative 18-1, which revised the definition of the required blood quantum for NMD, changing "one-quarter" to "some degree." *See* Thomas Manglona II, *Islands' Voters Endorse Three House Legislative Initiatives*, SAIPAN TRIB. (Nov. 6, 2014), https://www.saipantribune.com/index.php/islands-voters-endorse-three-house-legislative-initiatives [https://perma.cc/TQ9X-ZVF5]. Article XII defines "full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian" as persons "born or domiciled in the Northern Mariana Islands by 1950" and having citizenship "of the Trust Territory of the Pacific Islands before the termination of the Trusteeship." N. MAR. I. CONST. art. XII, § 4.

214. Covenant § 805, 90 Stat. at 275. Such restrictions would ordinarily violate the equal-protection component of the Fifth Amendment Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (striking down racially restrictive covenants by making them unenforceable in state courts on Fourteenth Amendment equal-protection grounds).

215. *See* Covenant § 501(b), 90 Stat. at 267.

216. *Wabol*, 958 F.2d at 1451-52. Specifically, the "persons" were an individual and a corporation.

of the Covenant, violates the Equal Protection Clause.[217] Ruling for the plaintiffs, the Ninth Circuit upheld Section 805.

The *Wabol* court endorsed the repurposing project and purported to adopt Justice Harlan's test, though it actually combined elements of three approaches — a version of the fundamental-rights test as interpreted in *Atalig*,[218] the impracticable-or-anomalous test as elaborated in *King*,[219] and one of two prongs of strict-scrutiny analysis[220] — which it brought up and then immediately discarded as irrelevant.

After briefly recounting the history of U.S.-NMI relations, the *Wabol* court repeated the erroneous standard account of the *Insular Cases*: "It is well established that the entire Constitution applies to a United States territory *ex proprio vigore* — of its own force — only if that territory is 'incorporated.' Elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply in the territory."[221] Then it described the question before it as follows: "Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?"[222]

One problem with this formulation is that it misconceives the question as that of whether a constitutional guarantee applies. There should be no question that it does since the *Insular Cases* acknowledged the applicability of the equal-protection guarantee in the unincorporated territories, which the Supreme Court confirmed in *Examining Board v. Flores de Otero*.[223] Even assuming Congress had the power to "exclude" certain guarantees "from operation in the territory," Congress did *not* exclude the Equal Protection Clause from operation in the NMI, but rather applied it (for good measure) via the Covenant. The question in this case should have been whether the NMI's land-alienation restrictions violate the concededly applicable constitutional guarantee of equal protection.

The *Wabol* court compounded the error by describing the constitutional guarantee at issue as a fundamental right, rather than as the equal-protection

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217. *Id.* at 1451.

218. *Id.* at 1460-61 (citing N. Mar. I. v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984)).

219. Id. at 1461-62 (citing King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975)).

220. *Id.*

221. *Id.* at 1459-60 (footnote omitted) (first citing Balzac v. Porto Rico, 258 U.S. 298, 312 (1922); then citing *Atalig*, 723 F.2d at 688; and then citing Examining Bd. v. Flores de Otero, 426 U.S. 572, 599-600 n.30 (1976)).

222. *Id.* at 1460.

223. *Flores de Otero*, 426 U.S. at 600 (first citing Downes v. Bidwell, 182 U.S. 244, 283-84 (1901); and then citing *Balzac*, 258 U.S. at 312-13)); *see also Ex parte* Bird, 5 P.R. 241, 261 (1904) (naming equal protection as among the personal rights that "are, by the mere fact of American possession, extended to every one residing within the jurisdiction of the United States").

guarantee. That is, the court asked whether a "right . . . resident in the equal protection clause" is "fundamental" in the NMI,[224] instead of asking whether the land-alienation restrictions in the NMI violate equal protection.

Having framed the question as one regarding the applicability of a right, the *Wabol* court turned to what "fundamental" means in the unincorporated territories—which, were it asking the right question, is certainly what it should have done next. Echoing *Atalig*, it explained: "What is fundamental for purposes of Fourteenth Amendment incorporation is that which 'is necessary to an Anglo-American regime of ordered liberty.' In contrast, 'fundamental' within the territory clause are 'those . . . limitations in favor of personal rights which are the basis of all free government.'"[225] Elaborating, it endorsed the repurposing project: "In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures."[226] It then offered its own revised formulation of *Atalig*'s fundamental rights test: "[T]he asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this *international* sense."[227]

The phrase "fundamental in this international sense" gives a modern flavor to the earlier question "[whether] a civilized system could be imagined that would not accord the protection."[228] But this update does not change the abstract nature of the inquiry. As explained above in the discussions of *King* and *Atalig*, the *Duncan* court abandoned this abstract inquiry in favor of a contextual inquiry with respect to an actual, existing legal system.[229] Apparently, the *Wabol* court believed it too was choosing a contextual inquiry, while discarding only the part of it that refers to an Anglo-American legal system. But as in *Atalig*, the *Wabol* court's teleological approach to the challenge misled it: it failed to see that the *Duncan* Court pursued a more, not less, contextual inquiry. Following *Duncan* would have been more, not less, conducive to the *Wabol* court's own stated goal of accommodating territorial culture.

The *Wabol* court next agreed with *Atalig*'s explanation of the different purposes served by the Fourteenth Amendment and territorial incorporation, and

224. *Wabol*, 958 F.2d at 1460.

225. *Id.* (citations omitted) (first quoting Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968); and then quoting *Atalig*, 723 F.2d at 690 (9th Cir. 1984)).

226. *Id.*

227. *Id.*

228. *Duncan*, 391 U.S. at 149 n.14; *cf.* Note, *The Extraterritorial Constitution and the Interpretive Relevance of International Law*, 121 HARV. L. REV. 1908, 1908 (2008) (arguing that the "'impracticable and anomalous' standard" should be interpreted as "implicitly referencing generally applicable international law").

229. *See supra* Sections III.A, III.B.

reiterated the importance of preserving the federal government's flexibility to accommodate the territories' distinctive cultures.[230] Citing *King*, it described the "approach" in that case as "similar [to], though more explicit" than, that taken in *Atalig*.[231] It then claimed to follow *King*—which, recall, had adopted Justice Harlan's test—describing *King*'s approach as a "workable standard for finding a delicate balance between local diversity and constitutional command."[232] The reasoning here is transparently teleological. The goal is to carve out an exception from a constitutional command. At every step, the court was looking to accommodate territorial culture. Here, it explicitly selected the test that it would apply with a view toward upholding a cultural practice that might otherwise violate the Constitution.

When the *Wabol* court finally turned to describe the cultural practices at issue, its description was surprisingly brief given the extended effort it had made to find a way to accommodate them:

> There can be no doubt that land in the Commonwealth is a scarce and precious resource. Nor can the vital role native ownership of land plays in the preservation of NMI social and cultural stability be underestimated. Land is the only significant asset of the Commonwealth people and "is the basis of family organization in the islands. It traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members." It appears that land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives' social system. The land-alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors. The legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the restrictions. Section 805 is a "fundamental provision[] of th[e] Covenant" which may be modified only with the mutual consent of the governments of the Commonwealth and the United States. And we must be mindful also that the preservation of local

230. *Wabol*, 958 F.2d at 1460-61 (quoting *Atalig*, 723 F.2d at 689).

231. *Id.* at 1461 (citing King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975)).

232. *Id.* at 1461.

> culture and land is more than mere desideratum—it is a solemn and binding undertaking memorialized in the Trusteeship Agreement.[233]

At the conclusion of this description, the court suddenly and without explanation used the means-end language of strict scrutiny: "[The defendant] does not contest the compelling justification for the restrictions. Rather, it attacks only the precision with which the restrictions operate to further those interests."[234] Upon reading these two sentences, which correctly articulate the strict-scrutiny standard, one is at a loss to understand the reasons for the detour into constitutional exceptionalism, complete with citations to the *Insular Cases*, suggestions of extraconstitutionality, and an endorsement of the impracticable-and-anomalous test. Why not simply address the defendant's argument by evaluating whether the NMI's racial restrictions on the alienation of land were narrowly tailored to achieve the compelling end of preserving the NMI's culture?

What came next was yet another sudden and unexplained turn, in which the court rejected strict scrutiny as irrelevant, in language once again sounding in constitutional exceptionalism:

> [The defendant's] attack [on the means] would have substantial force in an equal protection analysis, but it is only of minimal relevance to the threshold question of the validity of the Congressional waiver of equal protection restraints in [the Covenant]. A restriction need not be precisely tailored to qualify for exemption from equal protection scrutiny. It is therefore relevant, but not dispositive, that the restrictions . . . might have been drawn more narrowly to accomplish their goals.[235]

The court's bizarre reformulation of the equal-protection challenge as a rights challenge, its transparently teleological approach, and its embrace of constitutional exceptionalism all bear fruit in the quoted passage, which treats the idea that Congress could "waive" a restraint on its own power as if it were nothing out of the ordinary—as it is in the alternate universe of the unincorporated territories.

But even if one interprets what Congress did as a "waiver," the Covenant does not necessarily rule out strict scrutiny in the context of land-alienation restrictions. Section 805 of the Covenant provides that, "in view of the importance of the ownership of land for the culture and traditions of the [NMI] people," the NMI may "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern

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233. *Id.* (alterations in original) (citations omitted).

234. *Id.*

235. *Id.* at 1461-62.

Mariana Islands descent."[236] Section 501(b), in turn, provides that the "applica[tion] of certain provisions" of the U.S. Constitution to the NMI—including the Equal Protection Clause—will not "prejudice . . . the validity of and the power of the Congress of the United States to consent to" certain Covenant provisions, including Section 805.[237] This language allows the NMI to regulate the alienation of land on the basis of race to ensure native NMI land ownership. But all this should mean is that the Covenant supports the conclusion that the NMI's land-alienation restrictions are a compelling end. It does not absolve the restrictions from being narrowly tailored to achieve that end.

The *Wabol* court did not see it that way. Having discarded strict scrutiny as irrelevant, the court then applied the *King* version of the impracticable-and-anomalous test (recall that this version of this test considers both logistical obstacles to applying a right and its potential effect on territorial culture). Reiterating the importance of both cultural accommodation and compliance with the international obligations that the United States undertook when the NMI became a trust territory, the court concluded "that interposing this constitutional provision would be both impractical and anomalous in this setting."[238] Finally, the court echoed a favorite saying among proponents of the repurposing project: that the "Bill of Rights was not intended . . . to operate as a genocide pact for diverse native cultures."[239]

Of course not. But this exercise of mixing and matching doctrines to accommodate territorial culture is poorly reasoned and gratuitous. Again, the constitutional provision at issue here was the equal-protection guarantee. It applies to the NMI. The challenged classification required strict scrutiny. The *Wabol* court itself undoubtedly considered the goal of protecting native land ownership in the

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236. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 805, 90 Stat. 263, 275 (1976) (codified at 48 U.S.C. § 1801 (2018)).

237. *Id.* § 501(b), 90 Stat. at 267.

238. *Wabol*, 958 F.2d at 1462. One wonders whether the choice of the term "interposing," which is often associated with Southern massive resistance to the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954), is inadvertent. "Interposition" refers to the theory whereby the states have the sovereign power to "nullify" federal laws when they conclude those laws exceed the power of the federal government; when states nullify federal laws, they "interpose" themselves between federal law and their people. *See* MARK V. TUSHNET: MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 240 (1994) (describing interposition as a "'states' rights' constitutional theory" according to which "each state's legal authority [is] as great as the national government's"). *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290-442 (2004) (discussing massive resistance to *Brown*, including Southern states' enactment of interposition resolutions and laws).

239. *Wabol*, 958 F.2d at 1462.

NMI a compelling one. To require the NMI to proceed with care in devising the means of achieving that end is not to commit "cultural genocide."

D. Constitutional Exceptionalism Refutes Itself

To reject constitutional exceptionalism is not to say that there is no difference between territories and states. Indeed, the Constitution creates territories and confers upon Congress plenary power to govern them.[240]

As explained in Part I, the common understanding throughout the nineteenth century was that territorial status was a temporary stage on the way to statehood. Under the plenary power doctrine, "Congress exercises the combined powers of the general[] and of a state government" in the territories.[241] Congress, in other words, had the power to create and modify territorial governments, which were not entirely republican in form until the territory's admission into statehood.[242] Beginning with the Northwest Ordinance, Congress exercised this power through organic acts establishing territorial governments that developed in stages as the (white) population of each territory increased.[243] Upon the adoption of its organic act, an "unorganized" territory would become an "organized" territory.[244] Under these acts, Congress would initially provide for presidentially appointed territorial governors and legislative councils, then replace the latter with elected legislatures once the territorial population reached a certain size.[245] Congress's plenary power allowed it the flexibility to decide at what pace to make these changes.[246]

Once one understands that Congress has always had plenary power to govern the territories, one begins to see that gratuitous reliance on the *Insular Cases* sometimes consists of citing them when the source of congressional power is the Territory Clause, not the doctrine of territorial incorporation per se. *Rayphand v. Sablan*, a decision of the NMI federal district court rejecting an equal-protection challenge to the malapportionment of the NMI Senate, illustrates the point.[247]

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240. *See* U.S. CONST. art IV, § 3, cl. 2.

241. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828).

242. *See supra* note 7 and accompanying text.

243. *See id.*

244. *See id.*

245. *See id.*

246. *See id.*

247. 95 F. Supp. 2d 1133, 1140 (D. N. Mar. I. 1999), *summarily aff'd sub nom.* Torres v. Sablan, 528 U.S. 1110 (2000).

As authorized by the Covenant, the NMI Constitution provides for a bicameral legislature with a Senate and a House of Representatives.[248] Like the U.S. Congress, representation in the House is distributed according to population, but representation in the Senate is allotted equally among three Senatorial districts despite their very different population sizes.[249] One of those districts, consisting of the island of Saipan and several islands north of it, has approximately fifteen to twenty times the population of the other two districts, yet each district has three Senators.

The plaintiff in *Rayphand* challenged the malapportionment of the NMI Senate on the ground that it violates the one-person, one-vote standard announced in *Reynolds v. Sims*.[250] Rejecting the challenge, the federal district court in the NMI cited the *Insular Cases*, *Atalig*, and *Wabol* for the proposition that the one-person, one-vote standard is "not fundamental in an international sense."[251] Endorsing constitutional exceptionalism and the repurposing view, the court explained that the *Insular Cases* and their progeny give Congress "the most flexibility in fulfilling its mandate under the Territorial Clause," while avoiding "the imposition of unfamiliar and possibly unwanted rules on territorial cultures."[252]

The *Rayphand* court explained the question before it in terms that reflect its embrace of constitutional exceptionalism: "[D]id Congress exceed its authority under the Territorial Clause by insulating [the Covenant] from the reach of the Equal Protection Clause?"[253] The answer was simple: the "one person, one vote" standard could not be described as the basis of all free government because "[s]everal countries that are considered to have 'free government' have a bicameral legislat[ure] in which one house is malapportioned," including the United States.[254]

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248. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 203(c), 90 Stat. 263, 265 (1976) (codified at 48 U.S.C. § 1801 (2018)); N. MAR. I. CONST. art. II, § 2.

249. N. MAR. I. CONST. art. II, § 2(a).

250. *Rayphand*, 95 F. Supp. 2d at 1135 (citing Reynolds v. Sims, 377 U.S. 533 (1964)).

251. *Id.* at 1136.

252. *Id.* at 1138. The *Rayphand* court did not place primary reliance on the impracticable-and-anomalous test. It explained that "the vitality of that test is in doubt" because at the time it had only been endorsed at the Supreme Court level in two sole-authored concurrences. *Id.* at 1138 n.11. "Given this, we focus on the central test of *Atalig*, *Wabol*, and the *Insular Cases*, which is whether the given right is 'the basis of all free government.'" *Id.* (citations omitted). As we have seen, a majority of the Court would later adopt a version of the test, albeit in the context of Guantánamo—not an unincorporated territory of the United States. *See supra* Part II (discussing *Boumediene*). But, as we have also seen, constitutional exceptionalism comes in various guises.

253. *Rayphand*, 95 F. Supp. 2d at 1139.

254. *Id.* at 1140.

In one sense, the *Rayphand* court's reasoning is unassailable. It would be awkward, to say the least, for the United States to argue that a malapportioned Senate is inconsistent with free government. In another sense, its reasoning is inscrutable. Having explained that the purpose of constitutional exceptionalism is to avoid the "imposition of unfamiliar and possibly unwanted rules on territorial cultures," the *Rayphand* court then used an exceptionalist argument to uphold a practice that mirrors that of the U.S. Senate.

The pitfalls of constitutional exceptionalism become all the more evident in the *Rayphand* court's struggle over how to handle the federal analogy. Early in its opinion, the court declined to discuss the NMI government's argument that its legislature is "exactly analogous to the United States Congress and should therefore survive constitutional scrutiny under *Reynolds v. Sims*."[255] The court stated that "resort to the federal analogy may be misleading when discussing the Commonwealth, which exists 'under the sovereignty of the United States of America,'" and claimed to dispose of the case on other grounds.[256] But those other grounds turn out to involve the very same federal analogy.

Constitutional exceptionalism is at work in *Rayphand*. Despite the court's protestations, however, the result of that work is not to avoid the "imposition of unfamiliar and possibly unwanted rules on territorial cultures,"[257] since a clash of cultures is obviously not what is at stake in this case. Instead, the *Rayphand* court assumes the laws of constitutional physics have been suspended because the plaintiff is in an unincorporated territory, where all constitutional bets are off. And because everyone knows that the *Insular Cases* were racially motivated, imperialist decisions that constitutionalized perpetual U.S. colonies, the court justified reliance on them with the reasoning that it must do so to protect the culture of the NMI—regardless of the patent absurdity of that argument in this case. Presumably, the court fixated on cultural accommodation because it is questionable to suspend constitutional rules to achieve a particular result—even if the result is the laudable one of accommodating distinctive cultural practices in subordinate U.S. jurisdictions. But the enterprise unravels when there is no distinctive cultural practice to accommodate.

Rather than bending over backward to endorse and apply the doctrine of territorial incorporation, the *Rayphand* court should have analyzed the issue as one involving an exercise of Congress's plenary power over a territory. Arguably, plenary-power doctrine would suffice to uphold the NMI's malapportioned Senate. As explained above, Congress has always had the power to create, modify, and dissolve territorial governments unconstrained by a requirement that they

255. *Id.* at 1137.

256. *Id.*

257. *Id.* at 1138.

be republican in form.[258] To be sure, Congress, in its exercise of plenary power, is subject to constitutional limitations such as the equal-protection guarantee.[259] But does a malapportioned Senate in a territory violate equal protection? Given the history of territorial governments in the United States, it seems unlikely. At the very least, the *Rayphand* court should have analyzed the question as one concerning Congress's plenary power and left the *Insular Cases* aside.

Whatever the answer, it should not lie in constitutional exceptionalism. Either plenary power suffices to uphold malapportionment in the NMI Senate or the NMI could become independent and organize a government outside the U.S. Constitution however it pleases. It is no solution for a federal court to shun constitutional requirements by resorting to the idea of a nearly extraconstitutional zone—which comes at the unavoidable cost of perpetuating the subordination of the people of the territories.

E. Constitutional Exceptionalism at Bay

I have argued that constitutional exceptionalism breeds poor legal reasoning, engenders confusion and uncertainty, and perpetuates a problematic legal framework that always has and always will subordinate the unincorporated territories. I have also argued that it does all of this gratuitously, suggesting how, in each of the cases discussed above, a court could have accommodated territorial cultural practices without relying on the *Insular Cases* and their progeny. In this Section, I develop this claim by describing a case in which a court found a way to do just that.

That case is *Craddick v. Territorial Registrar of American Samoa*,[260] decided by the High Court of American Samoa several years after *King* introduced Justice Harlan's test into the case law on the Constitution in the unincorporated territories. *Craddick* acknowledged the existence of the *Insular Cases*, but eschewed reliance on them in resolving a tension between a territorial cultural practice and a constitutional command.

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258. Not only does the Territory Clause give Congress plenary power to govern territories, and Articles I and II of the Constitution exclude territories from federal representation, but the Guarantee Clause applies only to states. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

259. As noted above, even *Downes* assumed this was the case, while *Ex parte* Bird, 5 P.R. 241, 261-62 (1904), held it. *See* Examining Bd. v. Flores de Otero, 426 U.S. 572, 600 (1976) (first citing Downes v. Bidwell, 182 U.S. 244, 283-84 (1901); and then citing Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922)) (interpreting the *Insular Cases* as having held due process and equal protection applicable in Puerto Rico).

260. 1 Am. Samoa 2d 10 (1980).

American Samoa is both unincorporated and unorganized, the latter because Congress has not passed an organic act for it.[261] It is administered by the Secretary of the Interior, though it is locally self-governing under its own constitution and laws.[262] *Craddick* involved an equal-protection challenge to racial restrictions on the alienation of land in American Samoa. The plaintiffs were a married couple: one a non-Samoan U.S. citizen, the other an American Samoan U.S. national. They challenged the constitutionality of an American Samoan statute prohibiting the alienation of "any lands except freehold lands to any person who has less than one half native blood, and if a person has any nonnative blood whatever," then prohibiting the alienation of "any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan, lived in American Samoa for more than five years[,] and has officially declared his intention of making American Samoa his home for life."[263] The plaintiffs claimed that the provision made a classification on the basis of race in violation of the equal-protection component of the Fifth Amendment's Due Process Clause.[264]

The court began its analysis by confirming that the equal-protection and due-process guarantees "are fundamental rights which do apply in the Territory of American Samoa."[265] The court thus implicitly acknowledged the *Insular Cases*, which, as we have seen, stated that fundamental limitations apply in unincorporated territories. As noted, *Downes* acknowledged in dicta that equal-protection and due-process guarantees apply in unincorporated territories, and the Supreme Court confirmed this reading several years before *Craddick*.[266] Still, because the *Insular Cases* also held that what is fundamental may vary from one unincorporated territory to the next, the threshold question of whether a limitation is fundamental remains worth answering for any unincorporated territory where it has not yet been answered.

The *Craddick* court answered this threshold question concisely and correctly. Better yet, it avoided citing the *Insular Cases*, citing instead the trial court's summary-judgment order, which itself confirmed that equal-protection and due-process guarantees apply in American Samoa. The trial court observed that "it is inconceivable that the Secretary of the Interior would not be bound by these provisions in governing the territories, whether 'organized,' 'incorporated,' or

261. *See supra* note 244; *supra* note 159.

262. For information on American Samoa's Constitution and laws, see Emily Carr & Louis Myers, *Guide to Law Online: U.S. American Samoa*, LIBR. CONG. (June 29, 2021), https://guides.loc.gov/law-us-american-samoa [https://perma.cc/E2YN-Z8GU].

263. *Craddick*, 1 Am. Samoa 2d at 11-12 (quoting AM. SAMOA CODE ANN. § 37.0204(b) (2018)).

264. *See id.* at 12.

265. *Id.*

266. *See* Examining Bd. v. Flores de Otero, 426 U.S. 572, 600 (1976).

no."[267] The court then proceeded with a traditional application of equal-protection doctrine.

Because the case concerned an equal-protection challenge to a racial classification, the court applied strict scrutiny and upheld the restrictions on the ground that they served the compelling interest of protecting Native land ownership in American Samoa and were narrowly tailored to achieve that end. The court explained that "[i]t is well established that race is a suspect classification and that statutes discriminating on the basis of race are subject to the strictest judicial scrutiny."[268] Strict scrutiny, it went on, requires that the purpose served by the statute be "both constitutionally permissible and substantial," and that the means used be "necessary" to achieve that purpose.[269] The court concluded that American Samoa had "demonstrated a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa, or Samoan culture" and that "the prohibition against the alienation of land to non-Samoans [was] necessary to the safeguarding of these interests."[270]

The court's explanation of why the interest was "compelling" described the importance of land in Samoan culture and the uninterrupted history of efforts to preserve Samoan land ownership dating to the beginning of U.S. sovereignty in American Samoa.[271] As for the means used to achieve that end, the court explained that American Samoa is 76.2 square miles in size and "with so little land available," it was "clear" that racial restrictions on the alienation of land were necessary to preserve American Samoan land ownership.[272] The court thus upheld the challenged restrictions, concluding they were narrowly tailored to achieve a compelling end. Although the court did not itself use the term, it appeared to view the racial classification at issue as benign.

A dissenting opinion by Justice Murphy criticized the court for affirming summary judgment rather than remanding the case for the development of evidence in a full trial.[273] Murphy contrasted the *Craddick* court's approach to that taken by the *King* court, but to be precise, Murphy cited *King* with approval only for holding a trial on remand; he did not take issue with the *Craddick* majority's use of strict scrutiny.[274] On the contrary, Murphy assumed that the purpose of a trial would be to establish the facts to which strict scrutiny would apply. Indeed,

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267. *Craddick*, 1 Am. Samoa 2d at 12 (quoting the trial court).

268. *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967)).

269. *Id.* (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1973)).

270. *Id.*

271. *See id.* at 12-14.

272. *Id.* at 14.

273. *See id.* at 17 (Murphy, J., dissenting).

274. *See id.* at 16.

while contrasting the summary judgment in *Craddick* with the trial in *King*, Murphy interpreted *King* as if it too had applied strict scrutiny. As he put it, the *King* court "heard testimony and evidence presented by a cross-section of Samoan leadership and qualified experts before determining if the Government had an interest *sufficiently compelling* to prohibit trial by jury of American citizens in American Samoa."[275]

The minor inaccuracy in suggesting that *King* applied strict scrutiny has a major clarifying effect. It reveals that the impracticable-and-anomalous test is no more conducive to an extensive factual inquiry than the strict-scrutiny standard. *Craddick* thus demonstrates how a court can eschew constitutional exceptionalism and still be respectful of territorial cultural practices. It may even uphold them, as the *Craddick* court did, without perpetuating unsound precedent. Notice that *King* engaged in constitutional exceptionalism while *Craddick* did not, but *King* held the asserted constitutional right applicable despite its asserted tension with the culture while *Craddick* applied the relevant constitutional guarantee without qualification and upheld the challenged cultural practice. As *Craddick* demonstrates, a court can accommodate some cultural practices without resort to the impractical-and-anomalous test. And, as *King* suggests, that test does not necessarily guarantee cultural accommodation.

