

JAMES T. CAMPBELL

## *Aurelius's* Article III Revisionism: Reimagining Judicial Engagement with the *Insular Cases* and “The Law of the Territories”

**ABSTRACT.** The Supreme Court’s unanimous decision upholding the appointments structure of Puerto Rico’s controversial Financial Oversight and Management Board in *FOMB v. Aurelius* has, to date, yielded commentary fixated on what the Justices did not say. The bulk of that commentary criticizes the Court for declining to square up to and overturn the *Insular Cases*, the series of early twentieth-century decisions holding that the Constitution does not fully apply to Puerto Rico and other “unincorporated” possessions populated by “savages” and persons of “uncivilized race.” However, *Aurelius* teaches that the core constitutional problems of territorial exceptionalism and status manipulation run far deeper than the doctrinal framework of the *Insular Cases*—such that those cases’ ceremonial judicial overthrow is unlikely to spell an end to the harms of the legal order they represent.

Observing the *Aurelius* Court’s inclination to erase overseas expansion from its account of Article III doctrine, this Article questions the wisdom of urging judicial overthrow of the *Insular Cases* without a coherent rubric for the many doctrinal universes that might emerge from such an intervention. Together, the framing problems on display in *Aurelius* and the lessons from the recently overturned Japanese-internment case *Korematsu v. United States* suggest that although the *Insular Cases* are plainly indefensible, ill-considered judicial intervention will pose a grave threat to procedurally legitimate self-determination and to path-dependent interests with roots in that troubled framework. This Article reorients a conversation inclined to view judicial overthrow of the *Insular Cases* as an end in itself toward more informed and productive judicial engagement that secures legal recognition of territories’ agency in charting their own future. Formally condemning or overruling the *Insular Cases* will mean little if judges fail to account for the threshold ambiguities enabling territorial status manipulation across constitutional domains, which *Aurelius* shows can be effected with or without express reliance on the *Insular Cases* or the Incorporation Doctrine. Ultimately, this Article proposes a conversation with Federal Indian law as a starting point for theorizing judicial engagement with the *Insular Cases* and the so-called “law of the territories.”



**AUTHOR.** Yale Law School, J.D. 2020; Yale College, B.A. 2013. Alex Munson, Armando Ghinaglia Socorro, Aziz Rana, Ela Leshem, Evan Walker-Wells, Jade Ford, Julian Aguon, Kathy Campbell, Maggie Blackhawk, Phil Kaplan, Rosa Hayes, Soren Schmidt, and Valeria Pelet del Toro: *si yu'os ma'áse* for your humbling intellectual generosity. I am indebted to many others, especially Joe Linfield and the editors of the *Yale Law Journal*, for helping me through the writing process. I dedicate this Article to my mom.



## ARTICLE CONTENTS

INTRODUCTION	2546
I. AURELIUS AND THE APPOINTMENTS CLAUSE: A “ROUGH” ARTICLE III ANALOGY	2561
II. UNEARTHING AURELIUS’S ARTICLE III PROBLEM	2566
A. Article III’s “Exceptions”: Prevailing Understandings	2569
B. Aurelius’s Erasure of Territorial Courts	2571
1. Territorial Courts from the <i>Insular Cases</i> Through <i>Palmore</i>	2572
2. Territorial Courts Post- <i>Palmore</i>	2578
III. TERRITORIAL EXCEPTIONALISM AS STATUS MANIPULATION: MISREADING THE CONSTITUTION OF EMPIRE	2583
A. Status Manipulation: Preserving, Transforming, and Constructing Liminality	2585
B. Erasing Empire from Article III Doctrine	2588
IV. AURELIUS AS ANTIEXCEPTIONALISM’S FUTURE: THE TROUBLE WITH UNDERTHEORIZED JUDICIAL INTERVENTIONS CIRCLING THE <i>INSULAR CASES</i>	2597
A. The <i>Insular Cases</i> and Aurelius: Avoiding the <i>Korematsu</i> Trap	2598
B. Antiexceptionalism and Erasure: American Samoa in the Judicial Crosshairs	2604
C. The Legal Academy vs. The Unsophisticated Native Opposition: <i>Fitisemanu v. United States</i>	2611
D. Developing the Undertheorized <i>Insular Cases-Plessy</i> Parallel	2621
1. Drawing from <i>Plessy</i> , but not from <i>Brown</i> ?	2621
2. The <i>Insular Cases-Plessy</i> Parallel’s Inherent Limits	2624
V. IMPROVING JUDICIAL ENGAGEMENT WITH “THE LAW OF THE TERRITORIES”—WITH OR WITHOUT THE <i>INSULAR CASES</i>	2631



A. The Territories and Promise-Keeping: Holding Conversation with Federal Indian Law	2632
B. Doing the “Hard Work”	2639
C. Sketching the So-Called “Law of the Territories”	2642
<b>CONCLUSION</b>	<b>2651</b>

## INTRODUCTION

Heading into the 2020 Supreme Court Term, *Financial Oversight & Management Board v. Aurelius Investment, LLC* had the makings of a blockbuster. The case presented the first major constitutional hurdle for Congress's newly christened Financial Oversight and Management Board for Puerto Rico (FOMB), a novel, quasi-governmental entity chartered to wrest control over Puerto Rico's financial affairs from the island's elected government.<sup>1</sup> Less than a month after the Court granted certiorari, a series of massive protests erupted in Puerto Rico demanding the governor's resignation and dissolution of "la junta," a now-popularized nickname for the FOMB within the territory.<sup>2</sup> In an immediate sense,

- 
1. See generally Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101 (2018)) (outlining the organizational structure and responsibilities of the Financial Oversight and Management Board (FOMB)). PROMESA (Spanish for "promise"), passed in response to Puerto Rico's spiraling public-debt crisis, has been the subject of intense controversy in Puerto Rico from its inception. See, e.g., Hon. Juan R. Torruella, *Remarks at the Asamblea del Colegio de Abogados y Abogadas de Puerto Rico*, YOUTUBE, at 10:00-15:30 (Sept. 11, 2016), [https://www.youtube.com/watch?time\\_continue=626&v=UGUDEQ9CSe8&feature=emb\\_title](https://www.youtube.com/watch?time_continue=626&v=UGUDEQ9CSe8&feature=emb_title) [<https://perma.cc/W4QZ-NYNT>] ("If PROMESA does not confirm the existence of our colonial relationship with the United States, tell me where my mistake lies. In reality, this law makes holding elections in November superfluous. Even more than superfluous, it makes them irrelevant. . . . The imposition of this 'Junta' over Puerto Ricans with the powers that are granted to it by PROMESA represents the most denigrating, disrespectful, anti-democratic, and colonial act that has ever been seen in the course of our relationship with the United States. . . . What PROMESA does is—it perpetuates [Puerto Rico's colonial status], and it only leads to a new way of more directly and vulgarly administering the colony." (English subtitle translation)).
  2. *Massive Protests Held in Puerto Rico After Governor Refuses to Step Down*, BBC (July 23, 2019), <https://www.bbc.com/news/world-us-canada-49075683> [<https://perma.cc/DCU7-6FC4>]; Alex Lubben, *Puerto Ricans Aren't Done Protesting. "La Junta" Is Why.*, VICE NEWS (July 25, 2019, 3:26 PM), <https://www.vice.com/en/article/9kxxy/puerto-ricans-arent-done-protesting-la-junta-is-why> [<https://perma.cc/G2JH-XS5D>]. The 2019 protests merged ongoing public opposition to PROMESA with a newer political scandal over controversial leaked chat messages between the then-Governor and other Puerto Rican officials. Public demonstrations denouncing the FOMB and PROMESA have been ongoing since early 2017, when the FOMB announced it would impose austerity measures on the island. Indeed, months before Hurricane Maria's devastating impacts amplified public unease, these demonstrations were already among the largest in Puerto Rico's history. See Valeria M. Pelet del Toro, Note, *Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America's Colony*, 128 YALE L.J. 792, 795 (2019) (observing in the context of 2017 demonstrations that "[a] protest of that size and manifesting such palpable anticolonial sentiment" was, until that moment, "unheard of in Puerto Rico").

the constitutional challenges to the FOMB threatened to upend the very foundation of the island's \$129 billion public-debt restructuring,<sup>3</sup> and, with it, many trillions of dollars' worth of claims.<sup>4</sup> More significantly, the uncertain constitutionality of the FOMB's powers and composition pointed toward some of Puerto Rico's most difficult and enduring legal ambiguities: the limits of congressional power to interfere with the island's self-government and the future of Puerto Rico's relationship to the United States after what will soon mark 124 years in a supposedly "temporary" constitutional limbo.<sup>5</sup>

*Aurelius* presented the most inviting opportunity in decades to reconsider the *Insular Cases*,<sup>6</sup> the long-controversial series of Supreme Court precedents that

- 
3. Mary Williams & Karl Russell, *\$129 Billion Puerto Rico Bankruptcy Plan Could Be Model for States*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2019/09/27/business/puerto-rico-bankruptcy-promesa.html> [<https://perma.cc/5JFE-K4J3>]; Ryan Boysen, *PROMESA Board Is Unconstitutional, Aurelius Tells Justices*, LAW360 (Aug. 23, 2019, 4:53 PM), <https://www.law360.com/articles/1191868/promesa-board-is-unconstitutional-aurelius-tells-justices> [<https://perma.cc/2B6W-4RHE>].
  4. See Objection of FOMB at 12, *In re Fin. Oversight & Mgmt. Bd.*, No. 17 BK 3283 (D.P.R. Oct. 13, 2020), ECF No. 14547 (noting that approximately 44,000 claims had been processed, eliminating roughly \$42 trillion in outstanding claims against Puerto Rico); see also Transcript of Omnibus Hearing at 20, *In re Fin. Oversight & Mgmt. Bd.*, No. 17 BK 3283 (D.P.R. Apr. 24, 2019), ECF No. 6538 (noting "about 165,000 claims filed"); cf. La Brega, *The Bankruptcy Letters*, WNYC STUDIOS, at 14:30 (Feb. 24, 2021), <https://www.wnycstudios.org/podcasts/la-brega/articles/bankruptcy-letters> [<https://perma.cc/NUJ9-SZJJ>] (exploring the outlook of PROMESA's claims process for Puerto Rico's microcreditors).
  5. *De Lima v. Bidwell*, 182 U.S. 1, 198 (1901) ("The theory that a country remains foreign with respect to the tariff laws until Congress has acted . . . presupposes that a country may be domestic for one purpose and foreign for another. . . . [And] [t]hat this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words."); *Reid v. Covert*, 354 U.S. 1, 14 (1957) (noting that the *Insular Cases* "involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions" (emphasis added)); see Act of Apr. 12, 1900, ch. 191, 31 Stat. 77. *But see* Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2453 (2022) (insisting that "every account of the *Insular Cases* agrees" that they stand for the proposition that "the federal government has the power to keep and govern territories indefinitely, without ever admitting them into statehood (or de-annexing them, for that matter)"). Puerto Rico became a U.S. territory in 1898 as part of the Treaty of Paris between the United States and Spain following the Spanish-American War. See Treaty of Peace Between the United States and Spain, Spain-U.S., Dec. 10, 1898, S. TREATY DOC. NO. 57-182 (1902).
  6. See Adriel I. Cepeda Derieux, *The Supreme Court Has a Chance to Bring Constitutional Equality to Puerto Rico*, SLATE (Oct. 10, 2019, 3:28 PM), <https://slate.com/news-and-politics/2019/10/puerto-rico-constitutional-rights-supreme-court.html> [<https://perma.cc/FHN8-4AT4>].

gave birth to that constitutional limbo. The *Insular Cases*, while not easily summarized,<sup>7</sup> are today invoked principally for the proposition that at least some parts of the Constitution do not “follow the flag”<sup>8</sup>—in other words, that the federal government is not bound by certain otherwise-applicable constitutional rights and guarantees when it acts upon overseas possessions. To accomplish this purpose, the early twentieth-century decisions invented a doctrinal distinction between “incorporated” territories—those the Court viewed as firmly destined for statehood (e.g., the Northwest Territory)—and “unincorporated” ones—possessions of uncertain relationship, to which only “fundamental” constitutional provisions would be guaranteed (e.g., the Philippines, Guam, and Puerto

- 
7. See Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101, 126 (2020) (“Like pretty much everything affecting Puerto Rico’s status, what exactly the *Insular Cases* held has been the subject of much debate.”).
  8. See, e.g., *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 854 & n.12 (1st Cir. 2019); GUSTAVO A. GELPÍ, *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898-PRESENT)* 104 (2017); KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 81-87 (2009); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 284 n.5 (2007). There is some contestation around this shorthand. Christina D. Ponsa-Kraus maintains that *Boumediene v. Bush* rejected the notion that the *Insular Cases* stand for the proposition that the Constitution “does not follow the flag” to the unincorporated territories, as the Court announced that “the Constitution ha[d] independent force in [the] territories that was not contingent upon acts of legislative grace.” Christina Duffy Burnett [Ponsa-Kraus], *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 984 (2009) (quoting *Boumediene v. Bush*, 553 U.S. 723, 726 (2008)). However, immediately following that passage (which refers to “territories” generally, without differentiation), *Boumediene* declared that “the Court adopted the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.” *Boumediene*, 553 U.S. at 726 (emphasis added). Thus, another way to read this part of *Boumediene* is that the Court held that the Constitution has at least *some* independent force in the unincorporated territories, such that the political branches do not have discretion to “switch . . . off” the entire Constitution “at will.” *Id.* at 727; cf. 1 PHILIP C. JESSUP, *ELIHU ROOT* 348 (1938) (“[A]s near as I can make out the Constitution follows the flag—but doesn’t quite catch up with it.”). To be sure, there are many possible ways of understanding the *Insular Cases*. The term encompasses more than two decades of internally inconsistent rulings that are united in large measure by their indeterminacy. This Article makes no attempt to argue from a “correct” interpretation of those decisions in aggregate because there are undoubtedly many such interpretations. Because it invites discourse on contemporary judicial engagement, this Article’s view of what the *Insular Cases* stand for is tethered first and foremost to what the Supreme Court tells us it stands for. See *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (explaining that the reason the *Insular Cases* were not relevant in *Aurelius* was that the Court had already determined that “Constitution’s Appointments Clause applies,” despite the fact that FOMB board members fall outside the scope of the phrase “of the United States”); see also *infra* note 245 (discussing confusion over the *Insular Cases* at recent oral argument in *United States v. Vaello Madero*).

