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Introduction to the Special Issue on the Law of the Territories

The *Yale Law Journal* is thrilled to present a Special Issue on the Law of the Territories, which explores unresolved controversies and debates concerning the U.S. territories. In the pages that follow, our authors examine the complex and often-fraught relationship between the U.S. government and its territories. Their pieces discuss the implications of recently decided cases involving the territories, survey the vulnerabilities of longstanding territorial precedents, and propose alternative frameworks for understanding and litigating issues pertaining to the rights of territorial residents and the sovereignty of their governments.

Debates about these and various other topics relevant to the territories have often taken place in the courts. Indeed, the resurgence of litigation concerning the territories in the Supreme Court and the lower federal courts demonstrates the enduring relevance and importance of the law of the territories. This Term, the Supreme Court held in *United States v. Vaello-Madero* that the Constitution does not require Congress to grant Supplemental Security Income benefits to residents of Puerto Rico. In a concurring opinion, Justice Gorsuch called on the Court to overrule the *Insular Cases*, a series of early twentieth-century cases infamously holding that the Constitution does not fully apply to “unincorporated” territories. The petitioners in *Fitisemanu v. United States* have heeded his call to action. In their pending petition for a writ of certiorari, they ask the Court to decide whether persons born in the territories are entitled to birthright citizenship under the Fourteenth Amendment’s Citizenship Clause – and whether the Court should overrule the *Insular Cases* once and for all.

Outside of courthouses and legislatures, debates concerning the territories have also taken place in the scholarly literature, including in the pages of the

Journal. A century ago, those pages contributed to the development, dissemination, and popularization of racist notions of territorial subordination. The Supreme Court would later adopt those same notions to justify its holdings in the *Insular Cases*, demonstrating the important—and sometimes pernicious—role that legal scholarship can play in shaping legal and political realities. In publishing this Special Issue, the *Journal* hopes to begin the critical work of both recognizing its role in perpetuating damaging conceptions of the territories and uplifting scholarship that has the intention and potential to forge a new future.

The Special Issue features four Articles by renowned and emerging scholars. After advertising a call for papers on the law of the territories and receiving submissions, the *Journal* selected each Special Issue Article in accordance with its traditional review process, including several rounds of anonymized review by *Journal* editors and peer review by scholars specializing in the law of the territories.

The first Article, *Navassa: Property, Sovereignty, and the Law of the Territories*, is by Joseph Blocher and Mitu Gulati. It draws on the history of the first overseas U.S. territory, Navassa Island, to demonstrate how property and private law can help to dismantle colonial structures in the territories. In doing so, it encourages readers to think beyond traditional, public-law conceptions of the territories as sovereign land to be governed, proposing instead a private-law conception of the territories as property to be owned. So long as that property is understood to belong to the people of the territories, it argues, a private-law approach could provide concrete solutions to the harms wrought by colonialism, including negotiated economic settlements and auctions for sovereign control.

The second Article, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, is by Christina Duffy Ponsa-Kraus. Scholars and practitioners have recently argued that the *Insular Cases* should be repurposed to protect cultural practices in the territories from constitutional challenges. This Article disagrees. It calls on the Supreme Court to overrule—rather than repurpose—the *Insular Cases*, and it points to constitutional doctrines beyond their reach that can preserve cultural practices without spawning a crisis of political illegitimacy in the unincorporated territories.

The third Article, Aurelius's *Article III Revisionism: Reimagining Judicial Interventions for the Insular Cases and "The Law of the Territories,"* is by James T. Campbell. It challenges Ponsa-Kraus's argument head-on, arguing that simply overruling the *Insular Cases*, as the Supreme Court recently did with *Korematsu v. United States* in *Trump v. Hawaii*, could pose a grave threat to territorial self-determination. In doing so, the Article demonstrates how courts can and do engage in territorial status manipulation without explicit reliance on the *Insular Cases*.

The fourth and final Article is *Indigenous Subjects* by Addie C. Rolnick. Centering on the wide-ranging implications of the Supreme Court's decision in *Rice v. Cayetano*, it argues that the Court's race jurisprudence threatens Indigenous self-determination and land rights in the territories. It concludes by offering several strategies that litigants can use to protect Indigenous rights within the existing doctrinal landscape. Along the way, it also addresses the law's reluctance to recognize the distinctions and intersections between various political identity categories—including "indigeneity," "Indianness," "colonized," race, and ancestry—by clarifying their meanings and manifestations across various legal sub-fields—including Federal Indian law, international law, the law of the territories, and race law.

The Special Issue is the product of much hard work and collaboration across Volume 131 and beyond. First, thank you to Alexander Nabavi-Noori and Neil Weare for sharing their enthusiasm and ideas during early discussions surrounding the Special Issue, and for contributing to the *Journal's* call for papers. Second, thank you to our Special Issue Committee (Danny Li, Joseph B. Linfield, Kristin Angelle Sharman, Sarah M. Walker, and Noelle Nelson Wyman) for reading all of the submissions and selecting the four Special Issue Articles through our intensive review process. A special thank you is due to three of those editors (Danny Li, Joseph B. Linfield, and Sarah M. Walker) who also served as Executive Editors of those Articles. Third, thank you to the *Journal's* First-Year Editors for their work sourceciting early drafts. Another special thank you is due to several of those editors (Isabelle Barnard, Russell C. Bogue, Colette Le Brannan, Kevin X. Chen, Trent Colbert, Braden Currey, Elle Eshleman, Ethan Q. Fairbanks, Danny Hirsch, Milo Hudson, M. Broderick Johnson, Alexis L. Kallen, Rekha Kennedy, Michael Loedel, Cynthia Y. Long, Bo Malin-Mayor, Daniel A. Mejia-Cruz, Juan Pablo Miramontes, Varshini Parthasarathy, Nicholas S. Pellitta, Malina J. Simard-Halm, Hannah Vester, and William R. Weber), as well as Sierra T. Stubbs, who contributed to edit letters and line edits as part of the *Journal's* editorial process. Finally, thank you to the *Journal's* Managing Editors (Joshua A. Altman and Samantha C. Bensinger) for carefully shepherding each piece through production.

We hope that the Special Issue will represent a valuable and generative contribution to ongoing debates about the future of the territories. On June 30, 2022, the day of publication, the *Journal* hosted a Special Issue Symposium. Open to the public, the Symposium served as the first opportunity to discuss the Special Issue's Articles. In the years to come, our editors look forward to engaging in collaborations, discussions, and scholarship on the law of the territories—on and off the page.