I do not intend this discussion of *Craddick* to suggest that territorial cultural practices in tension with constitutional limitations would always and necessarily survive strict scrutiny (itself a somewhat vague standard, and concededly one the current Court would apply to any racial classification). But I am not looking for a standard that will ensure cultural accommodation. I am looking for an end to constitutional exceptionalism for the territories because it has produced a jurisprudence riddled with confusion and error that ever more deeply entrenches a doctrine that gives constitutional sanction to permanent colonialism. Part of my argument consists of demonstrating that the advocates of repurposing are wrong to conclude that we must learn to live with the *Insular Cases* if we wish to protect territorial cultures. I disagree with these advocates that one should—or must—reverse engineer one's constitutional analysis to achieve even a laudable goal.

Craddick illustrates the point that strict scrutiny gives voice to territorial culture as much as the impracticable-and-anomalous test does. Like the impracticable-and-anomalous test, strict scrutiny allows for a robust examination of territorial cultural practices. The arguable problem with the decision in *Craddick* was not that it applied the strict-scrutiny standard, but that it did not remand for trial, which could have better established that land-alienation restrictions were narrowly tailored to preserve the compelling end of protecting American

275. *Id.* at 16-17 (emphasis added).

Samoan culture. As for the outcome, strict scrutiny may not guarantee the desired result, but neither does the impracticable-and-anomalous test, as demonstrated by *King*. However, the strict-scrutiny standard eschews constitutional exceptionalism and thus avoids giving aid and comfort to the doctrine that has ensured the perpetual subordination of the inhabitants of the territories.

* * *

As I have suggested, the same argument applies to the constitutional rights at issue in the post-*Reid* territorial cases discussed in this Part. The *Atalig* court could have applied *Duncan* without asking whether juries are fundamental to an Anglo-American legal system by instead asking whether they are fundamental to the NMI's legal system. This question would not require a particular result, but it would amplify the argument for cultural accommodation without endorsing the *Insular Cases*. The *Wabol* court could have followed *Craddick*, applying strict scrutiny and determining whether the challenged restrictions were narrowly tailored to achieve the compelling end of protecting Native land ownership. Here again, the result would not be foreordained, but it would be relevant that Congress considered the end compelling enough to agree to it in the Covenant with the NMI. The *Rayphand* court could have relied on Congress's plenary power to organize governments in the territories, a power which long predates the *Insular Cases*, to conclude that the one-person, one-vote standard does not foreclose a malapportioned Senate in the NMI any more than it does in the U.S. federal government. In this case, the plenary-power doctrine, pursuant to which Congress exercises the combined powers of federal and state governments, would preserve a considerable measure of the vaunted flexibility that advocates of repurposing associate with the doctrine of territorial incorporation. There may well be traditional cultural practices that would be highly unlikely to survive without the *Insular Cases*, but only the reported resistance to same-sex marriage in American Samoa comes to mind.[276]

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276. Admittedly, my knowledge of the territorial cultural practices purportedly threatened by the Constitution comes from the scholarship on repurposing the *Insular Cases* and the relevant litigation (none of which has defended the *Insular Cases* on the ground that they would allow American Samoa to ban same-sex marriage, as far as I am aware). On the applicability of *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (upholding the right to same-sex marriage), to American Samoa, see *Legal Recognition of Same-Sex Relationships: American Samoa*, JONES DAY (Aug. 31, 2015), https://perma.cc/6KA7-MGHJ; Fili Sagapolutele & Jennifer Sinco Kelleher, *American Samoa Questions Gay Marriage Validity in Territory*, ASSOCIATED PRESS (July 10, 2015), https://apnews.com/article/c1deb598da6a482587fdd5bac501fc94 [https://perma.cc/J5V3-QFVF]. Arguably, the *matai* system in American Samoa violates the Nobility Clause, because only *matais* may serve in the American Samoan Senate. But arguably, it does not, because *matais* are elected and can lose their titles. *See* Tapu, *supra* note 23, at 82, 84-88, 89 (acknowledging that "there may be a legitimate claim" that the *matai* system violates the Nobility Clause but arguing both that the Nobility Clause would be impracticable and anomalous to

In short, it is simply not true that judicial adoption of the repurposing project is "defensible and perhaps even necessary" to achieve self-government in the territories.[277] Nor is it true that the *Insular Cases* "once served colonial interests in an era of mainland domination of the territories" but, now repurposed, no longer do.[278] The *Insular Cases* doctrine serves colonial interests *today*. It gave the Court's endorsement to perpetual territorial status, and it continues to do so today. It is neither defensible nor necessary to repurpose it in order to achieve self-government in the territories. On the contrary, as long as the cases that created permanent American colonies remain on the books, they will stand in the way of that goal. That is what the doctrine of territorial incorporation was all about: denying the unincorporated territories full self-government indefinitely. Only by overruling the *Insular Cases*, and thereby unequivocally rejecting the constitutionality of permanent territories, can the Court take a stand in support of genuine self-government for the people of the territories.

IV. THE *INSULAR CASES* RUN AMOK

The appeal of constitutional exceptionalism lies in its apparent solicitude toward territorial cultures in a time of consensus against cultural imperialism. But as we have seen, the cases that employ constitutional exceptionalism could have reached the same results without it. Gratuitous constitutional exceptionalism promotes poor legal reasoning and perpetuates doubts about the applicability of constitutional provisions where there should be none. Such uncertainty alone is oppressive.[279] Moreover, even where there are reasonable doubts over the

apply in American Samoa and that, even if the Nobility Clause applies, the *matai* system does not violate it because *matais* are elected and can lose their titles); Weaver, *supra* note 155, at 361 n.304 (observing that a challenge to the *matai* system could conceivably be brought under the Nobility Clause but concluding that the system is "more of a cultural institution than a government system of nobility and would most likely fall outside the Nobility Clause").

277. Rennie, *supra* note 22, at 1707.

278. *Territorial Federalism*, *supra* note 20, at 1686.

279. *See* SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 53-55 (2019); Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RIGHTS L. REV. 813 (2022); Cepeda Derieux & Weare, *supra* note 10, at 286; *see also infra* Part V (describing the disruptive role that uncertainty about the *Insular Cases* played in two constitutional challenges involving Puerto Rico). For a provocative argument that judges can and have engaged in territorial status manipulation even when they disclaim reliance on the *Insular Cases*, see Campbell, *supra* note 5. For a discussion of one example of such manipulation on the ground, in the context of federal prosecutions of local activity in Puerto Rico, see Emmanuel Hiram Arnaud, *Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico*, 53 COLUM. HUM. RTS. L. REV. 882, 920-941 (2022), which describes the role of ambiguous and misleading descriptions of Puerto Rico's constitutional status in cases involving federal prosecutions on the island.

applicability of a given constitutional provision, constitutional exceptionalism exacerbates the confusion and uncertainty. Worse, it leaves intact a legal framework that ensures the indefinite political subordination of the residents of unincorporated territories, which, cultural accommodation or not, remain subject to U.S. sovereignty without voting representation in the federal government.

Two recent appellate decisions seriously exacerbated the problems with the repurposing project. These cases, *Tuaua v. United States*[280] and *Fitisemanu v. United States*,[281] held that the Citizenship Clause of the Fourteenth Amendment does not apply in the unincorporated territory of American Samoa,[282] where under a federal statute, birth confers U.S. nationality but not U.S. citizenship.[283] Both decisions relied on the *Insular Cases*. As usual, this reliance involved adopting the erroneous standard account along with a version of the impracticable-and-anomalous test that was conducive to the court's desired outcome.

The courts' choices in these cases were even more problematic than in prior cases because the question presented here should not have been whether a right applied but whether a constitutional provision defining its own geographic scope with the phrase "United States" included American Samoa.[284] Failing to recognize the distinction between the two kinds of questions, the D.C. Circuit in *Tuaua* relied on the *Insular Cases* and its own version of the impracticable-and-anomalous test to hold that the Citizenship Clause does not apply in American Samoa.[285] The Supreme Court denied certiorari.[286] In *Fitisemanu*, a federal district court in Utah declined to follow the *Insular Cases* and instead followed the leading precedent on Fourteenth Amendment citizenship, *United States v. Wong Kim Ark*,[287] to hold that the Citizenship Clause does apply in American

280. 788 F.3d 300 (D.C. Cir. 2015).

281. 1 F.4th 862 (10th Cir. 2021).

282. One may want to add "and by implication, in other unincorporated territories," but these cases wrongly treat the question before them as one that can yield a different answer in different unincorporated territories.

283. 8 U.S.C. § 1101(a)(29) (2018) (defining "outlying possessions of the United States" as American Samoa and Swain's Island); *id.* § 1408(1) (providing that "person[s] born in an outlying possession of the United States . . . shall be nationals, but not citizens, of the United States").

284. *Tuaua*, 788 F.3d at 302-03.

285. *See id.* at 302.

286. Tuaua v. United States, 579 U.S. 902 (2016). The denial came less than a week after the Court handed down its decision in *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016), a double jeopardy case confirming that Puerto Rico is not a separate sovereign, but instead is fully subject to U.S. sovereignty. It was a jarring juxtaposition.

287. 169 U.S. 649 (1898).

Samoa.[288] But a divided panel of the Tenth Circuit reversed and followed *Tuaua*.[289] The judge who wrote the opinion for the court relied on *Tuaua*'s revised impracticable-and-anomalous test;[290] the concurring judge declined to rely on that test;[291] and the dissenting judge disagreed that the *Insular Cases* governed the question.[292]

The impracticable-and-anomalous test that the *Tuaua* court designed not only distorted it beyond recognition, but absolved the courts from learning anything at all about the cultural practices the test supposedly protects. As in *Rayphand*, constitutional exceptionalism may not have been gratuitous here, but it was pointless. After all, citizenship would not threaten any of the cultural practices at issue. What we see in *Tuaua* and *Fitisemanu* is nothing short of the *Insular Cases* run amok.

The Supreme Court has not answered the question of whether the Citizenship Clause applies in the unincorporated territories. The Court had the opportunity to do so in the 1904 case *Gonzales v. Williams*, but it chose not to.[293] The *Gonzales* case concerned a habeas corpus petition by Isabel Gonzalez, who was born in Puerto Rico before the island's annexation and traveled to New York several years after its annexation.[294] Congress would not extend U.S. citizenship to the people of Puerto Rico until 1917.[295] Instead, the organic act for the island referred to them as "citizens of Porto Rico."[296] Upon Gonzalez's arrival at Ellis Island, she was detained and excluded on the ground that she was likely to become a public charge.[297] She filed a habeas petition arguing that she had become

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288. Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1181-96 (D. Utah 2019).

289. Fitisemanu v. United States, 1 F.4th 862, 875, 878-79, *pet'n for reh'g en banc denied*, 20 F.4th 1325 (2021).

290. *Fitisemanu*, 1 F.4th at 879-81.

291. *See id.* at 881-83 (Tymkovich, J., concurring).

292. *See id.* at 883-908 (Bacharach, J., dissenting). This dissenting judge and one other dissented from the denial of rehearing en banc. *See Fitisemanu*, 20 F.4th at 1326 (Bacharach, J., dissenting from the denial of en banc consideration).

293. 192 U.S. 1, 12 (1904). On the *Gonzales* case, see generally ERMAN, *supra* note 279; Veta Schlimgen, *The Invention of "Noncitizen American Nationality" and the Meanings of Colonial Subjecthood in the United States*, 89 PAC. HIST. REV. 317 (2020); Sam Erman, *Meanings of Citizenship: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898-1905*, 27 J. AM. ETHNIC HIST. 5 (2008); and Christina D. Burnett [Ponsa-Kraus], *"They Say I Am Not an American . . .": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659 (2008).

294. *Gonzales*, 192 U.S. at 7. The opinion and caption misspelled her first and last names. Although González today is spelled with an accent, Isabel Gonzalez apparently did not use one. *See* ERMAN, *supra* note 279, at 91 fig.4.1 (image of a letter she signed without the accent).

295. *See* Jones-Shafroth Act, ch. 145, § 5, 39 Stat. 951, 953 (1917).

296. *See* Foraker Act, ch. 191, § 7, 31 Stat. 77, 79 (1900).

297. *Gonzales*, 192 U.S. at 7.

a U.S. citizen through Puerto Rico's annexation and therefore could not be detained at the border, let alone excluded. Gonzalez's case made it to the Supreme Court, which ruled in her favor.[298] However, the Court limited itself to the statutory holding that under the immigration laws then in force, the term "alien" did not refer to Puerto Ricans.[299] It expressly declined to reach the question of whether the Citizenship Clause applied to Puerto Rico.[300] In the wake of *Gonzales*, the federal government began designating the inhabitants of the unincorporated territories noncitizen U.S. nationals, first by executive action and eventually by congressional statute.[301] American Samoans continue to hold this status today.[302]

The two recent challenges to American Samoans' noncitizen U.S. national status pose squarely, for the first time since *Downes*, a question concerning a constitutional provision that defines its geographic scope with the phrase "United States": does "United States," as used in the Citizenship Clause, include American Samoa? These challenges were brought by American Samoan noncitizen

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298. *Id.* at 7, 16.