Rico).<sup>9</sup> This “territorial incorporation doctrine,” as that distinction is now known, was fashioned not from any recognized legal principle, but from the Justices’ varied concerns about the racial and ethnic makeup of islands newly acquired after the Spanish-American War.<sup>10</sup> Confronted with the specter of adding some ten million people of “alien”<sup>11</sup> and “uncivilized race”<sup>12</sup> to the American body politic, the Court licensed the political branches to maintain and develop these newly ambiguous “unincorporated” territories without citizenship and without constitutional impediment – at least “for a time.”<sup>13</sup>

As a result, nearly four million residents of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI)<sup>14</sup> are unrepresented across all branches of our national government, even in the four territories where U.S. citizenship is guaranteed by birth.<sup>15</sup> They have no electoral-college votes for President, no senators, and no voting

- 
9. See *Balzac v. Porto Rico*, 258 U.S. 298, 305, 312 (1922); United States’ Memorandum of Law in Support of the Constitutionality of PROMESA at 8-12, 9 n.5, *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d 537 (D.P.R. 2018) (No. 17 BK 3283) (arguing that the Appointments Clause does not apply with respect to Puerto Rico because that Clause is not fundamental under the incorporation framework).
  10. See Torruella, *supra* note 8, at 285, 308, 346; see also Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases, 97 IOWA L. REV. 101, 110-11 (2011) (“[T]he Insular Cases . . . [entail] deplorable discussions of the supposed racial and cultural inferiority of inhabitants of the newly annexed island territories . . . .”); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 433 (2020) (“The Justices . . . openly acknowledged their policy-driven concerns over potential U.S. citizenship for island natives . . .”).
  11. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).
  12. *Id.* at 306 (White, J., concurring); see also *Dorr v. United States*, 195 U.S. 138, 145-48 (1904) (hesitating to limit flexible application of the Constitution in future scenarios where the United States, “impelled by its duty and advantage, shall acquire territory peopled by savages”).
  13. *Downes*, 182 U.S. at 384.
  14. See Press Release, Chair Raúl M. Grijalva, Nat. Res. Comm. Grijalva Supports HR1, Highlights Many Ways It Increases Justice and Democracy in U.S. Territories Long Denied Political Representation (Mar. 3, 2021), <https://naturalresources.house.gov/media/press-releases/grijalva-supports-hr-1-highlights-many-ways-it-increases-justice-and-democracy-in-us-territories-long-denied-political-representation> [<https://perma.cc/3H2H-EL48>].
  15. See Stacey Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, ATLANTIC (Mar. 11, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246> [<https://perma.cc/CE7G-GLP9>]. The territories, like Washington, D.C., have nonvoting delegates (for Puerto Rico, the position is titled “Resident Commissioner”) to the U.S. House of Representatives. See 2 U.S.C. § 25a (2018) (Washington, D.C.); 48 U.S.C. §§ 891, 1711, 1731, 1751 (2018) (territories); Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105, 112 (2018); see also U.S. CONST. amend. XXIII (allowing residents of the District of Columbia to participate in presidential elections).



representation on the floor of the House.<sup>16</sup> Only Puerto Rico has Article III protections for its district-court judges.<sup>17</sup> Meanwhile, Americans in the territories are singled out for widespread discrimination in federal programs and public assistance despite having some of the nation's lowest per-capita income metrics and highest cost of living.<sup>18</sup> This remains true even as the people of the territories have fought and died in significant numbers during every American conflict of

- 
16. See *Shadow Citizens: Confronting Federal Discrimination in the U.S. Virgin Islands*, DISABILITY RTS. CTR. V.I. (Mar. 2021), <https://www.drcvi.org/documents/general/DRCVI-ShadowCitizens.pdf> [<https://perma.cc/RRZ5-S4HP>]; Aaron Steckelberg & Chiqui Esteban, *More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress*, WASH. POST (Sept. 28, 2017), <https://www.washingtonpost.com/graphics/2017/national/fair-representation> [<https://perma.cc/7QFL-XSQJ>].
  17. See James T. Campbell, Note, *Island Judges*, 129 YALE L.J. 1888, 1888-914 (2020) (describing differences in status among territorial district-court judges).
  18. The territories' exclusion from federal benefits varies widely from territory to territory. For example, the Commonwealth of the Northern Mariana Islands (CNMI) receives Supplemental Security Income (SSI) but not the Supplemental Nutrition Assistance Program (SNAP), while the opposite is true in the U.S. Virgin Islands. See Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1675-76 tbls.1 & 2 (2021). The territories' exclusion from federal benefits and infrastructure programs is most commonly defended on the ground that residents of U.S. territories generally do not pay federal income taxes to the federal treasury even though they do pay other forms of federal tax. See, e.g., Brief for Petitioner at 9, *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303). This question was recently decided by the U.S. Supreme Court in *United States v. Vaello Madero*. See *infra* Part V. For an exploration of the various tax-based justifications for discriminating against Puerto Rico and other territories, see Brief of the National Disability Rights Network, Disability Rights Center of the Virgin Islands, and Guam Legal Services Corporation-Disability Law Center as Amici Curiae in Support of Respondent at 4-22, *Vaello Madero*, 142 S. Ct. 1359 (No. 20-303). Estimates show that there are currently forty-two states that, like Puerto Rico and the other territories, create a net-negative to the federal treasury—meaning that they do not pay in as much as they receive out from federal appropriations. Laura Schultz, *Giving or Getting? New York's Balance of Payments with the Federal Government* (2021), ROCKEFELLER INST. GOV'T 12 (2021), <https://rockinst.org/issue-area/balance-of-payments-2021> [<https://perma.cc/74SB-C4V3>].

the past century.<sup>19</sup> Even today, the per-capita rate of military enlistment in some territories exceeds those of all fifty states.<sup>20</sup>

Largely for their overtly racist reasoning, the *Insular Cases* have emerged as some of the most controversial precedents still cited approvingly in modern courts.<sup>21</sup> The late First Circuit Judge Juan R. Torruella summarized these cases as the lynchpin of “a de jure *and* de facto condition of political apartheid for the U.S. citizens that reside in Puerto Rico and the other territories,” noting that the decisions “contravened established doctrine . . . to meet the political and racial agendas of the times.”<sup>22</sup> As scholars increasingly explore the cases’ historical and

- 
19. See, e.g., Blaine Harden, *Guam's Young, Steeped in History, Line Up to Enlist*, WASH. POST, Jan. 27, 2008, at A15; Josh Hicks, *Guam: A High Concentration of Veterans, but Rock-Bottom VA Funding*, WASH. POST (Oct. 29, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/10/29/guam-a-high-concentration-of-veterans-with-little-va-funding> [<https://perma.cc/XU7H-6959>]; Shannon Collins, *Puerto Ricans Represented Throughout U.S. Military*, U.S. DEP'T DEF. (Oct. 14, 2016), <https://www.defense.gov/News/News-Stories/Article/Article/974518/puerto-ricans-represented-throughout-us-military-history> [<https://perma.cc/KS4J-MQQE>]; *Igartúa-de la Rosa v. United States*, 386 F.3d 313, 320 n.19 (1st Cir. 2004) (Torruella, J., dissenting) (noting that “Puerto Rico had the second highest per capita casualty rate in the Nation in the Korean Conflict”), *vacated*, 404 F.3d 1 (1st Cir. 2005); *Tuskegee Airmen Honored in Government House Ceremony*, ST. CROIX SOURCE (Sept. 7, 2008), <https://stcroixsource.com/2008/09/07/tuskegee-airmen-honored-government-house-ceremony> [<https://perma.cc/HQB6-SELA>] (discussing members of the Tuskegee Airmen from the U.S. Virgin Islands); Mark Potter, *Eager to Serve in American Samoa*, NBCNEWS (Mar. 5, 2006, 6:56 PM), <https://www.nbcnews.com/id/wbna11537737> [<https://perma.cc/Y6AJ-C25M>] (noting American Samoa as having the “highest per capita death rate of any U.S. state or territory” in Iraq to that date); Bryan Manabat, *CNMI Honors Fallen Heroes During Memorial Day*, GUAM DAILY POST (June 1, 2016), [https://www.postguam.com/news/cnmi/cnmi-honors-fallen-heroes-during-memorial-day/article\\_10ad60be-26fb-11e6-8bca-4737da7814d4.html](https://www.postguam.com/news/cnmi/cnmi-honors-fallen-heroes-during-memorial-day/article_10ad60be-26fb-11e6-8bca-4737da7814d4.html) [<https://perma.cc/Z7YH-EX7M>] (“Though we are the newest member of the American family, the blood spilled in our islands, the sacrifices of our own sons and daughters and the service of those buried here binds us all to the long, sometimes turbulent, sometimes shameful history of our nation.” (quoting U.S. Congressman Gregorio Kilili Camacho Sablan)).
20. See, e.g., *Our District: American Samoa—A Territory of the United States*, CONGRESSWOMAN AUMUA AMATA COLEMAN RADEWAGEN, <https://radewagen.house.gov/about/our-district> [<https://perma.cc/78DN-GBSE>] (“American Samoa has the highest rate of military enlistment of any state or territory. They also have the sad distinction of having the highest per capita mortality rate of any state or territory.”); Shannon Togawa Mercer, *What the Heck Is Guam: A Guide for the Perplexed*, LAWFARE (Aug. 15, 2017, 11:00 AM), <https://www.lawfareblog.com/what-heck-guam-guide-perplexed> [<https://perma.cc/M8AQ-NQZV>] (“Guam has a higher rate of enlistment than any U.S. state and four times the national average of casualty rates in Iraq and Afghanistan. In 2007, Guam ranked first in recruiting success for the Army National Guard. As far back as Vietnam, Guam servicemen suffered casualty rates nearly three times the national average.”).
21. See, e.g., *Tuaua v. United States*, 788 F.3d 300, 306-07 (D.C. Cir. 2015).
22. See Torruella, *supra* note 8, at 346-47.

doctrinal links to *Plessy v. Ferguson*,<sup>23</sup> the *Insular Cases* have come to be viewed as “central documents in the history of American racism”<sup>24</sup> and a pillar of constitutional law’s “anticanon.”<sup>25</sup>

Importantly, *Aurelius* landed on the Court’s docket just one term after a 5-4 majority formally overruled another long-reviled precedent: *Korematsu v. United States*. In *Trump v. Hawaii*, that majority reached well beyond the question presented to ceremoniously overturn the Court’s infamous 1944 decision upholding the wartime relocation and internment of Japanese Americans – as “gravely wrong the day it was decided.”<sup>26</sup> Widely credited as a “long overdue . . . repudiation of a shameful precedent,” the Court’s unanticipated repudiation of *Korematsu* led many to believe that the *Insular Cases* and their progeny were not long for this world.<sup>27</sup>

And yet, *Aurelius* was anything but a blockbuster. The merits of the case centered on the application of Article II’s Appointments Clause to the FOMB, asking (1) whether the Appointments Clause applies to activities in Puerto Rico and (2) if so, whether Congress ran afoul of it by authorizing the President to appoint FOMB board members without Senate confirmation.<sup>28</sup> Throughout lower court proceedings, the United States, FOMB, and others insisted that Article II and

- 
23. 163 U.S. 537 (1896); see, e.g., Torruella, *supra* note 8, at 286, 300-02; Jose Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Constitution of Puerto Rico*, 68 REV. JURÍDICA U. P.R. 1, 4 (1999).
24. Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 245 (2000); see also RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946*, at 15 (1972) (“The actions of the federal government during the imperial period and the relegation of the Negro to a status of second-class citizenship indicated that . . . [t]he racism which caused the relegation of the Negro to a status of inferiority was to be applied to overseas possessions of the United States.”).
25. See, e.g., Retley Gene Locke, Jr., *Absolute and Perpetual Liminality: The Insular Cases and Puerto Rico*, YALE HIST. REV. (Jan. 2020), <https://www.yalehistoricalreview.org/absolute-and-perpetual-liminality> [<https://perma.cc/Y9PJ-LMXE>]; see also Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everybody Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the Insular Cases*, 53 COLUM. HUM. RTS. L. REV. 721, 746-56 (2022); cf. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 390 n.62 (2011) (centering on four cases: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*).
26. 138 S. Ct. 2392, 2423 (2018).
27. See *id.* at 2448 (Sotomayor, J., dissenting); Brief for Equally American Legal Defense and Education Fund as Amicus Curiae in Support of Neither Party at 3-4, *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC* at 3-4, 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1475, 18-1496, 18-1514 & 18-1521), 2019 WL 4192164 (urging the Court to overrule the *Insular Cases* “just as it recently overruled *Korematsu v. United States* in *Trump v. Hawaii*”).
28. See *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 842-43 (1st Cir. 2019).

other structural separation-of-powers constraints do not apply to federal activities in Puerto Rico, relying both directly and indirectly on the *Insular Cases*.<sup>29</sup> A unanimous First Circuit panel rejected those arguments and declared the appointments unconstitutional.<sup>30</sup> The Circuit held that FOMB appointees, whose positions had been created by Congress and endowed with significant authority under federal law, fell within Article II's definition of "Officers of the United States."<sup>31</sup> By the time the case reached the Supreme Court, however, lawyers defending the FOMB's constitutionality had abandoned their reliance on the *Insular Cases*. Instead, they offered a more general argument that because the FOMB had technically been created as a part of Puerto Rico's territorial government, Article IV's Territory Clause permitted Congress to evade separation-of-powers principles that otherwise constrain the federal government.<sup>32</sup>

FOMB's challengers did not follow suit. At oral argument, counsel for Puerto Rico's electrical union, Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER), committed her entire allotted time to persuading the Justices to overrule the *Insular Cases*. In doing so, she highlighted other parties' strategic abandonment of those precedents at the Supreme Court<sup>33</sup> after having relied on them

- 
29. See, e.g., Brief of Appellee Official Committee of Unsecured Creditors of all Puerto Rico Title III Debtors in Support of Affirmance at 1, *Aurelius*, 915 F.3d 838 (Nos. 18-1671, 18-1746 & 18-1787); United States' Memorandum of Law in Support of Constitutionality of PROMESA, *supra* note 9, at 8-9; Brief for Appellee American Federation of State, County & Municipal Employees, *Aurelius*, 915 F.3d 838 (Nos. 18-1671, 18-1746 & 18-1787); cf. Brief for Appellee the Financial Oversight and Management Board for Puerto Rico and the Puerto Rico Fiscal Agency and Financial Advisory Authority at 15, *Aurelius*, 915 F.3d 838 (Nos. 18-1671, 18-1746 & 18-1787) (quoting a portion of Justice Alito's dissent in *Ortiz v. United States*, 138 S. Ct. 2165, 2197 (2018), without noting the quoted portion's reliance on *Dorr v. United States*, 195 U.S. 138, 148 (1904), which declined to extend part of the Constitution to Puerto Rico on a theory that the "result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice" where "the United States, impelled by its duty or advantage, shall acquire territory peopled by savages"); Brief for the United States at 18, *Aurelius*, 915 F.3d 838 (Nos. 18-1671, 18-1746, 18-1787 & 18-8014) (same).
30. While it declared the appointments invalid, the First Circuit delayed its mandate for ninety days "so as to allow the President and the Senate to validate the currently defective appointments" and permitted the Board to continue operating during the stay. See *Aurelius*, 915 F.3d at 863.
31. See *id.* at 856.
32. See Opening Brief for Petitioner at 16, *Aurelius*, 140 S. Ct. 1649 (Nos. 18-1334, 18-1496 & 18-1514), 2018 WL 4944727.
33. See, e.g., Transcript of Oral Argument at 85-86, *Aurelius*, 140 S. Ct. 1649 (Nos. 18-1334, 18-1475, 18-1496, 18-1514 & 18-1521) (Roberts, C.J.) ("[A]s Justice Breyer has pointed out, none of the other parties rely on the *Insular Cases* in any way. So it would be very unusual for us to address them in this case, wouldn't it?"); cf. *id.* at 86 (Jessica E. Mendez-Colberg, Counsel for

throughout lower court proceedings, where judges lacked the authority to overrule them.<sup>34</sup> Even so, the Justices displayed little interest in her arguments.<sup>35</sup>

Rather than confront the *Insular Cases* or the broader legacy of constitutional liminality that denies key rights and political participation to millions, the majority narrowed its focus to the appointment power. It held that (1) Article II's Appointments Clause does apply to federal activities in Puerto Rico, but that (2) presidential appointments to the congressionally created FOMB do not trigger that Clause because of a new functional test that asks whether officers' responsibilities are "primarily local versus primarily federal."<sup>36</sup> While the Court's approach offers little clarity as to the future classification of federal and territorial officers under the Constitution's separation-of-powers framework, it successfully minimized disruption to Puerto Rico's politically contentious debt restructuring while evading all of the deeper and thornier questions about Puerto Rico's political status and the limits of federal power over territorial governments.