299. *Id.* at 13.

300. *Id.* at 12 ("We are not required to discuss the power of Congress in the premises; or the contention . . . that the cession of Porto Rico accomplished the naturalization of its people; or . . . that a citizen of Porto Rico . . . is necessarily a citizen of the United States.").

301. *See* U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 3.1 ("Noncitizen Nationality") (2021) (explaining how, in the wake of the United States's annexation of Puerto Rico and the Philippines, and Congress's denial of U.S. citizenship to their inhabitants, persons who owed allegiance to the United States but who weren't U.S. citizens came to be known as noncitizen nationals); JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 273 (1906) (stating that the State Department began using the designation of "national" to refer to noncitizen-U.S. nationals in 1906); Nationality Act of 1940, ch. 876, § 101(b)(1)-(2), 54 Stat. 1137, 1137 (defining noncitizen nationality). In 1906, Congress enacted a law allowing noncitizen nationals to naturalize, though it did not refer to them as noncitizen nationals. *See* Act of June 29, 1906, ch. 3592, 34 Stat. 596, 606 (extending naturalization laws to "all persons, not citizens, who owe permanent allegiance to the United States and who may become residents of any . . . organized territory of the United States"). Courts disagreed over whether then-existing racial bars on naturalization nevertheless applied to noncitizen nationals, rendering many of them ineligible for citizenship anyway. *See* Rev. Stat. § 2169 (1875) (limiting naturalization to "free white persons," "aliens of African nativity," and "persons of African descent"). *Compare In re* Mallari, 239 F. 416 (D. Mass. 1916) (denying application of racial bars and petition for naturalization on other grounds), *with In re* Rallos, 241 F. 686 (D.N.Y. 1917) (applying racial bars). For a discussion of this history and its relationship to former President Trump's effort to restrict birthright citizenship, see Neil Weare & Sam Erman, *Trump's Threat to Restrict Birthright Citizenship Has (Troubling) Precedent*, TAKE CARE (Nov. 13, 2018), https://takecareblog.com/blog/trump-s-threat-to-restrict-birthright-citizenship-has-troubling-precedent [https://perma.cc/4ASR-HQPK].

302. 8 U.S.C. §1101(a)(29) (2018) (defining "outlying possessions of the United States" as American Samoa and Swain's Island); *id.* § 1408(1) (providing that "person[s] born in an outlying possession of the United States . . . shall be nationals, but not citizens, of the United States").

U.S. nationals, some living in the territory and others living in states, who have suffered from the deprivation of rights inherent in second-class status. As noncitizen U.S. nationals, they cannot hold certain government positions; they are disadvantaged relative to U.S. citizens when it comes to sponsoring relatives for immigration; and, despite residing in a state and not having citizenship in any other country, they do not have the right to vote.[303]

The reasoning in both *Tuaua* and *Fitisemanu* is profoundly flawed. First, the cases use the wrong test, applying the impracticable-and-anomalous inquiry to a challenge based on a provision that defines its own geographic scope with the phrase "United States." The question should be whether that phrase includes unincorporated territories, not whether a right is impracticable or anomalous to apply. Second, they exacerbate the confusion and uncertainty that Justice Harlan's test has already engendered by purporting to rely on it, but then doing the opposite of what it requires, thereby avoiding rather than conducting an inquiry into whether citizenship would threaten any of the cultural practices supposedly at stake.

I have argued that the standard account of the *Insular Cases*—according to which they created a nearly extraconstitutional zone for the unincorporated territories—gets it wrong. I have offered a more modest account: the *Insular Cases* held that provisions defining their geographic scope with the phrase "United States" may or may not include unincorporated territories, and either way, fundamental limitations always apply, though what counts as fundamental may vary among unincorporated territories.[304] Admirers and critics of the impracticable-and-anomalous test alike would agree that it is one version of various tests courts have employed to address the second issue in the *Insular Cases*: that of what constitutional limitations count as fundamental in a given unincorporated territory. It is a distinct inquiry from the first: whether the phrase "United States" in any given constitutional provision includes certain territories. But the courts in *Tuaua* and *Fitisemanu* ask whether citizenship would be impracticable-and-anomalous to apply when they should be asking whether the phrase "United States," in this case as used in the Citizenship Clause, includes an unincorporated territory, in this case American Samoa.

Despite the rhetorical appeal of the well-known aphorism that "[c]itizenship is man's basic right for it is nothing less than the right to have rights,"[305] citizenship is not a "right" in the same sense as other individual rights, which may or

303. Complaint for Declaratory and Injunctive Relief, Tuaua v. United States, 788 F.3d 300 (2015) (No. 12-1143); Complaint for Declaratory and Injunctive Relief, Fitisemanu v. United States, 1 F.4th 862 (2021) (Nos. 20-4017, 20-4019).

304. *See supra* Part I.

305. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

may not be fundamental and infringements or denials of which warrant varying levels of scrutiny. It is, rather, a status one attains by fitting the description in the Citizenship Clause of being "born or naturalized in the United States, and subject to the jurisdiction thereof."[306] Whether a person is a U.S. citizen does not turn on whether citizenship is fundamental, let alone impracticable or anomalous, to apply. That is why even a person born to a foreigner briefly present in the United States at the time of birth is a U.S. citizen.[307] To hold, as the *Tuaua* and *Fitisemanu* courts did, that persons born in American Samoa are not U.S. citizens because citizenship is not a fundamental right or because it is "impracticable and anomalous" to apply the Citizenship Clause in that territory is to display a stunning lack of understanding of a basic point of constitutional law.[308]

In short, *Tuaua* and *Fitisemanu* use the already problematic impracticable-and-anomalous test to answer a question that the test was never intended to, and indeed cannot, answer. For this reason alone, the courts' analyses in these cases are utterly misguided. But it gets worse: these decisions' woefully inadequate discussion of the threat that U.S. citizenship would supposedly pose to American Samoa's culture fully exposes the pitfalls of constitutional exceptionalism.

Recall that when *King* first adopted the impractical-and-anomalous test with respect to jury-trial rights in American Samoa, it did so on the theory that the test would enable the district court to make the detailed factual findings required to answer the question of what, exactly, about American Samoan culture would be threatened by the introduction of trials by jury. Yet, in *Tuaua* and *Fitisemanu*, the test perversely served to relieve courts of their responsibility to investigate the territorial cultural practices that U.S. citizenship would allegedly threaten. Instead of conducting such an inquiry, these courts used the test to give themselves permission to hold a constitutional provision inapplicable in American Samoa on the ground that, according to the American Samoan government, a majority of its inhabitants may not want it to apply.

The *Tuaua* court is the worst offender in this respect, though by agreeing with its holding, *Fitisemanu* has made Supreme Court review of *Tuaua* less certain.[309] In *Tuaua*, the court emphasized its reluctance to "impose" U.S.

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306. U.S. CONST. amend. XIV, § 1.

307. Wong Kim Ark v. United States, 169 U.S. 649 (1898).

308. *See Fitisemanu*, 1 F.4th at 878-879 (not fundamental); *id.* at 880-881 (anomalous); *Tuaua*, 788 F.3d at 308 (not fundamental); *Tuaua*, 788 F.3d at 310 (anomalous). Only one judge in Fitisemanu reached these conclusions; the concurring judge reasoned simply that the Court should uphold the settled understanding that Congress has the power to decide the citizenship status of persons born in unincorporated territories. *See Fitisemanu*, 1 F.4th at 883.

309. That said, Justice Gorsuch's concurrence in *Vaello Madero* calling on the Court to overrule the *Insular Cases* at some point, *see Vaello Madero*, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J.,

citizenship over the objection of the majority of Samoans, as asserted by their government, in an expressly and emphatically teleological approach.[310] But it then failed to examine *how* U.S. citizenship would threaten Samoan culture. Moreover, it did not even attempt to explain why U.S. citizenship would threaten Samoan culture any more than U.S. nationality already does. American Samoans are noncitizen U.S. nationals, yet nowhere in the *Tuaua* or *Fitisemanu* litigation is there even a hint of an objection by the American Samoan government to that status—or, for that matter, to American Samoa's relationship to the United States.

The argument that citizenship poses a threat to culture would have to identify the cultural practices at stake and the constitutional provisions that would threaten those practices, which supposedly do not apply now but would somehow become applicable if the Citizenship Clause applied in American Samoa. The briefs for the United States and the American Samoan government gestured in the direction of an argument along these lines, but did not actually make it—likely because it fails on its own terms.[311] The cultural practices in question include racial restrictions on the alienation of land and the system of communal land ownership, the *matai* system, and curfews linked to religion.[312] The constitutional provisions in tension with these practices would be the Due Process Clause, the Equal Protection Clause, the Nobility Clause, and the Establishment Clause.[313] None of those clauses applies to U.S. citizens any more or less than

concurring), and Justice Sotomayor's agreement with that call in her dissent in *Vaello Madero*, *id.* at 1560 n.4 (Sotomayor, J., dissenting), give one hope that the Court will hear *Fitisemanu* and use the occasion to overrule the *Insular Cases*.

310. *Tuaua*, 788 F.3d at 302.

311. *See* Reply Brief for Defendants-Appellants at 3, 21, Fitisemanu v. United States, 1 F.4th 862 (2021) (Nos. 20-4017, 20-4019); Brief for Intervenor-Defendants-Appellants at 17-24, *Fitisemanu*, 1. F.4th 862 (Nos. 20-4017, 20-4019); Reply Brief for Intervenor-Defendants-Appellants at 3-8, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017, 20-4019); Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 23-32, *Tuaua*, 788 F.3d 300 (No. 12-1143). These briefs describe the threatened cultural practices and claim that citizenship would threaten them because it would render certain constitutional provisions (the Equal Protection Clause and the Establishment Clause) fully applicable. What they fail to explain is why citizenship would make any difference to the applicability of these or any other of the provisions at issue. It would not. As I explain in the paragraph following this footnote, none of the clauses at issue applies specifically to citizens.

312. *See supra* note 311; *see also* Hall, *supra* note 23, at 71-76 (describing these practices); Tapu, *supra* note 23, at 74-76 (describing the *matai* system).

313. The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.* The Nobility Clause reads: "No Title of Nobility shall be granted by

noncitizen U.S. nationals.[314] The Equal Protection Clause and the Due Process Clause expressly protect persons.[315] The Nobility Clause is not limited to the conferral of titles of nobility on U.S. citizens as opposed to noncitizen U.S. nationals.[316] The Establishment Clause does not refer to citizenship.[317] Were the Citizenship Clause held applicable in American Samoa, it would not change the relationship between the cultural practices at issue and these constitutional provisions.

Like the governments' briefs, the *Tuaua* court failed to examine how U.S. citizenship would threaten Samoan culture. Instead, it made passing mention of the "unique kinship practices and social structures inherent [in] the Samoan way of life, including those related to the Samoan system of communal land ownership,"[318] explaining that "[t]raditionally *aiga* (extended families) 'communally own virtually all Samoan land, [and] the *matais* (chiefs) have authority over which family members work what family land and where the nuclear families within the extended family will live.'"[319] Why any of this is in tension with U.S. citizenship but not U.S. nationality is anyone's guess.[320]

The *Tuaua* opinion seems on the verge of addressing the alleged tension between U.S. citizenship and American Samoan culture when it observes that "[r]epresentatives of the American Samoan people have long expressed concern that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life."[321] It continues: "Congressman [Eni] Faleomavaega and the American Samoan Government posit the extension of citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa's traditional,

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the United States." U.S. CONST. art. I, § 9, cl. 8. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. None of these provisions mentions citizens and none has been interpreted as applicable to citizens specifically as opposed to persons generally.

314. *See supra* note 313.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Tuaua*, 788 F.3d at 309.

319. *Id.* (second alteration in original) (quoting King v. Morton, 520 F.2d 1140, 1159 (D.C. Cir. 1975)).

320. Ironically, the internal quotation here comes from the appellate decision in the *King* litigation, where on remand the district court found no tension between the federal right to a trial by jury and American Samoan cultural practices. *Morton*, 520 F.2d at 1159; King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

321. *Tuaua*, 788 F.3d at 310.

racially-based land-alienation rules. [Plaintiff-appellants] contest the probable danger citizenship poses to American Samoa's customs and cultural mores."[322]

At this point, the court posed the question: how would U.S. citizenship "undermine these aspects of the Samoan way of life"?[323] What comes next is not an answer:

> The resolution of this dispute would likely require delving into the particulars of American Samoa's present legal and cultural structures to an extent ill-suited to the factual record before us. We need not rest on such issues or otherwise speculate on the relative merits of the American Samoan Government's Equal Protection concerns. The imposition of citizenship on the American Samoan territory is impractical and anomalous at a more fundamental level.
>
> We hold it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives.[324]

This astonishing passage is riddled with problems. For one thing, resolution of the disagreement over whether U.S. citizenship would threaten Samoan culture would not "likely" require an examination of the particulars of American Samoan culture. It would *definitely* require it. Such an examination is precisely what proponents of the impracticable-and-anomalous test have always argued it is for. Incredibly, the *Tuaua* court selected the wrong test and then absolved itself of the responsibility to do what that test requires.

For another, the court declined to "otherwise speculate on the relative merits of the American Samoan Government's Equal Protection concerns."[325] But it would not require "speculation" to observe that the Equal Protection Clause protects persons generally, not citizens specifically. Surely, this basic legal proposition is centrally relevant to the question of whether U.S. citizenship would affect a cultural practice in tension with the Equal Protection Clause.

Moreover, although the *Tuaua* court seems unaware of it, there is yet another reason U.S. citizenship would not result in greater scrutiny of American Samoa's race-based land-alienation restrictions: strict scrutiny *already* applies to them. The High Court of American Samoa applied strict scrutiny to these restrictions

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322. *Id.* Congressman Faleomavaega was American Samoa's nonvoting delegate in Congress at the time.

323. *Id.*

324. *Id.* (citation omitted).

325. *Id.*

decades ago in *Craddick*—and upheld them.[326] Incredibly, the *Tuaua* court did not even cite *Craddick*.[327] Add to this the fact that race-based restrictions on land alienation survived an equal-protection challenge in the NMI, where birth confers statutory U.S. citizenship, and it is impossible to pin down precisely what the supposed threat is.[328]

The *Tuaua* court does not reckon with any of this. Instead, it pivots: "We need not rest on such issues or otherwise speculate on the relative merits of the American Samoan Government's Equal Protection concerns" because "[t]he imposition of citizenship . . . is impractical and anomalous at a more fundamental level."[329] It then holds that it would be "anomalous to impose citizenship," regardless of what effect, if any, it would have on American Samoan culture, because according to the territory's elected representatives, a majority of American Samoans (apparently) object to it.[330] In other words, the court uses the impracticable-and-anomalous label, but actually applies an entirely different test: one in which a court need only ask what—according to the territorial government—might a majority of the inhabitants of the territory want?[331]

What comes next is an especially egregious example of the pitfalls of constitutional exceptionalism. Having discarded the only precedent that could provide any guidance on the question of who is a birthright citizen under the Fourteenth Amendment (*Wong Kim Ark*), choosing instead to apply an irrelevant test that provides no guidance at all (the impracticable-and-anomalous test), and then failing to do what that test requires, the court fills the void—the nearly extraconstitutional zone in which it is now operating—with a strange and unconvincing

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326. *See supra* Section III.E.

327. This occurred despite the fact that several briefs on appeal in *Tuaua* cited, quoted, or discussed *Craddick*. *See* Reply Brief of Plaintiff-Appellants at 28-30, *Tuaua*, 788 F.3d 300 (No. 13-5272); Brief for Intervenors or, in the Alt., Amici Curiae the Am. Samoa Gov't and Congressman Eni F.H. Faleomavaega at 4-5, *Tuaua*, 788 F.3d 300 (No. 13-5272); Brief of Amici Curiae Certain Members of Cong. and Former Governmental Offs. in Support of Plaintiffs-Appellants and in Support of Reversal at 17-23, *Tuaua*, 788 F.3d 300 (No. 13-5272).

328. Although the *Tuaua* court cites *Wabol*, which upheld the NMI's land-alienation restrictions, *see supra* Section III.C, it cites *Wabol* for a different proposition, *see Tuaua*, 788 F.3d at 308.

329. *Tuaua*, 788 F.3d at 310.

330. *Id.*

331. Presumably the *Tuaua* court was aware (though it gave no sign of it) of evidence supporting the proposition that American Samoan leaders believed, when they agreed to become subject to U.S. sovereignty at the end of the nineteenth century, that with U.S. sovereignty came U.S. citizenship, and that once they learned it had not, they unsuccessfully sought federal recognition of their status as U.S. citizens for decades, because the plaintiffs explained it. *See* Reply Brief of Plaintiffs-Appellants at 21-22, *Tuaua* 788 F.3d 300 (No. 13-5272). The Samoan Federation of America submitted a brief in *Fitisemanu* recounting this history. *See* Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Plaintiffs-Appellees and to Affirm, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021).

gesture in the direction of political theory. The next passage begins by quoting Cicero's *De Republica*:

> A republic of people "is not every group of men, associated in any manner, [it] is the coming together . . . of men who are united by common agreement . . . ." In this manner, we distinguish a republican association from the autocratic subjugation of free people. And from this, it is consequently understood that democratic "governments . . . deriv[e] their [] powers from the consent of the governed;" under any just system of governance the fount of state power rests on the participation of citizens in civil society—that is, through the free and full association of individuals with, and as a part of, society and the state.[332]

As a source for the second quotation in the passage above, the *Tuaua* court cites *Kennett v. Chambers*, an opinion by Chief Justice Taney (yes, *that* Chief Justice Taney), which in turn quotes the Declaration of Independence.[333] Why not just quote the Declaration of Independence? The *Tuaua* court's choice here does not inspire confidence.[334] Nor does the rest of the passage, the point of which seems to be that American Samoa is a republic and that to impose citizenship on its unwilling people would be autocratic. But we still do not know why U.S. citizenship would threaten American Samoan cultural practices, nor do we really

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332. *Tuaua*, 788 F.3d at 310 (all alterations in original) (citations omitted) (first quoting MARCUS TULLIUS CICERO, DE RE PUBLICA bk. I, ch. 25, 26-35 (George H. Sabine & Stanley B. Smith trans., Prentice Hall 1929) (54 B.C.); and then quoting Kennett v. Chambers, 55 U.S. (14 How.) 38, 41 (1852)).

333. *See id.* at 310 (quoting *Kennett*, 55 U.S. (14 How.) at 41). *Kennett* quoted the entire second paragraph of the Declaration of Independence, which begins with the famous line "We hold these truths to be self-evident, that all men are created equal . . ." and includes the following sentence: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." *Kennett*, 55 U.S. (14 How.) at 41. *Kennett* put quotations marks around the paragraph, but did not explicitly cite the Declaration of Independence, presumably because Chief Justice Taney assumed anyone who read those words would know where they came from. It is surpassingly strange that the *Tuaua* court attributed them to the *Kennett* opinion instead of the Declaration itself. The *Tuaua* court did not even include internal quotation marks or say that they were omitted.

334. *Kennett* discussed the law on the recognition of states, explaining that "according to the laws of nations," recognition turns on whether a state has "a civil government in successful operation, capable of performing the duties and fulfilling the obligations of an independent power." *Kennett*, 55 U.S. (14 How.) at 46. The decision to quote this case is thus doubly bizarre. Not only is it a Taney opinion (an awkward source of support for the project of repurposing an imperialist doctrine widely acknowledged to have been expressly motivated by racism), but the language that the *Tuaua* court quotes appears in a passage explaining that Texas had a right to become, and had in fact become, independent from Mexico as of March 17, 1836 (an awkward source of support for a decision affirming the denial of U.S. citizenship to persons born in a U.S. colony). *See id.*

know what a majority of American Samoans want. All we know is that the federal government and the government of American Samoa claim that a majority of American Samoans do not want the Citizenship Clause to apply. And that, it turns out, is enough to satisfy the amorphous impracticable-and-anomalous "test."

Perhaps the most striking feature of the quoted passage is the irony of citing the principle of government by consent in support of withholding U.S. citizenship from persons who live under U.S. sovereignty and law, yet are denied any voting representation in the federal government. In fact, American Samoans have it even worse. Like other territories, they have only one nonvoting representative who serves in the U.S. House of Representatives.[335] But unlike the inhabitants of other territories, even if they relocate to a state, they remain second class due to their lack of U.S. citizenship. Several of the plaintiff-appellants in *Tuaua* reside in states of the Union, but they cannot vote at any level of government—state or federal—because they are noncitizen U.S. nationals, not U.S. citizens.

That the *Tuaua* court upholds this state of affairs while waxing eloquent about the benefits of a republican form of government makes a bitter pill that much harder to swallow. It would take more than a quote from Cicero and another from the Declaration of Independence (via the improbable mouthpiece of the judge who authored the *Dred Scott* decision) to make a persuasive case that the holding in *Tuaua* vindicates the principle of government by consent, as opposed to giving a court's imprimatur to its continuing flagrant violation.

Finally, there is the elephant in the room. As noted earlier, American Samoans—*American* Samoans—are U.S. nationals. The *Tuaua* court acknowledges this fact[336] but nowhere reckons with its significance. Why doesn't everything that the federal and American Samoan governments say about U.S. citizenship apply with equal force to U.S. nationality? The court does not even ask this question, let alone answer it.

In short, the *Tuaua* opinion is a monument to the shortcomings of constitutional exceptionalism. It is confused, incoherent, and wrong. It applies the impracticable-and-anomalous test to the wrong question, modifies the test in a manner entirely unsupported even by the precedents that adopt it, and combines vague allusions to hoary principles of political philosophy with the fetishization of an unfamiliar culture, which it does not even take the trouble to familiarize itself with, to deny its people, all of them Americans living under U.S.

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335. *United States Congressional Non-Voting Members*, BALLOTPEDIA, https://ballotpedia.org/United_States_congressional_non-voting_members [https://perma.cc/AM2K-KLPD].

336. *See Tuaua*, 788 F.3d at 301, 302, 305 & n.6, 308, 309 n.9 (acknowledging that persons born in American Samoa are "noncitizen nationals" without explaining why U.S. nationality does not threaten the cultural practices at issue).

sovereignty, a constitutional guarantee they should be able to take for granted. All the while, it justifies its approach by claiming it is proceeding in the service of territorial self-determination. And while it misapplies a test it attributes to the *Insular Cases*, make no mistake: ultimately, it is cases like *Tuaua* that have ensured that the *Insular Cases*, with their racially motivated imperialist doctrine of subordination by legal ambiguity, live on.

V. THE *INSULAR CASES* UNRELENTING

Even in cases where no one disputes the applicability of a constitutional provision in an unincorporated territory — either because the dispute involves neither a constitutional provision defining its geographic scope with the phrase "United States" nor one about which it makes sense to ask whether it is "fundamental," or because the government simply concedes that the relevant constitutional provision applies in an unincorporated territory — the *Insular Cases* haunt constitutional challenges involving the unincorporated territories. The litigation in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*,[337] the Appointments Clause challenge to the selection of the members of the Financial Oversight and Management Board (FOMB) for Puerto Rico, is a striking and recent example; the litigation in *United States v. Vaello Madero*,[338] an equal-protection challenge to Puerto Rico's exclusion from the Supplemental Security Income (SSI) program, is another.

There should have been no question in either of these cases that the challenged discrimination against Puerto Rico was based on its status as a territory — not on its status as an *unincorporated* territory. But the *Insular Cases* kept coming up, injecting confusion and uncertainty into the proceedings. The story of how the *Insular Cases* haunted the litigation in *Aurelius* and *Vaello Madero* makes even clearer why the Supreme Court must overrule the *Insular Cases* once and for all. At the same time, it underscores how critical it will be for the Court to do so in the right case, so that when it overrules them, it does so unambiguously.

When the Court overrules the *Insular Cases*, it should be crystal clear *both* that it is overruling them *and* what exactly about them it is overruling. Along with being racist and imperialist, the *Insular Cases* were notoriously ambiguous and confusing. The decision that overrules them must be the opposite or it will only make matters worse. Specifically, it must overrule the doctrine of territorial incorporation — not merely disclaim the racism that gave rise to it while leaving the doctrine itself untouched. That means overruling *both* propositions in the *Insular Cases*: that certain constitutional provisions do not apply in certain

337. 140 S. Ct. 1649 (2020).

338. United States v. Vaello Madero, 142 S. Ct. 1539 (2022).

territories because they are "unincorporated" *and* that the United States has the power to subject territories to territorial status indefinitely.

The latter problem does not lend itself easily to judicial resolution, while the former, which is the only way for the Court to get at either, rarely arises. Indeed, it did not arise at all in either *Aurelius* or *Vaello Madero* because the government did not contest the applicability of a constitutional provision in either case. As a result, invocations of the *Insular Cases* in these two cases were a frustrating exercise in shadow-boxing.[339]

In this Part, I explain the confounding role of the *Insular Cases* in *Aurelius* and *Vaello Madero*. I argue that these cases illustrate both the urgency of overruling the *Insular Cases* and the importance of doing so in a case that allows the Court to overrule them clearly and unequivocally—a case like *Fitisemanu*, which could provide the Court with a rare opportunity to deliver the knock-out punch.

A. Aurelius*: The* Insular Cases *as a "Dark Cloud"*

In June 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) to address Puerto Rico's financial crisis.[340] Pursuant to PROMESA, the President of the United States appoints Board members without the advice and consent of the Senate, as long as they are selected from a list provided by Congress.