The most the Court could muster on the *Insular Cases* was a passing acknowledgment that they are "much-criticized."<sup>37</sup> The majority nodded to uncertainty surrounding "their continued validity," but held only that it "[would] not extend them" in *Aurelius*.<sup>38</sup> Even Justice Sotomayor, whose apprehensive concurrence expressed significant doubts about the FOMB's intrusions on Puerto Rican self-government, did not mention the *Insular Cases*.<sup>39</sup>

---

Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER)) ("Now it is very convenient for the other parties . . . to rely on the *Insular Cases* in the lower courts, where there is no authority to overrule those cases, . . . but then[,] when we come before this Court[,] to say that they are not relevant.").

34. See, e.g., United States' Memorandum of Law in Support of the Constitutionality of PROMESA, *supra* note 9, at 8-9; Brief for Appellee American Federation of State, County & Municipal Employees, *supra* note 29, at 1. Arguments invoking the *Insular Cases* for the proposition that the Appointments Clause does not apply to Puerto Rico did appear at the certiorari stage, however. Consolidated Opening Brief and Reply of Official Committee of Unsecured Creditors of All Title III Debtors Other than COFINA at 30-37, Off. Comm. of Unsecured Creditors of All Title III Debtors Other than COFINA v. Aurelius Inv., LLC, Nos. 18-1334, 18-1475, 18-1496, 18-1514 & 18-1521 (1st Cir. Sept. 19, 2019).
35. See, e.g., Transcript of Oral Argument, *supra* note 33, at 87 (Roberts, C.J.) ("I guess, again, I just don't see the pertinence . . . of the *Insular Cases*."); *id.* at 82 (Breyer, J.) (agreeing with counsel for one of the petitioners that the *Insular Cases* are "a dark cloud," though suggesting that "it doesn't matter here").
36. *Aurelius*, 140 S. Ct. at 1663 (emphasis omitted).
37. *Id.* at 1665.
38. *Id.*
39. Some commentators appear to attribute some of the Court's unwillingness to overrule the *Insular Cases* in the same manner as *Korematsu* to Justice Sotomayor's omission. See Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE

Unsurprisingly, *Aurelius* has attracted a range of criticism, almost all of which remains fixated on what the Justices failed to say.<sup>40</sup> On a surface level, it is right to observe that *Aurelius* was a missed opportunity to reconsider the *Insular Cases* and a sign of the Court's uneasiness about those precedents' continued validity or expansion. But *Aurelius* has much more to say about the Court's broader difficulty with the foundational constitutional dilemmas that flow from the nation's overseas expansion. This Article contends that the *Aurelius* Court's interpretive approach to the Appointments Clause is just as important to thinking about the constitutional future of U.S. territories as anything the case said (or did not say) about the *Insular Cases* themselves.

*Aurelius* offers an important – and often unobserved – window into the modern dynamics of colonialism and constitutionalism. While all nine Justices appeared to oppose the idea of constitutional “exceptions” in abstract, the Court's approach to the Appointments Clause only deepened the underlying ambiguity that attends U.S. territories' relationship to the Constitution. The case warns of threshold analytical obstacles to meaningful judicial engagement with the constitutional future of the territories. *Aurelius* at once demonstrates (1) that the underlying problem of territorial exceptionalism is not coterminous with the *Insular Cases*, and (2) that new dangers inhere in the Court's inclination to sweep the history of American overseas expansion into a purely domestic account of constitutional development.<sup>41</sup>

---

L.J.F. 284, 286 (2020) (“Justice Sonia Sotomayor, whose invocation of *Korematsu* in her *Trump v. Hawaii* dissent had prompted the Chief Justice's pointed response, observed only that ‘territorial status should not be wielded as a talismanic opt out of prior . . . constitutional constraints,’ with no mention of the *Insular Cases*. Not pressed to engage with the *Insular Cases*, the majority in *Aurelius* declined to go any further than it did. Thus, the invitation of multiple parties and amici on both sides to place the *Insular Cases* alongside *Korematsu* in the dustbin of history went unanswered.” (footnotes omitted)); see also Kyla Eastling, Danny Li & Neil Weare, *The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents*, SLATE (June 1, 2020, 5:42 PM), <https://slate.com/news-and-politics/2020/06/puerto-rico-insular-cases-supreme-court.html> [<https://perma.cc/376U-BSG2>] (“Sotomayor was silent on the *Insular Cases*, both at oral argument and in her concurring opinion . . . Thus, there was no similar pressure on Breyer's majority opinion to explicitly condemn the *Insular Cases*.”).

40. See Cepeda Derieux & Weare, *supra* note 39; see also Ponsa-Kraus, *supra* note 7, at 107 (criticizing Justice Sotomayor's concurring opinion for failing to give airtime to alternative views within the public and scholarly debate over Puerto Rican “compact theory,” opining that “[e]ither she does not know the debate exists, which is inconceivable, or she does and ignores it, which is unforgivable”). In fact, in the *Yale Law Journal Forum*'s recent collection titled *The Insular Cases in Light of Aurelius*, only one of its three essays actually engages with the Court's opinion in any meaningful depth. See Cepeda Derieux & Weare, *supra* note 39.

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



In *Aurelius*, the Court interpreted the Appointments Clause by analogizing to Article III.<sup>42</sup> But in doing so, it overlooked the fact that Article III is *itself* shot through with problems of territorial exceptionalism. For example, the majority's account of non-Article III territorial courts relied exclusively on the examples of the District of Columbia (D.C.) and territorial courts on the early North American frontier, ignoring important transformations in territorial-courts jurisprudence that occurred only as a result of overseas imperialism.

Its historically selective Article III analogy jettisons a complicated history of judicial federalism in overseas territories. Even as the Court insisted that its new test is "illuminated by historical practice," it entirely omitted the effect of overseas imperial expansion on the fabric of our federal judicial system.<sup>43</sup> In surveying the constitutional history of D.C.'s courts to reach the conclusion that "[i]ndeed, the Appointments Clause has no Article IV exception,"<sup>44</sup> the *Aurelius* Court hid from the strain that today's territorial courts in Guam, the CNMI, and the U.S. Virgin Islands have added to the long-running debate over Article III's own "exceptions."<sup>45</sup>

*Aurelius*'s Article III revisionism elides how the Court's vague antiexceptionalist pronouncements end up reinforcing the very harms for which the *Insular Cases* are shorthand. Although the Court rejects the idea that the Appointments Clause "does not apply" to Puerto Rico, it manipulates the Article III analogy to fashion a novel and expansive reading of the constitutional text.<sup>46</sup> *Aurelius* ostensibly brings Puerto Rico within the protection of the Constitution's separation-of-powers framework with respect to appointments. But this new "textual" approach conveniently accommodates the legal regime that the Court had previously advertised as relying on the *Insular Cases*. In other words, *Aurelius* reinforces territorial exceptionalism while ostensibly saying the opposite. At an even higher level of generality, *Aurelius* clarifies that the territories' self-government, rights, and autonomy are menaced not only by the continued survival of extra-textual inherent-to-sovereignty or plenary-power understandings of constitutional doctrine (i.e., the *Insular Cases*' proposition that parts of the Constitution "do not apply" to Puerto Rico),<sup>47</sup> but also by judicial moves that ostensibly "enumerate" or retether federal power over the territories to the text.

---

42. See *infra* Part II.

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

44. *Id.* at 1657.

45. See *infra* Part II.

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

47. *Id.* at 1671 (Sotomayor, J., concurring) (describing territorial status as a "talismanic opt out of prior congressional commitments or constitutional constraints").

But *Aurelius's* troubles do not end there. More than import existing exceptionalism into text, it overwrote constitutional doctrine in a way that made it nearly impossible to reckon with the depth of its entanglement with American overseas imperialism. This approach paves the way for wholesale deletion—rather than considered management—of promises and legal interests lodged in the territories' path-dependent idiosyncrasies.<sup>48</sup> *Aurelius* teaches that ill-considered judicial intervention threatens more than an empty repackaging of the status quo; it poses an imminent threat to Indigenous-rights and self-determination interests that have yet to be disentangled from the *Insular Cases* framework.

In this way, the most important lesson of *Aurelius* is that the constitutional problems of territorial exceptionalism run far deeper than the specific doctrinal holdings of the *Insular Cases*, such that those cases' precipitous judicial overthrow is unlikely to spell an end to the core harms of the legal order they represent.<sup>49</sup> Marketing the *Insular Cases* as doctrinal relics “long ‘overruled in the court of history,’”<sup>50</sup> those who urged the *Aurelius* Court to overturn the *Insular Cases*—and who now criticize it for failing to do so—paint them as discrete aberrations that can be shored up in a single knockout blow. But it is *Aurelius's* orientation to the doctrine—not the doctrine itself—that reveals the potential for the worst of both worlds: an empty repudiation of historical racism that both recharts second-class status within the text and erases existing promises to protect land, culture, or autonomy, and self-determination.

---

48. See *infra* note 332 and accompanying text.

49. In the Court's most recent case about Puerto Rico, *United States v. Vaello Madero*, two Justices condemned the *Insular Cases* and expressed the view that they should be overturned “soon.” See 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring); *id.* at 1560 n.4 (Sotomayor, J., dissenting). Yet only one of them believes that the Constitution prevents Congress from discriminating against the lowest-income disabled, blind, and elderly residents of Puerto Rico to deny them access to nationwide federal benefits. See *id.* at 1559–62 (Sotomayor, J., dissenting). Indeed, without any resort to the *Insular Cases* or the idea that some parts of the Constitution “do not apply” to Puerto Rico, eight of nine Justices agreed that the Constitution itself still permits Congress to cut Puerto Rico's most vulnerable populations out of SSI—the nation's largest income-assistance program—and deny those populations access to a lifeline that lifts millions of elderly Americans and Americans with disabilities out of extreme poverty throughout all fifty states, Washington, D.C., and the CNMI. *Id.* at 1542 (majority opinion); see Brief of the National Disability Rights Network et al., *supra* note 18, at 5–7.

50. Cepeda Derieux & Weare, *supra* note 39, at 297 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)); cf. Cepeda Derieux & Cox Alomar, *supra* note 25, at 752 (linking the *Insular Cases* to *Plessy* and *Korematsu* as “infamous ‘aberrations’”).



To date, little has been offered in the way of a workable framework to replace the *Insular Cases* that would allow the Court to curtail the problems of unreviewable federal power and status manipulation<sup>51</sup> while securing recognition of path-dependent promises.<sup>52</sup> More development of such a framework is required before the *Insular Cases* resurface at the Court, as a pending certiorari petition on the question of American Samoa's birthright citizenship captures.<sup>53</sup> While many have traveled the historical and doctrinal connections between the *Insular Cases* and *Plessy v. Ferguson*, none have followed this popular comparison to its next logical station: the robust scholarly debate on how *Plessy* was actually overturned.<sup>54</sup> The prevailing call for judicial intervention asks the Court to mimic its approach to *Korematsu* in *Trump v. Hawaii*—ignoring the substantial critiques that see *Trump v. Hawaii* as a largely symbolic, nonsubstantive repudiation that redeploys the logic of *Korematsu* by swapping “one ‘gravely wrong’ decision with another.”<sup>55</sup>

- 
51. See Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1192–98 (2021) [hereinafter Erman, *Truer U.S. History*] (reviewing DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019)) (distinguishing problems of status from those of “status manipulation,” made possible by constitutional and political narratives that obscure U.S. imperialism and empire building to achieve subordination “from the shadows”); Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813 (2022) [hereinafter Erman, *Status Manipulation and Spectral Sovereigns*].
52. While the *Yale Law Journal's* and *Harvard Law Review's* recently curated collections in this topic area may be “a notable token of atonement,” Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 133 (2018), they have not generated anything resembling the iterative doctrinal exploration rivaling that which gave birth to the *Insular Cases* from these pages a century ago, see, e.g., Elmer B. Adams, *The Causes and Results of Our War with Spain from a Legal Stand-Point*, 8 YALE L.J. 119 (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, 412 (1899); John Kimberly Beach, *Constitutional Expansion*, 8 YALE L.J. 225, 234 (1899); William Bradford Bosley, *The Constitutional Requirement of Uniformity in Duties, Imposts and Excises*, 9 YALE L.J. 164 (1900); C.C. Langdell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 484 (1899). Nor have they adequately questioned the role that these pages should play in unwinding ideas incubated a century ago in their earliest volumes. See *infra* Part V. But see JULIAN AGUON, *THE PROPERTIES OF PERPETUAL LIGHT* 65–67 (2021); Erman, *supra* note 15, at 105 (noting the *Harvard Law Review's* role in incubating the *Insular Cases* and the appeal of framing today's scholarship as an exercise in “you break it, you fix it,” but noting also that “rereading . . . with nonjudicial officials in mind provides new insights and optimism as well as grounds for skepticism”).
53. See Petition for a Writ of Certiorari, *Fitisemanu v. United States*, No. 21-1394 (U.S. Apr. 27, 2022); *infra* Part IV.
54. See *infra* Section IV.C.
55. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting) (quoting *id.* at 2423 (majority opinion)).