The FOMB wields extensive powers over Puerto Rico's government.[341] Regardless of one's views on its desirability as a matter of policy, it is undeniably a blatantly colonial institution installed by the federal government to run Puerto Rico's affairs. But the challenge in *Aurelius* did not take on the FOMB as such. Rather, it concerned the mechanism for selecting the members of the FOMB. The plaintiffs argued that the selection mechanism violates the Appointments Clause, which requires Senate confirmation of "Officers of the United States."[342] The plaintiffs argued that the members of the FOMB are Officers of the United

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339. Justice Gorsuch's concurrence in *Vaello Madero* described the dynamic whereby the Insular Cases have evaded review as a "workaround." *See Vaello Madero*, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring).

340. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended at 48 U.S.C. § 2101 (2018)).

341. *See* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 93-96 (2018) (describing the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) with a focus on the Financial Oversight and Management Board's (FOMB) extensive powers over Puerto Rico's government).

342. U.S. CONST. art. II, § 2, cl. 2 ("[The President] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . .").

States who therefore require Senate confirmation.[343] The United States and the FOMB responded that the members of the FOMB are not Officers of the United States, but rather officers of the territorial government of Puerto Rico, and that Congress therefore has plenary power under the Territory Clause to provide for their appointment without Senate confirmation.[344]

As we have seen, Congress has plenary power to govern the U.S. territories and has had that power since the Founding: the Territory Clause was part of the original Constitution, the United States had territories from its inception, and Congress had plenary power to govern them from the beginning.[345] But *Aurelius* concerned a constitutional challenge involving an unincorporated U.S. territory.[346] As a result, the *Insular Cases* inevitably came up. Before the district court, the FOMB argued primarily that Congress has plenary power under the Territory Clause to create territorial governments, which includes the power to appoint the officers of those governments with or without Senate confirmation.[347] But it also made an argument in the alternative. Citing the *Insular Cases*, it argued that the Appointments Clause does not "apply" in Puerto Rico because none but the "fundamental" limitations of the Constitution apply in unincorporated territories and the Appointments Clause is not "fundamental."[348]

This alternative argument further illustrates the troublesome legacy of the *Insular Cases*. Its premise is the standard account: that the unincorporated territories exist in a nearly extraconstitutional zone, where only "fundamental" constitutional limitations apply.[349] What follows, supposedly, is that it is fair to ask whether every line in the Constitution "applies" in an unincorporated territory, which in turn requires determining whether it is "fundamental" in that territory. But this is nonsense. The question of whether a constitutional provision is "fundamental" is a question relevant to limitations on government power—mainly rights: is any given constitutional limitation on government power, such as those

343. *See* Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 848 (1st Cir. 2019), *rev'd sub nom.* Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

344. *Id.* The First Circuit agreed with the plaintiffs but upheld the actions of the Board under the de facto officer doctrine. *Id.* at 862. Because the Supreme Court disagreed, there was no need to reach the de facto officer issue. *See Aurelius*, 140 S. Ct. at 1665.

345. *See* sources cited *supra* note 7.

346. *See Aurelius*, 140 S. Ct. at 1654.

347. The Financial Oversight and Management Board's Opposition to the Motion to Dismiss the Title III Petition, *In re* Fin. Oversight & Mgmt. Bd. for Puerto Rico, 318 F. Supp. 3d 537 (D.P.R. 2018) (No. 17 BK 3283-LTS). For the argument based on the Territory Clause and plenary power, see *id.* at 8-23; for the argument that the Appointments Clause is not "fundamental," see *id.* at 23-27.

348. *See id.* at 23-27.

349. *See supra* Part I.

in the Bill of Rights, "fundamental" in one or another unincorporated territory? This question is not—and never was—what one asks about any given constitutional provision, such as, say, the Uniformity Clause.

The inquiry concerning whether a limitation is fundamental is simply irrelevant to other constitutional provisions. Some provisions, such as those concerning the election of Representatives and Senators, do not apply in the territories because they concern states, not territories. Neither the doctrine of territorial incorporation nor the idea of fundamentality has anything to do with these provisions—though it would be risible to argue that the provisions are not "fundamental" to our constitutional structure. They are as fundamental as it gets. They simply do not concern the territories—any of them. Other provisions "apply" not because they are fundamental, but because they are not limited by geographic scope, whether implicitly or explicitly. The Appointments Clause is one such provision.

The Appointments Clause states that "[the President,] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . ."[350] Although this text includes the phrase "United States," the phrase as used here does not define a geographic scope. Unlike the Uniformity Clause and the Citizenship Clause, which do define their own geographic scope with the phrase "United States," the Appointments Clause uses the phrase to describe the kinds of officers who require Senate confirmation, regardless of their geographic location. The Clause is not a rights provision, either, so the question of whether it is fundamental should not even come up.

In short, neither of the questions the *Insular Cases* asked about constitutional provisions was at issue in *Aurelius*. The case did not involve a constitutional provision defining its own geographic scope with the phrase "United States." Nor did it involve a constitutional right. But since it was a constitutional case involving an unincorporated territory, the *Insular Cases* made an appearance. And sure enough, a team of otherwise highly skilled and sophisticated lawyers found itself making the absurd argument that the Appointments Clause does not "apply" to Puerto Rico because it is not "fundamental."

Not surprisingly, the FOMB had abandoned the argument by the time the case arrived at the U.S. Supreme Court. But its opponents did not forget. The First Circuit Court of Appeals ruled against the government without relying on the *Insular Cases*, but devoted two pages to making clear that "[n]othing about the *Insular Cases* cast[] doubt" on its analysis, adding that "[t]his discredited lineage of cases . . . hovers like a dark cloud over this case."[351] The dark cloud

350. U.S. CONST. art. II, § 2, cl. 2.

351. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 854-55 (1st Cir. 2019).

was still hovering at the Supreme Court: although the FOMB and the United States did not mention the *Insular Cases*, two parties and several amici discussed them in their briefs, insisting that they were irrelevant or should be overruled.[352]

Perhaps because they received so much attention in the briefs, and perhaps also because the court of appeals found it necessary to address them, if only to insist on their irrelevance, the Court granted ten minutes of additional oral argument time to one of the parties, the Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER), which had asked the Court to overrule them. They did not come up at all during the oral arguments by the lawyers for the FOMB, the United States, or Aurelius, but they were front and center in the argument by UTIER's lawyer.

Borrowing the First Circuit's formulation, she described the *Insular Cases* as a "dark cloud" hovering over the case and insisted that the Court must overrule them.[353] Justice Breyer agreed that they were a "dark cloud," but wondered what the Court could do about it, since "here . . . the provision of the Constitution does apply."[354] Chief Justice Roberts was puzzled, noting that "none of the other parties rely on the *Insular Cases* in any way," which would make it "very unusual" for [the Court] to address them.[355]

UTIER's lawyer insisted that the government had tacitly relied on the *Insular Cases* throughout the litigation and that, as we have seen, the FOMB had explicitly invoked them before the district court.[356] How can one properly explain, once the government had abandoned its reliance on them, that the *Insular Cases* have hovered like a dark cloud over Puerto Rico not only since the *Aurelius* litigation began, but also since the beginning of the twentieth century? That they are like an ace up the government's sleeve, always available for it to argue that the United States can essentially ignore the Constitution in its colonies? The idea that unincorporated territories exist in a nearly extraconstitutional zone has had such staying power that the government even threw it in as an alternative argument before the district court, despite the self-evident absurdity of that argument in this case.[357] Of course, the argument that some U.S. territories are not

352. *See* Cepeda Derieux & Weare, *supra* note 10, at 284-86 (discussing these briefs and the discussion of the *Insular Cases* at oral argument); Ponsa-Kraus, *supra* note 24, at 126-27 (same).

353. Transcript of Oral Argument at 82, 86-87, Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1521).

354. *Id.* at 82-83.

355. *Id.* at 85-86.

356. *Id.* at 85-86. On the FOMB citing the *Insular Cases* before the district court, see *supra* note 339 and accompanying text.

357. *See supra* note 339 and accompanying text.

part of the United States was self-evidently absurd in *Downes* itself, but it remains on the books nearly a century and a quarter later.

The Court understandably did not find occasion to overrule the *Insular Cases* in *Aurelius*: nothing in the case turned on the validity of the doctrine of territorial incorporation. While the Court reversed the First Circuit, holding that the appointment of the Board members did not violate the Appointments Clause because they are territorial officers, not Officers of the United States, it agreed with the First Circuit on the *Insular Cases*. In the closing passage of his opinion for the Court, Justice Breyer expressly rejected UTIER's request that the Court overrule them, instead explaining that they were irrelevant. "Those cases did not reach this issue," he wrote, "and whatever their continued validity we will not extend them in these cases."[358]

Critics of the *Insular Cases* were disappointed when the Court apparently limited itself to a modest refusal to extend them.[359] But *Aurelius* would have been a less than ideal vehicle for it precisely because nothing in the case turned on them. Were the Court to overrule the *Insular Cases* in a case not squarely presenting the question of their validity, it could make matters worse by launching us all into yet another interminable debate—this one about what exactly the Court rejected and what, if anything, still stands. A case in which nothing turns on the *Insular Cases* is not likely to produce the kind of unambiguous rejection that they deserve.

That said, when it comes to the *Insular Cases*, there is more to *Aurelius* than meets the eye. Although the Court did not overrule them, its reasoning constitutes a powerful, albeit implicit, refutation of the central idea long associated with them: that unincorporated territories exist in a nearly extraconstitutional

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358. *Aurelius*, 140 S. Ct. at 1665.

359. *See, e.g.*, Cepeda Derieux & Weare, *supra* note 10, at 286-87; Ramsey, *supra* note 147. Several amicus briefs had argued that the Supreme Court should either narrow the scope of, decline to extend, or outright overrule the *Insular Cases*. *See* Brief of Former Federal and Local Judges as Amici Curiae Supporting the First Circuit's Ruling on the Appointments Clause *passim*, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334); Brief of Amicus Curiae Virgin Islands Bar Association Supporting the Ruling on the Appointments Clause *passim*, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334); Brief for Amicus Curiae Equally American Legal Defense and Education Fund in Support of Neither Party at 7-17, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334); Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Puerto Rico, Supporting the First Circuit's Ruling on the Appointments Clause Issue *passim*, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334). Another amicus brief stopped short of calling on the Court to overrule the *Insular Cases*, but criticized them. *See* Brief of Elected Officers of the Commonwealth of Puerto Rico as *Amici Curiae* Supporting the Appointments Clause Ruling at 12, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334). Another (which I coauthored) argued that the *Insular Cases* did not govern the issue in *Aurelius*, and, in the alternative, that they should be overruled. *See* Brief for Amici Curiae Scholars of Constitutional Law and Legal History Supporting the First Circuit's Ruling on the Appointments Clause Issue *passim*, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334).

zone. Properly understood, the *Aurelius* opinion goes a long way towards cutting the *Insular Cases* down to size. It is clear from the first page:

> [T]he Appointments Clause governs the appointments of all officers of the United States, including those located in Puerto Rico. Yet two provisions of the Constitution empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories. And the Clause's term "Officers of the United States" has never been understood to cover those whose powers and duties are primarily local in nature and derive from those two constitutional provisions.[360]

Although this passage confirms the inapplicability of Appointments Clause requirements to the officers at issue in the *Aurelius* case, there is no hint here of the standard account of the *Insular Cases*—no hint of anything resembling an extraconstitutional zone. Instead, the Court posits that "the Appointments Clause governs the appointments of all officers of the United States, including those located in Puerto Rico."[361] Of course it does: not because it is fundamental, nor because it matters whether Puerto Rico is part of the United States for purposes of this provision, but because it governs the appointments of all Officers of the United States.

"Yet two provisions of the Constitution empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories."[362] That's right: the Territory Clause gives Congress plenary power to govern the U.S. territories (and the District Clause gives Congress analogous power over Washington, D.C.), which means Congress has the combined powers of the federal government and a state government in these places. The latter includes the power to appoint local officers, not because unincorporated territories exist in a virtual constitutional vacuum any more than states do, but because the Constitution confers this power, analogous to a power all states have, upon Congress over the territories. This is why Congress could create governments in the territories through organic acts long before the *Insular Cases* appeared in the *United States Reports*.

"And the Clause's term 'Officers of the United States' has never been understood to cover those whose powers and duties are primarily local in nature and derive from these two constitutional provisions."[363] Again, this is so not because "the Constitution" does not "apply" in the unincorporated territories except for its "fundamental" provisions, nor because it makes any difference whether

360. *Aurelius*, 140 S. Ct. at 1654-55 (citation omitted).

361. *Id.* at 1654.

362. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2.

363. *Aurelius*, 140 S. Ct. at 1654-55.