There are many untapped lessons in the robust practical and theoretical scholarship on both *Brown* and *Trump v. Hawaii*.<sup>56</sup> Federal Indian law is similarly replete with unobserved doctrinal lessons for the territories that complicate the *Insular Cases-Plessy* parallel.<sup>57</sup> These include the ramifications of migrating extratextual plenary-power understandings into textual readings of the Constitution, the availability of alternatives to the Reconstruction Amendments' dominant paradigm of minority-rights protection, conceptualizing colonial path dependencies within the Constitution, and the usefulness of legal interventions outside the judicial sphere.<sup>58</sup>

This Article makes no attempt to defend, redeem, or repurpose the *Insular Cases*.<sup>59</sup> They are plainly untenable. But that is not an invitation to discard Aurelius's lessons and charge ahead with theories of judicial intervention that would martyr promise keeping and self-determination to empty repudiations of past racism or an artificial coherence for its own sake.<sup>60</sup> Empire's role in constitutional development and the range of unique interests owing to it are too complex to be respectively unraveled and protected without a positive vision for managing them. Indeed, far beyond "preservation-through-transformation," ceremoniously overruling the *Insular Cases* on vague and open-ended terms may invite new, more pernicious harms for Americans in U.S. territories.<sup>61</sup>

This Article proposes a conversation with Federal Indian law and *McGirt v. Oklahoma* as a guidepost for theorizing judicial engagement with the colonial

---

56. See *infra* Part IV.

57. See *id.*

58. See *infra* Section IV.C.

59. See *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. 1680, 1686 (2017) ("Where the doctrine 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. The journey of this controversial theory from the academy in the 1980s to the D.C. Circuit's unanimous panel in 2015 tells a compelling story of shifting ideology in a complicated doctrinal area."); cf. Ponsa-Kraus, *supra* note 7, at 128 (discussing attempts to reappropriate the *Insular Cases* towards the ends of self-determination).

60. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 435 (2005) (discussing the need to resist the judicial "seduction of coherence," which often ignores the fact that "resolving . . . incoherence becomes not just a methodological challenge, but also an ideological struggle" (quoting Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 698 (2000))).

61. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178-87 (1996) (discussing the modernization of status regimes).

condition of U.S. territories,<sup>62</sup> with or without the *Insular Cases*.<sup>63</sup> The objects of that judicial engagement need not be framed as a binary choice between territorial exceptionalism and constitutional equality. Federal Indian law teaches that mediating doctrinal tensions in the service of promise keeping is faithful to our constitutional tradition. At the same time, advocates need not ask courts to repurpose the *Insular Cases* or harden “the law of the territories” into a permanent substantive domain to secure legal recognition of negotiated promises, Native cultures, or territorial self-government. Instead, judicial engagement with the *Insular Cases* must be reoriented toward empowering local political processes that have been stunted by federal disenfranchisement and unchecked discrimination under the *Insular Cases*’ untenable status quo – so that the territories may chart their own course out of it. Ultimately, judges who find themselves confronted with these intractable problems must commit themselves to what Philip P. Frickey termed the “hard work”<sup>64</sup>: navigating doctrinal tension to undo the legacies of colonialism in politically legitimate ways.

Part I describes how the *Aurelius* Court simultaneously held that the Appointments Clause indeed applies to Puerto Rico, but that FOMB appointees fall outside its text. Part II illuminates how the Court’s approach to Article II flows

---

62. A new book by Judge Jeffrey Sutton helpfully sketches the colonial condition of territories. Their experience fundamentally “echoe[s] the experiences of the first thirteen states. Noblesse oblige went only so far in the British Empire. Parliament did not treat the residents of its colonies in the same way it treated British citizens, often failing to heed their complaints, always denying them a way to protect their interests: the right to vote. [The right to vote] of course was the central complaint that triggered the Revolution, a lack of representation of the American colonies in Parliament and ‘the long train of abuses and usurpations’ that resulted. A comparable problem arose in the American territories. Instead of colonies of the British Empire, they became territories of an American Empire – often ignored, often frustrated by a lack of representation in the national government, a lack of local authority over their own affairs, and a lack of local understanding by the federally appointed officials who ruled them.” JEFFREY S. SUTTON, *WHO DECIDES: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION* 137 (2021). Interestingly, Judge Sutton’s book devotes an entire chapter to extensive historical exploration of territorial judging and territorial governance as a lens on the meaning of America’s “fifty-one constitutions” (Puerto Rico’s, the CNMI’s, and American Samoa’s do not count, apparently). *Id.* at 101-43. However, the book does not include in its analysis (or otherwise acknowledge the existence of) overseas territories. It does not appreciate the particular modes of territorial judging or governance that exist only as a result of overseas expansion – or, for that matter, as they currently exist today in the territories. While exploring how state and territorial courts’ interpretations can “facilitate a dialogue with the federal courts in interpreting the US constitution,” his analytical approach blinds itself to the example of courts like the Supreme Court of Puerto Rico, which would undoubtedly aid his inquiry. *Id.* at 102.

63. See *infra* Part V.

64. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 428 (1993).

from a warped Article III analogy that erases the equivalent problems of territorial exceptionalism that have long plagued the latter doctrinal context. Part III uses *Aurelius* to show that the underlying constitutional problems of territorial exceptionalism are not contained within the *Insular Cases* or any other discrete doctrinal device. Part IV adapts these unobserved lessons from *Aurelius* to today's prevailing calls to overturn the *Insular Cases*, highlighting various dimensions along which these calls remain undertheorized while exploring the harms that ill-considered judicial interventions are likely to visit upon territorial communities. Finally, Part V reorients the conversation on the *Insular Cases*' future towards more informed engagement with the territories' colonial condition as we encounter it—appreciating the usefulness of a “law of the territories.”

### I. AURELIUS AND THE APPOINTMENTS CLAUSE: A “ROUGH” ARTICLE III ANALOGY

*Aurelius* presented two basic questions about the Appointments Clause and Puerto Rico. The first was whether the Clause even applies to federal activities in Puerto Rico—a question that pointed straight toward the *Insular Cases*. At the district court, the United States explicitly invoked the *Insular Cases* when arguing that the Appointments Clause did not apply to this case as a threshold matter because the Clause is not “fundamental” under those precedents' framework.<sup>65</sup> The FOMB later reframed its argument at the Supreme Court to forego any reliance on the *Insular Cases*, but the underlying issue remained the same: whether and when “unincorporated” or territorial status allows Congress to escape constitutional constraints that might otherwise bind it.<sup>66</sup>

The second question, assuming that unincorporated status does not provide Congress with a talismanic “get out of separation-of-powers free” card, was whether the FOMB falls within the ambit of the Clause's text—in other words, whether FOMB board members are “Officers of the United States.”<sup>67</sup>

To date, the bulk of *Aurelius*'s commentary has focused on the Court's side-stepping the *Insular Cases* on the first question. This commentary has correctly observed that the majority's passing mention of the *Insular Cases*—a single paragraph—shows the Court's “clear mistrust of the *Insular Cases*, even as it declined

---

65. See United States' Memorandum of Law in Support of the Constitutionality of PROMESA, *supra* note 9, at 8-12, 9 n.5.

66. See Transcript of Oral Argument, *supra* note 34, at 86 (Jessica E. Mendez-Colberg, Counsel for UTIER) (noting that opposing parties had “relied on the *Insular Cases* since the beginning of the proceedings”).

67. U.S. CONST. art. II, § 2.

to overrule them.”<sup>68</sup> In addition to questioning the “much-criticized” *Insular Cases*’ “continued validity” and declaring that “we will not extend them in these cases,” the Court cited Justice Brennan’s plurality opinion in *Reid v. Covert*,<sup>69</sup> a case that did not deal directly with U.S. territories but cautioned that “neither the cases *nor their reasoning* should be given any further expansion.”<sup>70</sup> These are real (if vague) indications of doubt about the future of these precedents.

However, *how* the Court decided *Aurelius* without resorting to the *Insular Cases* framework deserves more attention. The Court declared that, notwithstanding Congress’s broad power under Article IV’s Territory Clause to make “all needful Rules and Regulations”<sup>71</sup> respecting territory belonging to the United States, “the Appointments Clause has no Article IV exception.”<sup>72</sup> The Court examined the general history of the Appointments Clause and the Founders’ underlying purposes for it, concluding that the “objectives advanced by the Appointments Clause counsel strongly in favor of applying that Clause to all officers of the United States.”<sup>73</sup> Remarkably, the Court declared this holding by asking, “Why should it be different when . . . duties relate to Puerto Rico or other Article IV entities?”<sup>74</sup>—a rhetorical question the Court has conspicuously refused to ask of the Constitution as a whole.

The Court then turned to the more important and challenging inquiry: whether FOMB board members are “Officers of the United States” requiring Senate confirmation. To interpret the text, the Court constructed an analogy to an adjacent area of doctrine: when and whether congressionally created courts trigger Article III’s life-tenure and salary-protection guarantees. The two contexts present parallel interpretive questions. Just as the Appointments Clause asks when an officer becomes an “Officer[] of the United States” requiring the advice and consent of the Senate,<sup>75</sup> Article III asks when and whether a court exercising judicial power can be said to exercise the “judicial power of the United States” for the purpose of that Article’s tenure-protection guarantees.<sup>76</sup>

The focal point for the Court’s Article III analogy is a line of cases governing whether Washington, D.C.’s local courts—which are created by Congress but

---

68. Cepeda Derieux & Weare, *supra* note 39, at 286.

69. 354 U.S. 1 (1957).

70. *Id.* at 14 (emphasis added); see *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

71. U.S. CONST. art. IV, § 3, cl. 2.

72. *Aurelius*, 140 S. Ct. at 1657.

73. *Id.* at 1652.

74. *Id.* at 1657.

75. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

76. *Id.* art. III, § 1, cl. 1 (emphasis added).

function more like state courts—exercise the “judicial power of the United States.”<sup>77</sup> Although the constitutional basis for D.C.’s local courts (Article I’s District, or Enclave, Clause)<sup>78</sup> is distinct from that of territorial courts (Article IV’s Territory Clause), the Court justified its focus on D.C. by lumping the District and Territory Clauses together on the theory that both “give Congress the power to legislate . . . in ways ‘that would exceed its powers, or at least would be very unusual’ in other contexts.”<sup>79</sup>

*Aurelius* conceptualizes the District and Territory Clauses as sharing a distinct mode of constitutional power. Whereas in most cases Congress is said to exercise a “federal” power to act as the national legislature, the Territory and District Clauses envision a separate domain of power reserved for certain “localities,” where there is “no state government capable of exercising local power.”<sup>80</sup> In other words, when Congress acts within the domain of “local” law, whether in an unincorporated territory or D.C., it is as if Congress stands in the shoes of a different sovereign. According to this view, “when Congress creates local offices using these two unique powers [(the District and Territory Clauses)], the officers exercise the power of the local government, not the Federal Government.”<sup>81</sup>

To support this view, the Court pointed to one of the most frequently debated cases in the field of federal courts: *American Insurance Co. v. 356 Bales of Cotton (Canter)*.<sup>82</sup> The majority interpreted *Canter* to stand for the proposition that “territorial courts may exercise the judicial power of the Territories without the life tenure and salary protections mandated by Article III for federal judges,” drawing a formal line between the boundaries of Congress’s powers when it acts

77. *Palmore v. United States*, 411 U.S. 389, 401 (1973); *O’Donoghue v. United States*, 289 U.S. 516, 531 (1933).

78. U.S. CONST. art. I, § 8, cl. 17.

79. *Aurelius*, 140 S. Ct. at 1658 (quoting *Palmore*, 411 U.S. at 398); cf. James Durling, *The District of Columbia and Article III*, 107 GEO. L.J. 1205, 1215 (2019) (arguing that the “predominant view” is that D.C. courts are said to fall within the territorial-courts exception by virtue of Congress’s “plenary authority” to legislate over D.C. as it does the territories); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 879–94, 901–02 (1990) (discussing territorial judges and comparing the Territory Clause to the District Clause). *But see O’Donoghue*, 289 U.S. at 538–39 (“In the District clause, unlike the Territorial clause, there is no mere linking of the legislative processes to the disposal and regulation of the public domain—the landed estates of the sovereign—within which transitory governments to tide over the periods of pupillage may be constituted, but an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental.”).

80. *Aurelius*, 140 S. Ct. at 1658.

81. *Id.* at 1652.

82. 26 U.S. (1 Pet.) 511 (1828).



as a “national” legislature and when it steps into the shoes of a nonexistent local or state government activity.<sup>83</sup>

In crediting this distinction between local and federal modes of constitutional power, the Court next had to decide which mode Congress exercised when it created the FOMB, whose board members hold authority over Puerto Rico’s elected government and have significant powers under federal law. On this theory, officers whose powers are “local” under the Territory and District Clauses (and about whom Article II says nothing) do not require the Senate’s advice and consent, while Officers “of the United States,” whose offices are “national” in character, do. Finding “no case from this Court directly on point,” the Court looked once again to its Article III jurisprudence for a “rough analogy.”<sup>84</sup>

At the heart of that analogy are two cases, both about D.C.: *O’Donoghue v. United States* and *Palmore v. United States*. *O’Donoghue* asked whether D.C. courts were Article III courts requiring life tenure and salary protections for judges whose duties involved hearing a mix of cases arising under both federal and “local” law.<sup>85</sup> Notwithstanding these judicial officers’ mix of federal- and local-law functions, the Court held that D.C. courts were “recipients of the judicial power of the United States.”<sup>86</sup> Judges were thus entitled to Article III’s tenure and salary protections.<sup>87</sup>

However, the Court reversed course four decades later in *Palmore* following a significant reorganization of D.C.’s courts.<sup>88</sup> The D.C. superior courts were organized to partition local-law matters from the now primarily federal docket of the U.S. District Court for the District of Columbia. In *Palmore*, a criminal defendant in the superior court challenged a proceeding based on the judge’s lack of Article III life tenure.<sup>89</sup> But instead of finding that the superior court’s mix of

---

83. *Aurelius*, 140 S. Ct. at 1659 (emphasis added) (citing *Canter*, 26 U.S. (1 Pet.) at 546). This interpretation, which could help to resolve a nearly two-century debate about *Canter*’s reading of Article III’s text, represents a significant analytical step. See, e.g., Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 199 (describing confusion orbiting *Canter*); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 589-92 (1985).

84. *Aurelius*, 140 S. Ct. at 1664 (drawing from *O’Donoghue v. United States*, 289 U.S. 516 (1933), and “especially” *Palmore v. United States*, 411 U.S. 389 (1973)).

85. U.S. CONST. art. III, § 1, cl. 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); *O’Donoghue*, 289 U.S. at 539-40.

86. *O’Donoghue*, 289 U.S. at 546.

87. *Id.* at 551.

88. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

89. *Palmore*, 411 U.S. at 390-93.

local and federal functions brought it within the judicial power “of the United States,” as *O’Donoghue* had, the Supreme Court trained its sights on the superior court’s focus “primarily upon . . . matters of strictly local concern.”<sup>90</sup>

As the *Aurelius* Court reads *Palmore*, “Congress changed what had been a unified court system where judges adjudicated both local and federal issues into separate court systems, in one of which judges adjudicated *primarily local issues*.”<sup>91</sup> *Palmore* thus provided the source of the Court’s new functional test for the Appointments Clause: whether the duties of the official in question are “primarily local versus primarily federal” in nature.<sup>92</sup> The *Aurelius* Court concluded:

*Palmore* concerned Article I of the Constitution, not Article IV. And it concerned “the judicial Power of the United States,” not “Officers of the United States.” But it provides a rough analogy. It holds that Article III protections do not apply to an Article I court “focus[ed],” unlike the Courts at issue in *O’Donoghue*, primarily on local matters. Here, Congress expressly invoked a constitutional provision allowing it to make local debt-related law (Article IV); it expressly located the Board within the local government of Puerto Rico; it clearly indicated that it intended the Board’s members to be local officials; and it gave them primarily local powers, duties, and responsibilities.<sup>93</sup>

Justice Thomas, who wrote separately to criticize this “primarily local versus primarily federal” test as “amorphous,” would apply Article II and Article III wherever officers exercise *any* power of the national government – even if those officers have “primarily local” duties.<sup>94</sup> He concludes, however, that applying his test would not change the outcome of the case, since in his view the FOMB members’ roles are “entirely within the scope of Article IV.”<sup>95</sup> While the majority acknowledged Justice Thomas’s concerns about the haziness of the new functional test, it ultimately concluded that “this is the test established by the Constitution’s text, as illuminated by historical practice.”<sup>96</sup> Indeed, the Court relied heavily on its view of relevant historical practice. “The practice of creating by federal law local offices . . . filled through election or local executive appointment has continued unabated for more than two centuries,” the Court wrote. “Puerto Rico’s history

---

90. *Id.* at 400–02, 407.

91. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1664 (2020) (emphasis added).

92. *Id.* at 1663.

93. *Id.* at 1664–65.

94. *Id.* at 1670 (Thomas, J., concurring).

95. *Id.*

96. *Id.* at 1665 (majority opinion).



is no different,” with “a longstanding practice of selecting public officials with important local responsibilities in ways that the Appointments Clause does not describe.”<sup>97</sup>

*Aurelius* broke new ground on the Appointments Clause by looking primarily to adjacent Article III doctrine, which the Court tells us is illuminated by unabated historical practice. The result safely rationalizes the appointments structure of the FOMB, neither altering nor threatening anything related to the Board’s existing activities or composition, while insisting that there is no Appointments Clause “exception” for Puerto Rico. But the Court’s Article III analogy is deeply flawed. The interpretation unravels quickly upon closer inspection of the relevant Article III jurisprudence from which it analogizes, evincing the Court’s broader failure to reckon with the significance of overseas empire in American constitutional development.

## II. UNEARTHING *AURELIUS*’S ARTICLE III PROBLEM

The *Aurelius* Court’s “rough analogy”<sup>98</sup> to adjudication outside Article III proves rougher than the Court acknowledges. The majority ignores the extent to which Article III doctrine is plagued by contestation over its territorial and other “exceptions.” Moreover, it misunderstands the arc of historical practice in those courts that should have been most relevant to its analysis. In particular, the Court’s decision to ground its reasoning primarily in the line of cases concerning non-Article III adjudication in D.C. (and, secondarily, on *Canter* and the historical practice of the early American frontier) leaves us to wonder: what about the territorial courts of Puerto Rico, Guam, the Virgin Islands, American Samoa, and the CNMI? After all, these are the only modern courts with any actual nexus to the text of Article IV’s Territory Clause, the subject of *Aurelius*’s inquiry. Rather than include those courts within their analytical framework, all nine Justices ignored them, obscuring the fact that at least some of them—such as the District Court of Guam, District Court of the Virgin Islands, and District Court for the Northern Mariana Islands—would certainly fail the “primarily local versus primarily federal” test that the majority claims is derived from “unabated” historical practice.<sup>99</sup>

As a threshold matter, what the Court fails to mention in grounding its Appointments Clause reading in cases like *Palmore*, *O’Donoghue*, and *Canter* is that underlying each of these cases is deep contestation over the constitutionality of

---

97. *Id.* at 1659.

98. *Id.* at 1664.

99. See *infra* Section II.B.

non-Article III federal courts.<sup>100</sup> Missing from the Court's emphatic holding that "[i]ndeed, the Appointments Clause has no Article IV exception"<sup>101</sup> is the long-running and active debate over what have long been theorized as "exceptions" to Article III: territorial courts, military tribunals, and public-rights adjudication.<sup>102</sup> Territorial exceptionalism plays a critical role in this debate—for the same reasons at play in *Aurelius*. While the question of when a non-Article III tribunal can be said to exercise the judicial power "of the United States" received an answer with respect to D.C. in *Palmore*, that holding did not extend to territorial courts, where today federal district judges without life tenure still preside over federal—not local—dockets. Consistent with the *Aurelius* majority, courts and legal scholars widely view these three categories of non-Article III tribunals through the lens of historical practice or functional necessity. And together, these three "exceptions"—whether they are recognized under that nomenclature or not—have hardened into something of a gloss over the text of Article III, even as the true constitutional basis for them remains a clouded and unceasing battle across a range of formalist and functionalist views.<sup>103</sup>

Some recent scholarship has endeavored to rationalize the current architecture of non-Article III federal adjudication without reference to functional concerns or historical practice, offering new or refreshed readings of Article III's text that attempt to draw a clean bullseye around the non-Article III exceptions produced over the last two hundred years.<sup>104</sup> Others have sought to revise function-

---

100. F. Andrew Hessick, *Federalism Limits on Non-Article III Adjudication*, 46 PEPP. L. REV. 725, 733-35 (2019); see also William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1581 (2020) ("Some of the greatest scholars of constitutional law and federal courts . . . have debated whether we should take Article III literally, or whether the disruption to our practice would be too serious to tolerate.").

101. *Aurelius*, 140 S. Ct. at 1657.

102. See, e.g., Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305, 309 (2015) (describing the "conventional view" that Article III has three discrete exceptions: "territorial courts, courts-martial, and the most elusive category of all, 'public rights,'" while noting as a conceptual matter that the three categories "are anything but tidy, and may not even be exceptions" (first citing *Am. Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 546 (1828); then citing *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82-83 (1857); then citing *Stern v. Marshall*, 564 U.S. 462, 504-05 (2011) (Scalia, J. concurring); then citing *Marshall*, 564 U.S. at 494 (majority opinion); then citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283-85 (1856); and then citing Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 951-54 (2015))).

103. Compare *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986) (holding an administrative agency could constitutionally assume jurisdiction over common-law counterclaims), with *Stern*, 564 U.S. at 469 (holding that the U.S. Bankruptcy Court could not constitutionally enter final judgment on a state-law counterclaim).

104. See, e.g., Baude, *supra* note 100, at 1514-15.

alist justifications for the exceptions on account of “seismic changes” in the jurisdictional landscape that have obviated the exceptions’ original justifications and rendered the historical-practice rationale untenable.<sup>105</sup> Still, all recent scholarship on this aspect of Article III appears to agree on one thing: “[N]obody has yet come up with a persuasive reconciliation of text and longstanding practice . . . .”<sup>106</sup>

The recent wave of scholarly attention to Article III’s historical “exceptions” revives the sharp critiques of Article III exceptionalism from the early 1980s, voiced most famously by then-Justice Rehnquist. He famously wondered whether these established historical practices “support a general proposition and three tidy exceptions . . . or whether instead they are but landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night.”<sup>107</sup>

But the contemporary debate on Article III’s “exceptions” does more than parrot Justice Rehnquist. Importantly, today’s non-Article III jurisdictional landscape is materially different than the one that was before the Court in 1982. The questions that hover over the doctrine of non-Article III adjudication and the meaning of “the judicial power of the United States” today call for reassessment of the prevailing doctrine’s core functionalist assumptions—the same assumptions on which the *Aurelius* Court relied.

This Part begins by summarizing the prevailing understandings of Article III’s supposed “exceptions” and how the territories factor into the long-running debate over their continued validity. It then examines how *Aurelius*’s warped Article III analogy erased that debate and deleted overseas imperialism from its view of “unabated” historical practice, which looked only to the legislative courts of Washington, D.C. and the early American frontier. Finally, it illuminates how engaging with the development of territorial courts in overseas territories would have forced *Aurelius*’s Article III analogy in a different direction, requiring it to reckon with the constitutional significance of federal territorial agreements like the CNMI Covenant.

---

105. Vladeck, *supra* note 102, at 936; *see also id.* at 969–1000 (analyzing these changes in the military-justice context).

106. Baude, *supra* note 100, at 1517; *cf.* Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. 183, 190 (“[T]he Court never has developed a coherent explanation for why non-Article III courts are permissible under the Constitution.”). Section III.B, *infra*, discusses William Baude’s recent attempt at such a reconciliation.

107. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

## A. Article III's "Exceptions": Prevailing Understandings

Since its inception, the federal judicial system has contemplated that non-Article III courts would hear Article III's enumerated subject matter. This is uncontroversial with respect to state courts: there is little if any disagreement that the text, structure, and history of Article III allow state courts to adjudicate enumerated federal subject matter—a core feature of the Madisonian Compromise.<sup>108</sup> The controversy arises, broadly speaking, where the relevant non-Article III forum is one created by the federal government itself. Nonetheless, the Supreme Court has upheld numerous forms of non-Article III adjudication devised under federal law, which have been grouped into three categories: territorial courts, military tribunals, and public-rights adjudication. Despite common reliance on historical practice, none of the three exceptions has a settled relationship to the Constitution's text.

The territorial-courts exception traces back to *Canter*.<sup>109</sup> The Supreme Court's various articulations of the exception rest on the assumption that Congress is not bound by Article III when it "exercises the combined powers of the general and state governments" pursuant to its Article IV powers to "make all needful rules and regulations, respecting the territory, or other property belonging to the United States."<sup>110</sup> As in *Aurelius*, the territorial-courts exception has elsewhere been used as shorthand for the constitutional grounding of non-Article III local courts in D.C., notwithstanding whatever differences may exist between the District and Territory Clauses.<sup>111</sup> As articulated in *Glidden Co. v. Zdanok*,<sup>112</sup> cited also in *Aurelius*,<sup>113</sup> the territorial-courts exception eschews "doctrinaire" approaches in favor of a basic "responsibility to see the Constitution work" within the "realities of territorial government."<sup>114</sup>

---

108. See Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 311 & n.3 (1976).

109. *Am. Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828).

110. *Id.* at 512, 546 (quoting U.S. CONST. art. II, § 3, cl. 2).

111. Namely, the Territory Clause appears to contemplate "transitory" structures of government, unlike the District Clause. See Durling, *supra* note 79, at 1253 (quoting *O'Donoghue v. United States*, 289 U.S. 516, 538-39 (1933)).

112. 370 U.S. 530 (1962) (plurality opinion).

113. See *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1660-61 (2020) (citing *Glidden*, 370 U.S. at 546).

114. *Glidden*, 370 U.S. at 546, 547. The *Glidden* plurality also emphasized a developmentalist logic driving the territorial-courts exception. See *id.* at 547-48 (citing *O'Donoghue*, 289 U.S. at 536-39); see also Lawson, *supra* note 79, at 908 (suggesting that applying a rigid formalist view of Article III to territorial courts would appear to result in "constitutionally mandated colonialism . . . not likely to go over well at cocktail parties, legal symposia, or congressional committee hearings").

The military-courts exception is more complex.<sup>115</sup> Though commonly thought of as a twin to the historical carveout for territorial courts, the military-courts exception is subdivided in some instances into three classes of permissible non-Article III military adjudication: courts-martial, courts incident to military occupation (e.g., martial law), and military commissions (e.g., prosecution of enemy combatants at Guantanamo Bay).<sup>116</sup> Some of the textual provisions offered in support of military courts' constitutionality include the "land or naval forces" exception to the Fifth Amendment's Grand Jury Clause<sup>117</sup> and Congress's Article I powers to "make Rules for the Government and Regulation of the land and naval Forces" and to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."<sup>118</sup> The Supreme Court, meanwhile, has articulated functionalist rationales for the exception—not unlike the practical-demands and temporary-government rationales in the territorial-courts context.<sup>119</sup>

As Stephen I. Vladeck has recently observed, it has been "decades since [the Justices or scholars] have reconsidered either the territorial or military species of non-Article III adjudication" in any major depth.<sup>120</sup> Though the Court has given some attention to judicial review of military courts since Vladeck's observation,<sup>121</sup> the territorial-courts exception has lingered deep within the shadows.

In its most recent case implicating an Article III exception (just two years before *Aurelius*), the Supreme Court viewed these two types of courts as standing "on much the same footing," having "deep historical roots" in which Article III "give[s] way to accommodate plenary grants of power to Congress."<sup>122</sup> In another recent case, Justice Thomas referred to them as "unique historical exceptions that tell us little about the overall scope of the judicial power."<sup>123</sup> Regardless of how the exceptions are organized conceptually, the Court has vacillated on the question of what (if anything) should be done about them.

---

115. See Vladeck, *supra* note 102, at 935.

116. See *id.* at 935-36.

117. U.S. CONST. amend. V.

118. *Id.* art. I, § 8, cls. 14, 16.

119. See *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) ("The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.").

120. Vladeck, *supra* note 102, at 935.

121. See, e.g., *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018).

122. *Id.* at 2169 (alteration in original) (quoting *Palmore v. United States*, 411 U.S. 389, 408 (1973)).

123. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 711 (2015) (Thomas, J., dissenting).

The third and most expansive exception, the “public-rights” exception, undergirds non-Article III tribunals like the U.S. Tax Court, Court of Federal Claims, and Court of Appeals for Veterans Claims. It is commonly traced back to an 1856 decision in which the Supreme Court upheld a non-Article III adjudication of a federal employee’s account audit.<sup>124</sup> However, the conception of a “public-rights” dispute capable of evading Article III is ill-defined. Though sometimes articulated as a way of adjudicating disputes between the federal government and persons subject to its authority in connection with some governmental function, a more expansive conception of the exception defines it in relief, focusing instead on the boundaries of “private rights” to life, liberty, and property that *must* be heard under Article III.<sup>125</sup>

As articulated by F. Andrew Hessick, the tension between Article III and its exceptions presents three paths towards resolution:

The first is to eradicate all the exceptions inconsistent with Article III. The second is to accept that the text of Article III is no longer constraining in light of the various exceptions. The third is to rely on *stare decisis* to maintain the deeply entrenched exceptions to Article III but refuse to recognize new exceptions in the future.<sup>126</sup>

A fourth, of course, is to persist in search of the elusive constitutional reading that cleanly rationalizes the current architecture of non-Article III courts with both historical practice and Article III literalism. This is the dead-end path down which *Aurelius’s* Article III analogy leads.

#### B. *Aurelius’s Erasure of Territorial Courts*

In *Aurelius*, the Court not only glosses over non-Article III courts’ fundamentally uncertain constitutional grounding—it completely disregards the specific problems that existing territorial courts pose for its vision of Article III doctrine.

Over the past half-century, territorial courts have undergone a significant jurisdictional transformation that disconnects them from the historical practice of

---

124. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284-86 (1856).

125. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593-94 (1985) (expanding the public-rights exception to a context involving two private parties); see also *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853-54 (1986) (moving away from the public/private binary and articulating a broad, functional balancing test to determine whether non-Article III adjudication of a given right would result in an intrusion on Article III).

126. F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 754 (2018).

courts in early America and in Washington, D.C.<sup>127</sup> In fact, today's concept of a territorial *federal* court outside Article III—like the federal district courts now functioning in the U.S. Virgin Islands, Guam, and the CNMI—emerged only after the United States acquired overseas territories it viewed as unfit for imminent settlement and statehood.<sup>128</sup>

This Section inspects the doctrinal development of non-Article III territorial courts to illustrate that *Aurelius's* analogy (1) papered over territorial courts that resulted from overseas expansion to misinterpret *Palmore* and (2) ignored significant legal and jurisdictional developments realized after *Palmore*.

### 1. *Territorial Courts from the Insular Cases Through Palmore*

The developmental logic of non-Article III territorial courts in early America and in D.C. formed a predictable and sequential link from frontier to statehood. As described by Judith Resnik, the controlling logic of territorial courts prior to the late nineteenth century was that administrative flexibility was permissible incident to territories becoming states.<sup>129</sup> Since Congress was acting as “the functional equivalent of a state legislature” in areas where a separate sovereign government did not exist,<sup>130</sup> the flexibility that was afforded to these frontier courts outside the bounds of Article III allowed them “to deal with the everyday litigation matters that go before state courts in states.”<sup>131</sup> The “primarily local versus primarily federal” test that the *Aurelius* Court divined from *Palmore* and *Canter* maps easily onto this paradigm: as expedient structures of day-to-day adjudication gave way to the judicial federalism contemplated by Article III, so too did discernibly “federal” functions find their way into the Constitution's separation-of-powers framework.<sup>132</sup>

---

127. For a more complete account of this jurisdictional transformation and distinct territorial-courts paradigm before and after 1890s expansionism, see Campbell, *supra* note 17, at 1903-07. The remainder of this Section sketches only the broad contours of the descriptive contributions of that work, which (importantly) looks beyond the Court's jurisprudence toward less appreciated influences on the developmental logic of territorial courts, such as organs of federal judicial administration.

128. *Id.* at 1905; cf. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 712 & nn.309-10 (2004) (noting that in the legislation implementing the Louisiana Purchase, Congress provided for an “Article III district court” for the territory of Orleans).

129. See Resnik, *supra* note 83, at 589-90.

130. See *id.* at 590 (addressing Congress's authority to create non-Article III courts in the territories pursuant to constitutionally enumerated powers).

131. Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 384 (1991).

132. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 546-48 (1962).



Overseas expansion severed this link from frontier to statehood as both a practical and jurisprudential matter. In the wake of the *Insular Cases*, the fabric of American territorial courts has increasingly mimicked the structures of constitutional federalism at the surface,<sup>133</sup> but without the same structural guarantees and without any immediate prospect of accession to political rights. As these structures of territorial adjudication hardened into the federalism-mimicking parallelism of separate “local” and “federal” territorial courts, the logic for maintaining this limbo rapidly evolved.

At the turn of the twentieth century, accounts of why overseas territorial courts should be preserved outside Article III and the rest of the Constitution were overtly racial. In the decades immediately following the U.S. annexation of Puerto Rico, Guam, and the Philippines in 1898, Congress and the Supreme Court repeatedly justified divergence from the early republic’s territorial-courts framework by relying on extralegal principles of racial and institutional inferiority. In one of the *Insular Cases*, *Dorr v. United States*,<sup>134</sup> the Court concluded that holding the nation’s new overseas courts to the strict commands of the Constitution’s text might “work injustice and provoke disturbance rather than . . . aid the orderly administration of justice” in those circumstances where the nation, “impelled by its duty or advantage, shall acquire territory peopled by savages.”<sup>135</sup> This would continue even as federal courts in the territories developed a strong “resemblance of [their] jurisdiction to that of true United States courts.”<sup>136</sup> Notwithstanding that resemblance in Puerto Rico, twenty years after *Dorr*, the Court reaffirmed that the textual commands of the Constitution should bow to Congress’s judgment that “a people like . . . the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions,” did not satisfy the jury system’s need for “citizens trained to the exercise of the responsibilities of jurors.”<sup>137</sup>

---

133. See *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1632 (2017) (“[T]he federal territory relationship has more or less gradually progressed toward functionally mimicking the federal-state structural relationship.”); cf. 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, 104 (2018) (“‘Territorial federalism’ without political power is not federalism. It is just another hollow and meaningless name for the same colonial inequality . . .”).

134. 195 U.S. 138 (1904).

135. *Id.* at 148.

136. *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

137. *Id.* at 310; cf. Torruella, *supra* note 8, at 326 (“Taft conveniently overlooked the fact that civil and criminal jury trials had been conducted in the U.S. District Court for Puerto Rico for



The Court would eventually shed those decisions' overt racial character in favor of a "transitional" theory of non-Article III adjudication in the territories.<sup>138</sup> Under this articulation, overseas territorial judiciaries are portrayed as existing somewhere along an imagined trajectory towards legal maturity, differentiated as a matter of necessity to "avoid[] the risk of jurisdictional gaps while the territorial government takes time to organize itself."<sup>139</sup>

This transitional theory of territorial courts runs throughout *O'Donoghue* and is undisturbed by *Palmore*. The *O'Donoghue* Court, pointing to the *Insular Cases*, said that *Canter* and the line of cases giving rise to Article III's territorial-courts exception "grow out of the 'presumably ephemeral nature of a territorial government.'"<sup>140</sup> The *Glidden* Court suggested that the touchstone of territorial-courts doctrine is "the need to exercise the jurisdiction then and there for a transitory period."<sup>141</sup> To complete the transitional theory, the Court has noted that when "the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling."<sup>142</sup> As articulated by Peter Nicolas, the transitional theory imagines that the jurisdiction of any given non-Article III territorial district court "gradually shrinks as local territorial courts are created to adjudicate local matters until its docket becomes indistinguishable from that of a typical Article III district court."<sup>143</sup> This is the trajectory followed by the federal district court in Puerto Rico, which had

---

twenty-three years, since 1899."). For a comprehensive account of Puerto Rico's federal district court and its transformation during the first half of the twentieth century, see GUILLERMO A. BARALT, *HISTORY OF THE FEDERAL COURT IN PUERTO RICO: 1899-1999*, at 338 (Andrés Palomares ed., Janis Palma trans., 2004). Cf. Judge José A. Cabranes, *History of the District Court of Puerto Rico*, *FED. LAW.*, Jan. 2005, at 16, 16 ("Of all the 'inferior courts' of the United States . . . none has a more complex and interesting cultural and political setting, or is the product of more dramatic historical circumstances, than is the U.S. District Court for the District of Puerto Rico. . . . The court at first reflected the island's own subordinate status within the American constitutional system. Through most of the first half of the 20th century, the single U.S. district judge in Puerto Rico and the governor, who was also appointed by the President of the United States, were the embodiment of U.S. authority—the embodiment of U.S. law—in a colonial setting. By the middle of the 20th century, the District Court had been transformed, in line with Puerto Rico's strides toward democratic home rule under the U.S. Constitution.").

138. See Peter Nicolas, *American-Style Justice in No Man's Land*, 36 *GA. L. REV.* 895, 990-92 (2002).

139. *Id.* at 992.

140. *O'Donoghue v. United States*, 289 U.S. 516, 537 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 293 (1901)).

141. *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962).

142. *Id.* at 548.

143. Nicolas, *supra* note 138, at 992.

shed all of its local-law functions by the early 1960s and was conferred Article III protections by Congress in 1966.<sup>144</sup>

But only Puerto Rico has followed this path. Today, largely as a result of jurisdictional developments across other territorial judiciaries in the decades since *Palmore*, the landscape of American territorial courts includes judicial officers whose functions are now overwhelmingly, even *entirely*, federal. Motivating the 1966 Act conferring Article III protections on Puerto Rico's federal judges was an observation that the island's only district judge had become "the only such judge in the entire Federal system who does not have life tenure and whose court has exclusive Federal jurisdiction."<sup>145</sup> But today, that same scenario is effectively mirrored across all the remaining federal territorial courts.<sup>146</sup> This has been the case in the CNMI since 1989, in Guam since 1997, and most recently in the U.S. Virgin Islands, whose Supreme Court assumed exclusive jurisdiction over local-law appeals in 2007.<sup>147</sup> As articulated by the Ninth Circuit's Pacific Islands Committee in 1990, the CNMI's district court was in "the exact same position that Puerto Rico was in at the time their court was reestablished as an Article III court."<sup>148</sup> That is, the CNMI's district judge had become "the only judge in the

---

144. See Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (codified as amended at 28 U.S.C. §§ 134, 373, 451 (2018)); Juan M. García-Passalacqua, *The Judicial Process and the Status of Puerto Rico*, 30 REV. JURÍDICA U. P.R. 145, 153-54 (1961).

145. H.R. REP. NO. 87-684, at 1-2 (1961). Because Congress, at the repeated urging of the Judicial Conference of the United States, intervened to extend life tenure and salary protection to federal judges in Puerto Rico, the Court has not had the opportunity to decide whether Congress has the power to reconstitute Puerto Rico's federal court outside Article III. Some scholars question whether the U.S. District Court for the District of Puerto Rico is an Article III court in the constitutional sense. For a brief discussion, see Campbell, *supra* note 17, at 1902 n.50.

146. See Campbell, *supra* note 17, at 1930. This new jurisdictional landscape of overseas federal courts is brought into relief also by the disappearance of other non-Article III overseas courts with nonfederal adjudicative functions. These include the U.S. District Court for the Canal Zone, the U.S. Court for China, the U.S. Court for Berlin, and the Trust Territory of the Pacific Islands High Court. See *id.* at 1901-16. Although today's territorial federal courts have out-grown justification by the transitional theory, the transitory existence of the aforementioned courts suggests some support for the functional practical-necessity view of the territorial-courts exception to Article III in the overseas context.

147. See *id.* at 1916-30.

148. Memorandum from the Pac. Islands Comm. to the Ninth Cir. Jud. Council, Article III Status for the Commonwealth of the Northern Mariana Islands 5 (on file with author).

entire Federal system who does not have life tenure and whose court has exclusive Federal jurisdiction,”<sup>149</sup> a verbatim restatement of the transitional model’s supposed terminus in Puerto Rico.<sup>150</sup>

That transformation notwithstanding, the political branches still retain power to replace sitting federal judges in Guam, the U.S. Virgin Islands, and the CNMI.<sup>151</sup> The tenure of those judges, which as a formal matter is supposed to

---

149. See S. REP. NO. 89-1504, at 2 (1966) (noting that the judges of courts in other U.S. territories, though similarly serving limited terms, “exercise local jurisdiction as well” – a justification that no longer held in the CNMI after 1989). The same became true for Guam in 1996, when its district court was divested of local-law appellate jurisdiction. See *Judicial History, JUDICIARY GUAM*, <http://www.guamcourts.org/Judicial-History/Judicial-History.html> [https://perma.cc/9WLM-MT5M]. An earlier attempt by the Guam legislature to establish a “Supreme Court of Guam” and divest the federal court of local-law appellate jurisdiction was invalidated by the U.S. Supreme Court. *Guam v. Olsen*, 431 U.S. 195, 196 (1977). Congress subsequently amended the Organic Act of Guam to expressly authorize transfer of that jurisdiction to a local appellate system. Act of Oct. 5, 1984, Pub. L. No. 98-454, § 801, 98 Stat. 1732, 1743.

150. In the few instances when pieces of this doctrinal problem have come before judicial administrative bodies like the Judicial Conference of the United States or the Ninth Circuit Judicial Council, these bodies have displayed a tendency to invent new justifications for allowing the federal courts in the territories to remain outside Article III despite their overwhelmingly or exclusively federal jurisdiction. See Campbell, *supra* note 17, at 1931-45. For example, the Ninth Circuit Judicial Council in 1992 suggested to the Judicial Conference of the United States that it would not be appropriate to recommend Article III status for Guam or the Virgin Islands, despite their district courts’ exclusive federal jurisdiction, on the novel grounds of their lower-than-average caseload statistics and Guam’s lack of a “permanent” political relationship with the United States – as distinguishable from Puerto Rico and the CNMI, which have “[c]ommonwealth [s]tatus.” PAC. ISLANDS COMM., REPORT OF THE PACIFIC ISLANDS COMMITTEE: ARTICLE III STATUS; NORTHERN MARIANAS AND GUAM 4 (Sept. 29, 1992) (on file with author). This recommendation proceeded from an assumption that there is a constitutional distinction between the status of “territory” and that of “commonwealth” – an assumption that once prevailed in the First Circuit but was recently rejected by the Supreme Court in the context of applying double-jeopardy principles in Puerto Rico. See *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 77 (2016) (claiming that Puerto Rico’s constitution fell under Congress’s “broad latitude to develop innovative approaches to territorial governance,” despite Puerto Rico being a commonwealth); cf. *United States v. Sanchez*, 992 F.2d 1143, 1151-52 (11th Cir. 1993) (suggesting that the constitutional boundary between “commonwealth” and “territory” had been an open question even into the 1990s). Compare *Sanchez Valle*, 579 U.S. at 77 (2016) (claiming that Puerto Rico’s constitution falls beneath Congress’s “broad latitude to develop innovative approaches to territorial governance”), with *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) (claiming that “Congress cannot amend the Puerto Rico Constitution unilaterally”), and *Fin. Mgmt. & Oversight Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1672-80 (Sotomayor, J., concurring) (suggesting that the Puerto Rico Constitution contains independently enforceable legal rights to self-government not subject to unilateral congressional alteration). The Ninth Circuit Judicial Council would later reverse its own recommendation after that circuit’s Pacific Islands Committee expressed concerns with the Council’s justifications. See Memorandum from David Pimentel, Assistant Cir. Exec., U.S. Cts. for the Ninth Cir., to Judge Alfred T. Goodwin, Ninth Cir. Ct. of Appeals 5 (Aug. 18, 1992) (on file with author).

151. See Campbell, *supra* note 17, at 1893-84.

last ten years, continues indefinitely past the ten-year mark.<sup>152</sup> This arrangement gives the President a subtle but potentially powerful tool to hold appointments over these judges' heads or to quietly remove them under the guise of a new appointment. This has discernible political effects in U.S. territories as sitting judges approach the prospect of replacement or renomination – especially where these judges are the same ones presiding over challenges to the very sorts of constitutional exceptionalism that their positions embody.<sup>153</sup> For example, a federal judge in Guam, whose term had already expired and whom the President and Senate could have replaced at any moment, was asked to rule on the constitutionality of a decades-long effort to construct an Indigenous plebiscite registry for self-determination by “Native Inhabitants of Guam.”<sup>154</sup> At the same time, the federal government announced plans for a strategic military buildup that will relocate between 4,000 and 19,000 U.S. Marines from Okinawa to Guam by 2028 – plans that are related to other litigation that has come before that judge.<sup>155</sup> The plebiscite case became an object of Guam's largest public demonstration in recent memory, a march for CHamoru self-determination whose endpoint was the District Court of Guam.<sup>156</sup> Such a scenario is immediately relevant in all of

---

152. 48 U.S.C. § 1614(a) (2018); *United States v. Ayala*, 917 F.3d 752, 758 (3d Cir. 2019) (“The clear language of the statute necessitates the conclusion that a judge of the District Court of the Virgin Islands may serve past the expiration of the term, until the President nominates and the Senate confirms a successor.”).