Puerto Rico is part of the United States or not, but because local territorial officers are not "Officers of the United States."[364]

The *Aurelius* opinion goes on to elaborate on these basic propositions with a brief historical survey of congressional legislation for the territories in both its federal and its local capacity.[365] As these examples illustrate, when Congress appoints Officers of the United States in the territories—such as, say, the judges on the Federal District Court for the District of Puerto Rico—the Appointments Clause applies, and when it appoints local officers, it does not. Again, the question in the case does not concern the applicability of the Appointments Clause, let alone "the Constitution," to Puerto Rico, but rather simply whether the members of the FOMB are federal or territorial officers.[366] Concluding that they are the latter, the Court upheld PROMESA's mechanism for appointing them.[367]

As we have seen in its closing passages, Justice Breyer's opinion for the Court takes a moment to address the *Insular Cases*.[368] The Court questions the ongoing vitality of the *Insular Cases* and makes clear that they should not be further expanded. But because the outcome in *Aurelius* does not turn on the validity of the doctrine of territorial incorporation, it stops short of overruling them.[369] Sure enough, they reappeared in *Fitisemanu*, where the majority on the court of appeals did not even mention *Aurelius*.[370] And they reappeared in the oral argument

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364. One could argue with this conclusion; indeed, the First Circuit reached the opposite one. But my point here is that the phrase "United States" as used in the Appointments Clause does not refer to the geographic scope of that constitutional provision at all but rather describes the officers covered by the Appointments Clause. To conclude that the officers of the FOMB are not Officers of the United States, whether right or wrong, does not imply that the Appointments Clause does not apply in Puerto Rico—only that it does not apply to the appointment of those officers (in contrast to, for example, federal judges serving on the U.S. District Court for the District of Puerto Rico, to whose appointments the Appointments Clause applies).

365. *See Aurelius*, 140 S. Ct. at 1659-60.

366. *See id.* at 1658.

367. *See id.* at 1662-63.

368. *See id.* at 1665.

369. *See id.* (finding it unnecessary to overrule the *Insular Cases*).

370. *See* Fitisemanu v. United States, 1 F.4th 862, 862-83 (10th Cir. 2021), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021) (mem.). *Aurelius* came down after briefing in *Fitisemanu* concluded, but the Plaintiff-Appellants submitted a letter to the Tenth Circuit before its decision came down, alerting it to the *Aurelius* decision and citing it as supplemental authority. *See* Letter from Matthew D. McGill, Counsel of Record, to Christopher M. Wolpert, Clerk Ct., 10th Cir. (July 22, 2020), https://d3n8a8pro7vhmx.cloudfront.net/wethepeopleproject/pages/210/attachments/original/1595467437/Fitisemanu__28J_Letter_%28Appellee%29.pdf?1595467437 [https://perma.cc/4JFQ-2CDU]. The dissent in *Fitisemanu* did mention *Aurelius*—it quoted *Aurelius*, along with the *Reid* plurality, questioning the validity of the *Insular Cases* and refusing to extend them beyond their facts. *See Fitisemanu*, 1 F.4th at 900 (Bacharach, J.,

in *Vaello Madero*.[371] And they reappeared in a concurrence in *Vaello Madero*, which called upon the Court to overrule them, but not in that case.[372] And they will keep reappearing until the Court finally puts an end to their imperialist reign.

B. Vaello Madero*: The* Insular Cases *Redux*

As noted above, *Vaello Madero* is an equal-protection challenge to Puerto Rico's exclusion from the SSI program, which provides benefits to needy people who are disabled or elderly. The government does not argue that the equal-protection guarantee does not apply in Puerto Rico. Instead, it defends Puerto Rico's exclusion from the program on the ground that Puerto Rico is a territory and Congress has plenary power to discriminate against territories as long as it has a rational basis to do so.[373] Its merits brief before the Supreme Court did not even mention the *Insular Cases*.[374] But Vaello Madero's did, citing them as evidence of a history of racism against Puerto Ricans that should translate into strict scrutiny of legislation classifying on the basis of residence in Puerto Rico.[375]

Early in the argument, Chief Justice Roberts seemed to surprise Deputy Solicitor General Curtis Gannon by asking whether the *Insular Cases* have anything to do with *Vaello Madero*.[376] Gannon responded by explaining that the *Insular Cases* are not relevant because they "were about whether . . . different portions of the Constitution . . . apply differently to different territories," whereas in *Vaello Madero* the government concedes that the equal-protection component of the Fifth Amendment's Due Process Clause applies to Puerto Rico.[377]

Justice Gorsuch then spoke up: "Counsel, if that's true, why—why—why shouldn't we just admit the Insular Cases were incorrectly decided?"[378] Sounding taken aback, Gannon observed that it "would not be the Court's normal course to just say that several cases were incorrect" when Gorsuch testily interrupted him: "I'm asking for the government's position. I'm not asking for

dissenting). Of course, as explained in Part IV, the *Insular Cases* are relevant in *Fitisemanu*—not because they govern the result but because they are the reason the question of whether the Citizenship Clause applies in an unincorporated territory arises in the first place.

371. Transcript of Oral Argument at 8-11, 29-31, 47-58, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303).

372. *See* Vaello Madero, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring).

373. *See* Brief for the United States at 9-10, *Vaello Madero*, 142 S. Ct. 1539 (No. 20-303).

374. *Id.* at IV-VII (omitting the *Insular Cases* from the brief's table of authorities).

375. Brief for Respondent at 2-3, *Vaello Madero*, 142 S. Ct. 1539 (No. 20-303).

376. Transcript of Oral Argument, *supra* note 371, at 8.

377. *Id.*

378. *Id.* at 9. For the exchange described in this paragraph, see *id.* at 9-11.

thoughts about the Court's normal course." Gannon demurred again: "I don't think we're proceeding on a premise that's inconsistent with the Insular Cases because—" Gorsuch interrupted again: "I think you've said that you're proceeding on a premise that the Constitution applies fully and . . . without exception in—in respect to this claim, right?" To which Gannon replied: "With respect to the equal protection claim, yes. But . . . I don't think that that's the only thing that the . . . *Insular Cases* decided." Leading Gorsuch to ask again: "What is the government's position on the *Insular Cases*?" At this point, Gannon acknowledged that some of the *Insular Cases*' "reasoning and rhetoric" was "obviously anathema, [and] ha[d] been for decades, if not from the outset." But he insisted that they were irrelevant in *Vaello Madero* because the government agreed with Vaello Madero that the equal-protection guarantee applies to Puerto Rico.

The perplexing exchange left observers wondering whether the Court will finally overrule the *Insular Cases* in *Vaello Madero*.[379] It did not, likely because despite Justice Gorsuch's flirtation with the possibility at oral argument, and his concurrence calling for it in some future case, *Vaello Madero* would have been yet another less-than-ideal vehicle for the Court to take on the doctrine of territorial incorporation.

Although the *Insular Cases* figured prominently in Vaello Madero's brief, and although he is strongly critical of their racism, he did not argue that they should be overruled.[380] Instead, as noted above, Vaello Madero cited them as historical

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379. *See, e.g.*, Lawrence Hurley, *U.S. Supreme Court Wrestles with Puerto Rico's Exclusion from Benefits Program*, REUTERS (Nov. 9, 2021), https://www.reuters.com/world/us/us-supreme-court-weighs-puerto-ricos-exclusion-benefits-program-2021-11-09 [https://perma.cc/L52H-AQ4D] (quoting Justice Gorsuch's question at oral argument about overruling the *Insular Cases* and commenting that the *Vaello Madero* case "gives the justices an opportunity to revisit those rulings").

380. Brief for Respondent, *supra* note 375, at 2-4, 46. Several amici did, however. *See* Brief of Amicus Curiae Virgin Islands Bar Association in Support of Respondent at 28, *Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303) ("The Court has never revisited the *Insular Cases* since these fundamental changes in this Court's jurisprudence. The Court should do so now and finally overrule the 'much-criticized "Insular Cases."'" (quoting Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020))); Brief of LatinoJustice PRLDEF and Ten *Amici Curiae* in Support of Respondent at 4-6, *Vaello Madero*, 142 S. Ct. 1539 (No. 20-303) ("Accordingly, this action is an appropriate vehicle for the Court to reconsider—and overrule—the *Insular Cases*."); Brief of League of United Latin American Citizens as Amicus Curiae in Support of Respondent at 2, *Vaello Madero*, 142 S. Ct. 1539 (No. 20-303) ("Accordingly, the Insular Cases must be decisively overturned and soundly rejected."); Brief of the Government of the U.S. Virgin Islands as Amicus Curiae in Support of Respondent at 21, *Vaello Madero*, 142 S. Ct. 1539 (No. 20-303) ("This Court should affirm the decision below by overruling the *Insular Cases* and applying heightened scrutiny."); Amicus Brief for Puerto Rico Governor Pedro Pierluisi and the New Progressive Party in Support of Respondent at 12, *Vaello Madero*, 142 S. Ct. 1539 (No. 20-303) ("When Congress made Puerto Ricans citizens, they became vested with

evidence in support of the proposition that the Court should subject Puerto Rico's exclusion from the SSI program to strict scrutiny.[381] The argument was that the equal-protection guarantee should trigger strict scrutiny because the SSI exclusion classifies on the basis of residence in an unincorporated territory, and unincorporated territories were the direct product of the racism that explicitly motivated the *Insular Cases*. If not for this racist doctrine, the residents of Puerto Rico (virtually all of whom are members of an ethnic minority[382]) would not be subject to U.S. sovereignty and most federal laws but denied voting representation in the federal government nearly one and a quarter centuries after the United States annexed Puerto Rico — and Congress would not have the power to exclude them from the SSI program.[383]

For its part, although the government conceded that the equal-protection guarantee applies in Puerto Rico notwithstanding its status as an unincorporated territory, it argued that Puerto Rico's exclusion from the SSI program triggers only rational basis review because the Territory Clause gives Congress plenary power to govern U.S. territories, whether incorporated or not, and this challenge involves a social welfare program and courts ordinarily defer to the government in allocating benefits.[384]

At argument, Justice Sotomayor made clear her sympathy with Vaello Madero's position, pointing to the *Insular Cases* as a "prime example" of racism against Puerto Ricans and using her questions to highlight their Hispanic ethnicity, the history of discrimination against them, and their political powerlessness.[385] While no one used the phrase "discrete and insular minority" at argument, Sotomayor's questions brought it to mind, and Vaello Madero's brief explicitly invoked it, describing residents of Puerto Rico as a "quintessential example of a politically powerless 'discrete and insular' minority."[386]

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all fundamental rights of citizenship. To the extent the Court held otherwise in *Balzac* (which was the only *Insular Case* post-dating the Jones Act), the Court should overrule *Balzac*."); Brief of Amicus Curiae Virgin Islands Bar Association in Opposition to Summary Reversal at 17, *Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303) ("The Court should deny summary reversal and grant certiorari to finally overrule the 'much-criticized "Insular Cases."'" (quoting *Aurelius*, 140 S. Ct. at 1665)).

381. *See supra* note 375 and accompanying text.

382. *See QuickFacts Puerto Rico*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/PR [https://perma.cc/5GYM-948K] (showing that 98.7 percent of Puerto Rico's population identifies as "Hispanic or Latino").

383. Brief for Respondent, *supra* note 375, at 21-31.

384. *See supra* note 373 and accompanying text.

385. Transcript of Oral Argument, *supra* note 371, at 29.

386. Brief for Respondent, *supra* note 375, at 22.

However, other Justices evidently had difficulty accepting the proposition that a geographical classification, whatever its sordid history, should receive strict scrutiny. Justice Thomas, for example, wanted to know what analysis Vaello Madero's lawyer, Hermann Ferré, would apply to the case of "someone who is of Italian descent [and] has lived in New York City all his life and decides" to move to Puerto Rico, thereby losing his eligibility for SSI benefits.[387] Ferré replied that upon moving to Puerto Rico, such a person would instantly be in the same politically powerless position as any other resident of Puerto Rico,[388] which is, of course, true: anyone who establishes residence in Puerto Rico loses voting representation in the federal government regardless of their race, ethnicity, or anything else about them. But Thomas seemed unconvinced. "So you are transferring the relationship with Puerto Rico to the individual who happens to reside in Puerto Rico?" he asked.[389] When Ferré answered in the affirmative, Thomas pressed him: "Do you have any [cases] where we have transferred the treatment of a state to an individual?"[390] Ferré did not because there aren't any.

Even so, the analogy to discrete and insular minorities has intuitive appeal. Residents of unincorporated territories are politically powerless with respect to the federal government, and the vast majority of them arguably share all of the features that define discrete and insular minorities. These include a history of discrimination against them (in this case, based on race and ethnicity—again, it was because the people of these territories were perceived as nonwhite that the Court invented the unincorporated territory in the first place); the immutability of shared traits giving rise to such discrimination (where immutability, a contested concept to be sure, refers to traits that members of the minority either cannot or should not have to change and that have been assigned a subordinating social meaning—all of which can be said about residence in an unincorporated territory); and the arbitrariness of the classifications affecting them (where arbitrariness refers to the moral irrelevance of the traits targeted by such classifications, which instead serve the purpose of reinforcing status hierarchies—as the category of the unincorporated territory surely does). Indeed, well before *Vaello Madero*, there existed scholarship powerfully arguing that classifications based on residence in an unincorporated territory should receive strict scrutiny.[391]

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387. Transcript of Oral Argument, *supra* note 371, at 44.

388. *Id.*

389. *Id.*

390. *Id.*

391. *See, e.g.*, Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797 (2010).