153. For further discussion of the real-world effects that attend this exceptional status among territorial district judges, see Campbell, *supra* note 17, at 1941-44.

154. *Davis v. Guam*, No. 11-00035, 2017 WL 930825, at \*1-2 (D. Guam Mar. 8, 2017), *aff'd*, 932 F.3d 822 (9th Cir. 2019).

155. See *U.S. to Start Moving Okinawa-Based Marines to Guam in 2024*, JAPAN TIMES (Apr. 27, 2017), <https://www.japantimes.co.jp/news/2017/04/27/national/politics-diplomacy/u-s-start-moving-okinawa-based-marines-guam-2024> [<https://perma.cc/FHF3-ALLB>]; Haidee Eugenio Gilbert, *Hearing on H-2B Case Likely in Early 2018*, PAC. DAILY NEWS (Nov. 6, 2017), [https://www.guampdn.com/news/local/hearing-on-h-2b-case-likely-in-early-2018/article\\_3298bb83-d7aa-54ff-97d9-0dee0621ebc8.html](https://www.guampdn.com/news/local/hearing-on-h-2b-case-likely-in-early-2018/article_3298bb83-d7aa-54ff-97d9-0dee0621ebc8.html) [<https://perma.cc/3BFF-JMHS>].

156. See *Guam Prepares for Largest March for Self-Determination on September 2nd 2019*, UNPO (Aug. 26, 2019), <https://unpo.org/article/21634> [<https://perma.cc/ZQS6-236Q>]; Jerick Sablan, *Hundreds March for Chamoru Self-Determination*, PAC. DAILY NEWS (Sept. 2, 2019, 2:36 PM ChT), <https://www.guampdn.com/story/news/2019/09/02/hundreds-march-chamoru-self-determination/2189704001> [<https://perma.cc/W2A8-FWV4>].

the territories with non-Article III federal courts. Three of the four active territorial district court judges occupy this limbo: two saw their formal terms expire in 2021,<sup>157</sup> and the judge in Guam has been in limbo since 2016.<sup>158</sup>

The enduring vulnerability of the federal territorial courts for which Congress has not statutorily intervened illuminates how *Aurelius's* account of the doctrinal relationship between Article III and D.C. courts has not mapped onto the courts of overseas empire. A full decade before the *Palmore* Court ruled that D.C.'s local courts exist outside Article III because their functions are primarily local, the Court had already observed that "territorial courts have long exercised a jurisdiction commensurate . . . with that of the regular federal courts and have been subjected to the appellate jurisdiction of [the Supreme Court] precisely because they do so."<sup>159</sup> Put differently, by the early 1960s, the Court had already observed that the nation's overseas federal district courts could exist outside Article III with overwhelmingly federal jurisdiction – even before *Palmore* was on the horizon. Perhaps for this reason, the *Palmore* Court conspicuously avoided linking the constitutionality of D.C.'s superior court to the jurisdictional landscape of overseas territorial courts. It is only through *Aurelius* that the Court creatively reads back into *Palmore* the notion that Article I's District Clause and Article IV's Territories Clause can be approximated with respect to federal activities in Puerto Rico.<sup>160</sup>

## 2. Territorial Courts Post-Palmore

Since *Palmore*, the territories' judicial institutions have continued to transform and develop. So too has the Supreme Court's view of those institutions,

---

157. See Brian O'Connor, *While Bryan Can Shape Superior Court, Federal Courts Are up to the President*, V.I. DAILY NEWS (Apr. 10, 2019), [http://www.virginislandsdailynews.com/news/while-bryan-can-shape-superior-court-federal-courts-are-up-to-the-president/article\\_90a25508-a4ee-5b1c-890e-12c2cec4cacc.html](http://www.virginislandsdailynews.com/news/while-bryan-can-shape-superior-court-federal-courts-are-up-to-the-president/article_90a25508-a4ee-5b1c-890e-12c2cec4cacc.html) [https://perma.cc/66B7-AJQC] (noting that Virgin Islands' District Judge Wilma Lewis's term expired on June 29, 2021); K-Andrea Evarose Limol, *Governor Supports Renomination of Judge Manglona*, MARIANAS VARIETY (Apr. 21, 2021), [https://mvariety.com/news/governor-supports-renomination-of-judge-manglona/article\\_28a288fe-a188-11eb-a5b6-5328bceaf558.html](https://mvariety.com/news/governor-supports-renomination-of-judge-manglona/article_28a288fe-a188-11eb-a5b6-5328bceaf558.html) [https://perma.cc/UT4Q-AHSY].

158. Towards the end of his term, President Trump nominated a replacement who was not confirmed. Gerry Partido, *Cenzon Nomination for District Court Judge Sent Back*, PNC GUAM (Jan. 5, 2021), <https://www.pncguam.com/cenzon-nomination-for-district-court-judge-sent-back> [https://perma.cc/6NBM-B6RE]. This problem is ripe for conversation between territorial governments and the Biden Administration as it considers these judicial "vacancies" for the territories.

159. *Glidden Co. v. Zdanok*, 370 U.S. 530, 545 n.13 (1962).

160. See *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658-60 (2020).

although not in ways consistent with *Palmore*. In *Nguyen v. United States*, a criminal defendant who had been sentenced in the District Court of Guam challenged the adequacy of his appeal on the grounds that the three-judge Ninth Circuit panel included a non-Article III district judge from the Northern Mariana Islands.<sup>161</sup> During a series of special sittings in Guam and the CNMI, the Circuit had invited the Chief Judge of the District Court for the Northern Mariana Islands to sit by designation pursuant to the court's statutory power to designate "one or more district judges within the circuit to sit upon the court of appeals . . . whenever the business of that court so requires."<sup>162</sup>

A 5-4 majority noted that while the CNMI's federal judge was, in a literal sense, a "district judge[]" within the ninety-four-district architecture of the federal judicial system, he could not be a "district judge[]" as contemplated by the designation statute.<sup>163</sup> To reach this result, the Court looked to adjacent statutory provisions that link the definition of "district judge" to holding office "during good behavior" – an Article III requirement.<sup>164</sup> Like *Aurelius*, the Court employed "further aid from historical usage," noting that "it is evident that Congress did not contemplate" district judges in the CNMI within the designation statute because of how Congress designated domestic territorial courts and federal courts in Indian Country at the turn of the twentieth century.<sup>165</sup>

More importantly, however, all nine justices in *Nguyen* described the constitutional status of the CNMI district court as an "Article IV" court. The five-justice majority made clear that the chief judge of the District Court for the Northern Mariana Islands is not—and need not be—an Article III judge, notwithstanding the fact that the CNMI had already separated federal and local-law appellate functions some fifteen years earlier.<sup>166</sup> According to the majority, the reason that Title 28 does not permit the CNMI federal judge to sit by designation reflects a legislative judgment that "Article IV territorial courts, even when their jurisdiction is similar to that of an Article III United States District Court," should be excluded from presiding in Article III fora.<sup>167</sup>

The *Aurelius* majority tries to tell us that *Palmore* controls the Article III-Article IV boundary line – namely, that "territorial courts" come within the ambit of Article III's text when their functions can be said to be "primarily federal." That observation bears the entire weight of the Court's Appointments Clause

161. 539 U.S. 69 (2003).

162. 28 U.S.C. § 292(a) (2018).

163. *Nguyen*, 539 U.S. at 75-76.

164. *Id.* at 72-75.

165. *Id.* at 76.

166. *Id.* at 71-72.

167. *Id.* at 71 (citing *Mookini v. United States*, 303 U.S. 201, 205 (1938)).



interpretation. But if *Palmore* was intended to govern the relationship between overseas territorial courts and Article III, then the *Nguyen* Court's view of "Article IV territorial courts . . . where [] jurisdiction is similar to that of an Article III United States District Court" would contradict itself.<sup>168</sup> Under *Aurelius's* view of *Palmore*, any court capable of that jurisdictional description would necessarily be unconstitutional, because a non-Article III territorial court must be "primarily local" in its function.<sup>169</sup>

Confronted with the prospect of having to invalidate the structure of federal adjudication in the CNMI, *Nguyen* pointed in the opposite direction of *Aurelius* as to the constitutional status of primarily federal Article IV courts – despite a similarly historicist orientation to the doctrine. The Court emphatically declared that the federal court in the Northern Mariana Islands "is not an Article III court but an Article IV territorial court with subject-matter jurisdiction substantially similar to the jurisdiction of the District Court of Guam" – that is, overwhelmingly (and now exclusively) federal jurisdiction.<sup>170</sup> Even the four-Justice dissent embraced the view that the CNMI district court owes its existence to Article IV, exclusive federal jurisdiction notwithstanding: "It was undoubtedly a mistake . . . for the appellate panel to include an Article IV judge."<sup>171</sup>

Explicitly rejecting the argument that the Court's characterization of the CNMI court in *Nguyen* was "a) nonbinding dicta; b) historically and legally inaccurate; and c) ultimately nondeterminative of whether the protections of Article III apply,"<sup>172</sup> the Ninth Circuit has reemphasized that "*Nguyen* stated that the NMI District Court 'is not an Article III court but an Article IV territorial court with subject matter substantially similar to the jurisdiction of the District Court of Guam.'"<sup>173</sup> In *United States v. Xiaoying Tang Dowai*, the Circuit noted that "whatever the initial authority for the United States exercising authority over the CNMI," the structure of the court is ultimately accountable to the terms of the CNMI Covenant, which guarantees – among other negotiated promises – the territory's "inalienable right of self-determination."<sup>174</sup> Rejecting the *Palmore* approach, the Ninth Circuit held that Article III doctrine is not fungible between the territorial and D.C. contexts, as the Supreme Court already made clear in

---

168. *Id.*

169. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1664 (2020).

170. *Nguyen*, 539 U.S. at 72-73.

171. *Id.* at 84.

172. See Appellant's Reply Brief at 23, *United States v. Xiaoying Tang Dowai*, 839 F.3d 877 (9th Cir. 2016) (No. 14-10277), 2015 WL 5012408.

173. *Xiaoying Tang Dowai*, 839 F.3d at 879-80.

174. *Id.* at 880 (quoting Act of Mar. 24, 1976, Pub. L. No. 94-241, § 105, 90 Stat. 263, 264 (codified as amended at 48 U.S.C. § 1801 (2018)) (CNMI Covenant)).

*Nguyen*. It views *Nguyen* as following a separate line of precedent: one that would decline to sacrifice promises like the CNMI Covenant or Puerto Rico Commonwealth Constitution to a mechanical application of the doctrine.<sup>175</sup>

In the Third Circuit, another recent decision stands in sharp contrast to the *Aurelius* Court's *Palmore* revisionism. In *United States v. Ayala*,<sup>176</sup> decided just months before the Supreme Court handed down *Aurelius*, a criminal defendant challenged the jurisdiction of the District Court of the Virgin Islands<sup>177</sup> on a theory that his trial before federal judge Curtis V. Gómez, whose formal term had expired years earlier and who could have been replaced at any moment, was an Article III violation.<sup>178</sup> Assessing the basis of an Article IV court's ability to hear Article III subject matter, the unanimous Third Circuit panel concluded:

Since at least 1828, it has been the law that Congress may create territorial courts that have jurisdiction to hear cases that Article III courts have jurisdiction to hear. The Supreme Court's teaching in *Canter* is not limited because the Virgin Islands are now equipped with paved roads, planes,

---

175. This Article's references to the Puerto Rico Commonwealth Constitution denote an agreement between the United States and Puerto Rico—that is, the political fact of the mutual assent to Puerto Rico's constitution-making through the asymmetrical combination of popular adoption and statutory enactment. See *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 64-65 (2016) (describing the process by which Public Law 600 authorized the people of Puerto Rico to “organize a government pursuant to a constitution of their own adoption” and its subsequent adoption in the manner specified by Congress (quoting Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319, 319)). It is in this sense that the Article addresses the Commonwealth Constitution together with the American Samoa Deeds of Cession and the CNMI Covenant (rather than the American Samoa or CNMI Constitutions). It does so largely on account of the contestation over what to call this promise. Much ink has been spilled regarding the legal significance of Public Law 600's use of the phrase “in the nature of a compact”—and use of the word “compact” generally—to describe the agreement that attends Puerto Rico's Constitution. § 1, 64 Stat. at 319 (codified at 48 U.S.C. § 731b (2018)). For instance, Ponsa-Kraus objects to Justice Sotomayor's use of the term “compact” to describe promises between the federal government and Puerto Rico during the 1950s because “[t]he term ‘compact’ in this context means something very specific: a binding bilateral agreement, unalterable except by mutual consent. For Justice Sotomayor to begin by simply declaring its existence is no less striking than were she to begin an opinion in an abortion case by asserting that the fetus is a person.” Ponsa-Kraus, *supra* note 7, at 110. This Article engages with the question of how to frame the legal significance of these promises in substance, regardless of whether they are susceptible to the label of “compact” in a particular legal sense, in Part V.

176. 917 F.3d 752 (3d Cir. 2019).

177. The non-Article III federal courts in the territories follow a different naming convention. For example, instead of “United States District Court,” for the “[Geographic] District of [State or Territory],” the U.S. Virgin Islands' federal court is named “the District Court of the Virgin Islands.” See 48 U.S.C. § 1612 (2018); Campbell, *supra* note 17, at 1938-39.

178. For a discussion of the political battle over Judge Gómez's potential renomination, see Campbell, *supra* note 17, at 1942.



and the Internet. *The law remains the same. Article IV, § 3 grants Congress the power to do what it believes proper to regulate the territories, whether that is creating courts with the same jurisdiction as United States District Courts, or not creating courts at all.*<sup>179</sup>

Citing nowhere to *Palmore* or *O'Donoghue*—and without so much as a word on the District Clause or Article I courts in D.C.—the Third Circuit looked to a completely separate line of precedent. On its view of the law, the Supreme Court had “long held” that Congress has total authority to maintain territorial courts outside of Article III, even if those courts “exercise the same jurisdiction as District Courts of the United States.”<sup>180</sup> What *Aurelius* tells us is controlling—*Palmore* and the historical practice of the District Clause—*Ayala* suggests isn't even relevant.

Evidence of *Aurelius*'s Article III revisionism goes far beyond these conflicting lines of precedent. Looking behind the Court's decision in *Nguyen*, it is significant that the object of that case—the District Court for the Northern Mariana Islands—did not yet exist at the time *Palmore* was decided. It is unique among all Article IV courts in American history in that it was created pursuant to a negotiated covenant between the federal government and the people of a not-yet-territory.<sup>181</sup> The structure and jurisdiction of that federal court are a substantive component of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States—the bargain pursuant to which the people of the Northern Mariana Islands formally agreed to become part of the United States in the first instance. That bargain that took two years to negotiate before the Northern Marianas people formally validated it in a 1975 referendum.<sup>182</sup>

If *Palmore* was meant to supply the standard for whether Article III's text constrains federal court-creation in the territorial context, then by all indications the District Court of the Northern Mariana Islands—and by extension, a material portion of the CNMI Covenant—would have been unconstitutional from

179. *Ayala*, 917 F.3d at 757 (emphasis added).