Still, Justice Thomas has a point. It is difficult to explain why a category that can be joined and abandoned at will by someone who otherwise does not belong to any discrete and insular minority should constitute a classification that triggers strict scrutiny. Moreover, even acknowledging the racist roots of the doctrine of territorial incorporation, the Italian person who moves to Puerto Rico becomes politically powerless because she now lives in a territory—not because she now lives in an unincorporated territory. While it is undeniable that Puerto Ricans are Hispanic, have suffered a history of discrimination based on their ethnicity, and are politically powerless, it is also undeniable that Congress has always had the power to treat residents of territories differently. "That's why Respondent was able to get these benefits while he was living in New York" was how Gannon put it.[392] What he meant was that discrimination against residents of a territory is grounded in a distinction drawn by the Constitution itself, which, ipso facto, cannot be suspect.

Whatever one thinks of the arguments above, all of them reflect uncertainty as to the relevance of the *Insular Cases*, and none of them turns on the merits of the doctrine of territorial incorporation. A Justice who agrees with the government would have no occasion to mention the *Insular Cases*, let alone reconsider their doctrine. One who agrees with Vaello Madero would have no need to reach their merits, because their role in his argument is purely historical. That is, on his reasoning, if Congress "incorporated" Puerto Rico tomorrow but continued to exclude it from the SSI program, strict scrutiny should still apply by virtue of Puerto Rico's status as a *previously* unincorporated territory, because the history that makes the classification suspect cannot be overruled. Overruling the *Insular Cases* in this context would have been bizarre and gratuitous.[393]

In short, there were the *Insular Cases* again in *Vaello Madero*, making trouble yet evading review. The fact is that even if the doctrine of territorial incorporation were squarely presented to the Court, it would be no mean feat for the Court to overrule the *Insular Cases* clearly and definitively. The doctrine of territorial

392. Transcript of Oral Argument, *supra* note 371, at 30.

393. There is a tweaked version of Vaello Madero's argument that would raise the merits of the *Insular Cases*. It goes like this: in light of the history of racism that gave rise to the unincorporated territories, classifications on the basis of residence in Puerto Rico are a proxy for racial classifications and should receive strict scrutiny—but only as long as Puerto Rico remains an unincorporated territory. Only then would the merits of the *Insular Cases* be at issue, because only then would the argument for strict scrutiny turn on the validity of the doctrine of territorial incorporation. On this view, if the Court were to overrule the doctrine, eliminating the distinction between incorporated and unincorporated territories altogether, Puerto Rico would cease to be an unincorporated territory. The good news: the *Insular Cases* would finally be overruled. The bad news: Vaello Madero's argument for strict scrutiny would fail because Puerto Rico would no longer be an unincorporated territory, but rather, simply, a territory. It is no mystery why Vaello Madero did not press this version of the argument.

incorporation has confused people ever since Justice Harlan, dissenting in *Downes v. Bidwell*, wrote that "this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel."[394] To this day, scholars and lawyers vigorously debate the meaning and implications of the doctrine.[395] When the Court finally takes it on, the risk of unhelpful and even incoherent reasoning within and across opinions will be high. Perhaps as much as any case the Court has decided, an opinion reconsidering the *Insular Cases* would benefit from rigorous and focused briefing. These landmark, notorious, racist, confusing, infuriating, and profoundly influential cases deserve to be presented to the Court, front and center, for consideration on their merits.

Fortunately, there is a better path to overruling the *Insular Cases* at hand. The case is *Fitisemanu*, in which a petition for certiorari is currently pending before the Court.[396] *Fitisemanu* cleanly presents the validity of the *Insular Cases*. While, as I have argued, they do not govern the result here, the doctrine of territorial incorporation is nevertheless squarely presented in *Fitisemanu* because it is the only reason the question in *Fitisemanu*—whether the Citizenship Clause includes unincorporated territories—is a question at all.[397] Every Justice deciding *Fitisemanu* would have to take a position on the merits of the doctrine of territorial incorporation.

Occasions for overruling the *Insular Cases* are few and far between. The fact is that their holdings that certain constitutional provisions did not apply in the unincorporated territories turned out to be less consequential than their endorsement of permanent colonialism. But the clearest way for the Court to get at the latter is through a challenge raising the former—as *Fitisemanu* does. Any decision overruling the *Insular Cases* would be cause for celebration. But a

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394. Downes v. Bidwell, 182 U.S. 244, 391 (1901) (Harlan, J., dissenting).

395. *See, e.g.*, sources cited *supra* notes 1, 5, 20-23. This Article also makes this point.

396. Petition for a Writ of Certiorari, Fitisemanu v. United States, Nos. 20-4017, 20-4019 (U.S. Apr. 27, 2022).

397. I have made this point not only in this Article, but in several coauthored amicus briefs in the *Fitisemanu* and *Tuaua* litigation. *See* Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Appellees' Petition for Rehearing En Banc, Fitisemanu v. United States, 1 F.4th 862, 870 (10th Cir. 2021) (Nos. 20-4017, 20-4019); Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Appellees with Respect to the *Insular Cases*, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017, 20-4019); Memorandum for Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party, Fitisemanu v. United States, 426 F. Supp. 3d 1155 (D. Utah 2019) (No. 1:18-CV-00036EJF); Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Petitioners, Tuaua v. United States, 579 U.S. 902, (2016) (No. 15-981); Brief of Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party, Tuaua v. United States, 951 F. Supp. 2d 88, 91 (D.D.C. 2013) (No. 13-5272).

resounding, and resoundingly unanimous, decision should not be too much to ask for. One hopes the Court will grant certiorari in *Fitisemanu* and deal those abhorrent decisions a long-overdue death blow.

CONCLUSION: THE END OF THE *INSULAR CASES*

Suppose the Supreme Court overrules the *Insular Cases*. Then what?

The territories would still be territories. They would still be subject to U.S. sovereignty and Congress's plenary power under the Territory Clause. They would still be denied voting representation in the federal government. But the distinction between incorporated and unincorporated territories would finally be erased from American constitutional law. Permanent colonies would no longer have the imprimatur of the Supreme Court.

On the question of which constitutional provisions apply in the unincorporated territories, little, if anything, would change. The "entire" Constitution would not apply to them then, either. To cite just the most obvious evidence in support of this proposition, the provisions governing representation in the federal government would still exclude the territories, as they always have.

The phrase "United States" in the Uniformity Clause would now include them. But as noted earlier, that provision does not foreclose the differential treatment of territories under Congress's plenary power even with respect to uniformity, as the Court's decision in *Binns* demonstrated just a few years after *Downes*.[398] Recall that *Binns* relied on Congress's plenary power over all territories to uphold the imposition of excise taxes that would otherwise have violated the Uniformity Clause, on the ground that the resulting revenue benefitted Alaska. The Court could employ analogous reasoning to uphold programs that benefit the territories today.

The Citizenship Clause would surely include the territories, though in my view it does already, and only a distorted version of the already erroneous standard account could lead to a different conclusion, as it did in *Tuaua* and *Fitisemanu*.[399] As for other constitutional provisions, we have seen that the *Insular Cases* themselves recognized the applicability of fundamental limitations on Congress's power in the unincorporated territories. Whether these include jury-related provisions would depend on how the courts chose to analyze the question of whether these rights are fundamental in the territories—a question courts could answer with regard to the relevant legal context, as they already do in the states.[400]

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398. *See supra* Part I.

399. *See supra* Part IV.

400. *See supra* Part III.

Finally, the disappearance of the distinction between incorporated and unincorporated territories need not affect the United States' power abroad. Recall, a majority of the Justices in *Reid* itself recognized this, though Justice Harlan was not among them. Rejecting the relevance of the *Insular Cases* to the application of the Constitution in foreign territory, they found a way to answer the question before them without reliance on those decisions.[401]

So what would change? No longer would a constitutional challenge involving a territory trigger a suspension of the laws of constitutional physics. No longer would the doctrine of territorial incorporation haunt constitutional challenges involving the territories, muddling matters and engendering a confused and confusing jurisprudence. No longer would cases involving these territories bestow a patina of legitimacy upon their patently illegitimate status. No longer would perpetual colonialism have the endorsement of the federal courts.

Advocates of repurposing, "focused on the functional goal of maintaining indigenous practices, may argue that the benefit of ending legal subordination is too abstract compared to the tangible protection that repurposing the *Insular Cases* may bring."[402] And it is true that overruling the *Insular Cases* would not concretely require Congress to do anything specific at any particular time. However, as I have shown, repurposing the *Insular Cases* has not actually brought the territories any tangible protection that could not be achieved without them.[403] Meanwhile, a decision overruling them would be an event of momentous symbolic significance, which would shine a light on the territories' subordinate status and draw attention to Congress's responsibility for it. For the people of the unincorporated territories, who have no voice in the federal government, and who are largely invisible to the rest of the United States, a strong statement by the Supreme Court rejecting the constitutionality of their indefinite subordination would be no small thing.

And what would become of the territories? My hope is that the Court's definitive rejection of the distinction between incorporated and unincorporated territories would give rise to an American reckoning with the reality of U.S. imperialism that would, in turn, lead to the demise of perpetual colonialism in the United States. Or to put it in more concrete terms, my hope is that in the course of definitively rejecting the doctrine of territorial incorporation, the Court would bring attention to the plight of the territories while reviving and endorsing the understanding that, under the U.S. Constitution, territorial status *must be*

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401. *See supra* Part II.

402. I took the liberty of quoting the editors of this Special Issue, in their second edit letter to me, because they put the objection clearly and concisely.

403. As noted above, perhaps one would need them in order to sustain a ban on same-sex marriage in American Samoa, were the territory to enact such a ban.

temporary because it subjects people to U.S. sovereignty and federal laws while denying them representation. I suspect it is too much to hope that the American public would finally become aware of the territories. But perhaps it is not too much to hope that such a pronouncement by the Supreme Court would go a long way toward eroding the insidious message of constitutionally sanctioned subordination that the Court's failure to overrule the *Insular Cases* sends instead. And perhaps, in the wake of such a decision, U.S. officials charged with governing and administering the United States's colonies would feel that much more pressure to bring democratic legitimacy to the United States's relationships with the territories.

For better or worse, territorial self-determination cannot become a reality without action from the political branches of the federal government. On the better side of the ledger, a widespread consensus exists even in the federal government that it is up to the people of the territories to decide where their decolonization should lead. Their options include statehood or independence, with or without free association[404] — or the United States could amend the Constitution to provide for a noncolonial form of asymmetrical federalism that genuinely protects alternative forms of sovereignty without sacrificing equality and representation.

The reason to overrule the *Insular Cases* is not, however, to resolve the political status of the territories, which the Court cannot do. It is to end the proposition that the unincorporated territories exist in a nearly extraconstitutional zone. Again, doing so would have the salutary twofold effect of reining in the purely teleological and poorly reasoned jurisprudence engendered by that proposition, while withdrawing once and for all the Court's implicit imprimatur from the outrageous notion that a U.S. territory can remain a territory forever — notwithstanding the flagrant political illegitimacy and shameless hypocrisy of a representative constitutional democracy that allows itself, in perpetuity, to govern a people without representation.

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404. There is considerable disagreement, at least in the context of the debate over Puerto Rico's status, over whether free association is a form of independence or a status distinct from independence. *Compare, e.g.*, André Lecours & Valérie Vézina, *The Politics of Nationalism and Status in Puerto Rico*, 50 CAN. J. POL. SCI. 1083, 1095 (2017) ("Free association is really independence.") *with, e.g.*, Angel Israel Rivera & Aarón Gamaliel Ramos, *The Quest for a New Political Arrangement in Puerto Rico: Issues and Challenges*, 26 CARIBBEAN STUD. 265, 279, 282-83 (arguing that "sovereign free association" is a status distinct from independence). As the statement accompanied by this footnote indicates, my own view is that free association is a form of independence because a free association agreement can be unilaterally terminated by either party. On this disagreement, see Rafael Cox Alomar & Christina D. Ponsa-Kraus, *Proposed Compromise Status Legislation for Puerto Rico and Companion Memorandum with Background & Commentary* 6 (Oct. 1, 2021), https://www.law.columbia.edu/sites/default/files/2021-10/Compromise%20Proposal%20Puerto%20Rico%20Status%20Legislation_0.pdf [https://perma.cc/3DP9-UY3G].

The fact is that not even Justice White, who originally insinuated the doctrine of territorial incorporation into the Court's jurisprudence, went so far as to endorse indefinite territorial status explicitly. On the contrary, in the closing passages of his concurring opinion in *Downes*, he did the opposite, albeit in characteristically racist-imperialist terms:

> [I]t is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control, when, in its political discretion, the situation is ripe to enable it to do so. Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated the occupation will terminate.[405]

Even Justice White understood that it would be wrong for the United States to subject a place and its people to territorial status indefinitely. Even the doctrine of territorial incorporation, as qualified in this closing passage of White's troublesome concurrence, rests on the assumption that the political branches have a constitutional duty to ensure that territorial status will not go on forever. If there is any proposition in the *Insular Cases* worth preserving, it is this one.

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405. Downes v. Bidwell, 182 U.S. 244, 343-44 (1901) (White, J., concurring).