180. *Id.* at 758.

181. Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180, 181 (2003) (“The Covenant established a political relationship unique in American history, and at least rare in the history of the world.”).

182. Act of Mar. 24, 1976, Pub. L. No. 94-241, §§ 401-403, 90 Stat. 263, 266-67 (codified as amended at 48 U.S.C. § 1801 (2018)) (CNMI Covenant); *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 751 (9th Cir. 1993) (summarizing the negotiations). See generally HOWARD P. WILLENS & DEANNE C. SIEMER, NATIONAL SECURITY AND SELF-DETERMINATION: UNITED STATES POLICY IN MICRONESIA (1961-1972) (2000) (chronicling the Northern Mariana Islands's transition to United States sovereignty). The Northern Mariana Islands had previously been a part of the Trust Territory of the Pacific Islands.

their inception.<sup>183</sup> This plainly cannot have been the understanding on which the United States and people of the Northern Mariana Islands exchanged those foundational promises.

Decades have passed since even a colorable argument could be made that territorial district court judges exercise “primarily local” duties. Their distinguishing local-law functions are long divested – whether as forums for domestic relations, traffic cases, or local-law felonies, or as appellate tribunals for cases arising under local law.<sup>184</sup> In transplanting the “rough analogy” born of the Court’s domestic lens onto Article III doctrine, the *Aurelius* Court crafted a “primarily local versus primarily federal”<sup>185</sup> test that could invalidate much of the Article III doctrine that supposedly supplied it.<sup>186</sup>

\* \* \*

This tension between *Nguyen* and *Palmore* is just one relevant expression of the longstanding contestation surrounding the outer limits of non-Article III adjudication in U.S. territories that *Aurelius* fails to acknowledge. The full depth of territorial courts’ underappreciated and complicated role in the contemporary debate on adjudication outside Article III is far beyond the scope of this Article. But we need only observe *Aurelius*’s Article III revisionism at this high level to appreciate what it reveals about the Court’s broader orientation towards the problem of territorial exceptionalism across doctrinal domains.

### III. TERRITORIAL EXCEPTIONALISM AS STATUS MANIPULATION: MISREADING THE CONSTITUTION OF EMPIRE

While *Aurelius*’s critics focus on its refusal to dispense with the *Insular Cases*, a closer inspection reveals higher-order problems. The case suggests that the Court’s failure to meaningfully confront the colonial condition of Puerto Rico

---

183. See *supra* note 166 and accompanying text.

184. See REPORT OF THE JUDICIAL COUNCIL OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON THE VIRGIN ISLANDS SUPREME COURT (2012); Commonwealth Judicial Reorganization Act of 1989, N. Mar. I. Pub. L. No. 6-25, §§ 3101, 3102 (removing local-law appellate jurisdiction from the U.S. District Court for the Northern Mariana Islands); *Judicial History*, *supra* note 149 (noting the divestiture of local-law appellate jurisdiction from the U.S. District Court for Guam in 1996); Act of Oct. 30, 2004, Pub. L. No. 108-378, § 2, 118 Stat. 2206, 2208 (creating a framework for divestiture of local-law jurisdiction from the U.S. District Court for Guam).

185. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1664 (2020).

186. For this, some might even be inclined to read *Aurelius* as an instance of the Court doing more than it says: that is, that *Aurelius* is using an Article II case to overwrite Article III’s problems of territorial exceptionalism, rather than the other way around. Perhaps it is only a matter of time until the Court declares that like Article II, Article III “has no Article IV exception.” See *id.* at 1657.

has little to do with any discrete doctrinal concept that may be ceremoniously expunged from the U.S. Reports. The higher order problem is *how* the *Aurelius* Court reads the Constitution where it is entangled with turn-of-the-twentieth-century overseas imperialism.

Wielding the distorted Article III analogy discussed above, *Aurelius* rearticulates Puerto Rico's relationship to the Constitution without running any of its analysis through the *Insular Cases* or territorial incorporation doctrine. And while the novel reading of the Appointments Clause ostensibly extends Article II's separation-of-powers protections to federal activities in Puerto Rico, the ruling simultaneously revises what those protections mean. In the end, the new reading preserves the FOMB's existing structure and function safely within the bounds of a new and manipulable functional test—successfully importing into text broad and discretionary federal power once thought to depend on the *Insular Cases*.

As a matter of constitutional doctrine, *Aurelius*'s simplest lesson is that the harms attributable to territorial exceptionalism and unbounded federal power do not depend on the *Insular Cases* remaining good law. It indicates that even if the Court were to broadly overturn the sum of the *Insular Cases* and explicitly hold that the Constitution “applies” in full to the territories, there is little to stop it from reconstructing the current order within the bounds of the constitutional text. Whatever its symbolic or political value may be, the legal effect of enumeration—of retethering Puerto Rico and other territories to the Constitution—will be determined entirely by how the Court reads that text as it applies to them.<sup>187</sup> *Aurelius* warns of what will happen if that reading continues under a warped lens.

---

187. Academic discourse on the *Insular Cases* supplies a range of theories on what effect, if any, repudiating those precedents may have on the prospect of a territory's admission as a state or deannexation from the Union. See, e.g., GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 203 (2004) (“Once the acquisition has been constitutionally validated . . . [t]here is nothing in the Territories Clause that requires Congress either to admit a territory as a state or to dispose of it (perhaps by granting independence) if statehood ever ceases to be an option.”); Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005) (arguing that “the most critical contribution of the *Insular Cases* to the constitutional law of American territorial expansion” is the notion that the United States could “relinquish sovereignty over an unincorporated territory”); see also Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 DUKE L.J. 229 (2018) (arguing that the United States has duties derived from international law that would prevent the federal government both from expelling Puerto Rico without its consent and from denying it statehood should it apply). Even as they applaud Joseph Blocher and Mitu Gulati's theory as capable of opening common ground at Puerto Rico's statehood/commonwealth fault line, Erin F. Delaney and Ponsa-Kraus appreciate its academic nature: “[i]t does sound too good to be true.” Erin F. Delaney & Christina D. Ponsa-Kraus, *Fantasy Island*, YALE J. INT'L L. ONLINE (May 19, 2018), <https://www.yjil.yale.edu/fantasy-island> [https://perma.cc/VTG9-7M35].

A. *Status Manipulation: Preserving, Transforming, and Constructing Liminality*

*Aurelius* teaches that “territorial exceptionalism” is not coterminous with *any* discrete status or doctrinal principle. As Sam Erman’s work illuminates, the essential mechanism of the territories’ subordinate and liminal condition has not been the Incorporation Doctrine *per se*.<sup>188</sup> Rather, it has been the sum of legal ambiguities giving rise to a broader capacity for “status manipulation.”<sup>189</sup> Erman’s term connotes something more than simple relegation to a fixed subordinate position. Instead, it functions by purposeful alteration of conditions held out as enduring.<sup>190</sup>

In Erman’s paradigmatic example, the advent of statutory-birthright U.S. citizenship in Puerto Rico tells a story of legal change with parallel dimensions.<sup>191</sup> The first and more obvious one is the transformed formal status of these Americans on paper: from noncitizen national<sup>192</sup> to “U.S. Citizen.” But a second, more imperceptible dimension is the extent to which the constitutional significance of citizenship in overseas territories was itself transformed during the first decades of the twentieth century. To accommodate overseas imperialism, the Supreme Court obscured the legal relationship between citizenship, voting, and territorial status in ways that have materially affected the legal meaning (and

---

188. SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 158 (2019) (arguing that “ambiguity has been the handmaiden of empire”).

189. Erman, *Truer U.S. History*, *supra* note 51, at 1192-98; Erman, *Status Manipulation and Spectral Sovereigns*, *supra* note 51.

190. The breadth of potential manipulations to the territories’ constitutional status is made possible in large part by their subject communities’ invisibility in the American constitutional and political narrative. Sam Erman, adding to the contributions of historian Daniel Immerwahr, points out that the critical feature of this analytical orientation is its ability to achieve subordination by way of “[d]eliberate ambiguity” and obfuscation – as he puts it, “from the shadows.” Erman, *Truer U.S. History*, *supra* note 51, at 1192, 1211. The spread of warped accounts of U.S. imperialism across constitutional domains is paved by the extent to which the American public (and, for now, the legal academy) “sees a version of their nation in which authoritative voices have carefully obscured U.S. empire” *Id.* at 1194; see IMMERWAHR, *supra* note 51, at 35 (arguing that a defining feature of the U.S. empire in world history is its capacity to remain hidden from the mainland political consciousness).

191. ERMAN, *supra* note 188, at 121-61; see 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, 486 (1978). Congress extended statutory-birthright citizenship to Puerto Rico in 1917, the U.S. Virgin Islands in 1927, Guam in 1950, and the CNMI in 1976. See Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1254-63 (2019).

192. See generally Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017) (unearthing the legal construction of the status “noncitizen national”).

normative desirability) of U.S. citizenship for the territories in hindsight.<sup>193</sup> For example, as recounted by Judge Juan Torruella, one of the early *Insular Cases*, *Hawaii v. Mankichi*, had suggested that a grant of U.S. citizenship was determinative evidence of a territory's transformation from "unincorporated" to "incorporated" status—in other words, that extending U.S. citizenship to Puerto Rico would amount to a guarantee that Puerto Rico was destined for statehood.<sup>194</sup> This understanding was short-lived.<sup>195</sup>

To accommodate empire, the law of U.S. citizenship bent to keep Americans in the territories in an ambiguous and exceptional status, even while bearing that title. Erman's recent book on U.S. citizenship in Puerto Rico traces ably the theoretical and practical journey of a new vision of naturalization that would "placate Puerto Ricans and signal permanent U.S. rule over Puerto Rico without bringing Puerto Ricans new rights, greater self-government, or eventual statehood."<sup>196</sup> As Judge José A. Cabranes describes it, the version of citizenship eventually granted to Puerto Rico "was never intended to confer on the Puerto Ricans 'any rights that the American people [did] not want them to have.'"<sup>197</sup> To Cabranes, extending that version of citizenship further obscured the colonial relationship. The "very word 'citizenship' suggested equality of rights and privileges and full membership in the American political community" even as the legal effect of its extension was "the creation of a second-class citizenship . . . perpetuating the colonial status of Puerto Rico."<sup>198</sup> Critically, Puerto Rico's U.S. citizenship, as American law understands it today, bears little in common with the visions of political membership that many of those who fought hardest for it originally had in mind. As summarized by Christina D. Ponsa-Kraus, early twentieth-century Puerto Rican political figures like Federico Degetau y González, Domingo Collazo, and Santiago Iglesias

---

193. ERMAN, *supra* note 188, at 121-61; Christina D. Ponsa-Kraus, *A Perfectly Empty Gift*, 119 MICH. L. REV. 1223 (2021) (reviewing ERMAN, *supra* note 188).

194. 190 U.S. 197, 215-18 (1903) (holding that the granting of citizenship was the determinative factor in deciding whether a territory had been incorporated into the United States); see Torruella, *supra* note 8, at 314-17.

195. See Torruella, *supra* note 8, at 314 ("The crucial holding of *Mankichi* was that it was the *granting of citizenship* that was the determinative factor in deciding whether a territory had been incorporated into the United States.").

196. ERMAN, *supra* note 188, at 121.

197. Cabranes, *supra* note 191, at 396 (quoting 33 CONG. REC. 2473 (1900) (statement of Sen. Foraker)).

198. *Id.*

[e]ach brought to the struggle an understanding of the meaning and promise of citizenship that was tried, tested, and transformed by an unrelenting cycle of incremental gains and repeated setbacks in the face of federal resistance. By the time they succeeded, citizenship—the U.S. citizenship that the United States proved willing to grant Puerto Ricans in 1917—had become, as one of the island's federally appointed governors put it, a “perfectly empty gift.”<sup>199</sup>

Thus, the term “status manipulation” exists “in deliberate tension with itself . . . combin[ing] apparent continuity and actual change to achieve subordination from the shadows. Status poses as immemorial and permanent despite always being constructed and reconstructed . . .”<sup>200</sup> Confronting status manipulation, then, requires looking beyond the operative ambiguities themselves—and towards their capacity for migration.<sup>201</sup>

---

199. Ponsa-Kraus, *supra* note 193, at 1224.

200. Erman, *Truer U.S. History*, *supra* note 51, at 1192.

201. The lesson that more constitutionalism does not necessarily correlate with greater functional limitations on relevant federal power has analogues in other constitutional-law domains. In Federal Indian law, for example, doctrinal understanding of federal power over tribes has migrated into, out of, and within the Constitution—often in the service of background changes to federal policies in Indian country. See, e.g., Greg Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019); Neil Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199–232 (1984); Robert Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981). This is the first of several points this Article proposes for developing a contemporary conversation between Federal Indian law and the law of the territories on shared questions of Indigenous recognition and the limits of federal power vis-à-vis self-government or sovereignty. Beneath the broader work on plenary power's evolution by scholars like Sarah H. Cleveland and Natsu Taylor Saito, there is room for work on the shared path of federal power over Native Americans and unincorporated territories. Maggie Blackhawk observes in passing that “following the *Insular Cases*,” the Court briefly “began rooting the power to govern Indian affairs within the Territories Clause,” before grounding it in the commerce power. The *Insular Cases*' significance to Federal Indian law is more than a stop in a doctrinal journey from (1) an unenumerated, inherent-to-sovereignty understanding of constitutional power in cases like *United States v. Kagama*, 118 U.S. 375 (1886), to (2) enumeration and the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.). While there is some recent work that links these two contexts at a high level, see, e.g., Cuison Villazor, *supra* note 52; Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657 (2013), as well as discussing the relationship between Indian affairs and the Territories Clause at the Founding, see, e.g., John Hayden Dossett, *Indian Country and the Territory Clause: Washington's Promise at the Framing*, 68 AM. U. L. REV. 205 (2018), this work has not traced their converging path towards the tenuous extraconstitutionalism that knocks at the Supreme Court's door in both contexts. This is also a missing thread in contemporary work on enumeration generally. See, e.g., Jud



B. *Erasing Empire from Article III Doctrine*

*Aurelius's* artificially domestic lens on Article III doctrine renders it incapable of reckoning with the status manipulation problem and the role it has played in constructing the territories' liminal existence under the Constitution. What is more, the Court does not just fail to engage with the problem — it repeats it. Even as all nine Justices reject the idea that there is an Appointments Clause “exception” for Puerto Rico, the opinion of the Court manipulates this rough Article III analogy to fashion an entirely new reading of that text. In a very limited way, it confers a new status — after more than 120 years of doctrinal shapeshifting, the Court tells us that Puerto Rico is, once and for all, protected by the constitutional separation of powers (with respect to executive-branch appointments, at least) without exception. But the result preserves the exceptional exercise of federal power; indeed, the exact power the United States had told lower courts depended on the *Insular Cases*. In this way, *Aurelius* reinforces territorial exceptionalism while telling us it is being done away with. That the Court does this by overwriting a rich debate about the constitutional basis of non-Article III courts shows the lengths to which the Court is willing to go to obscure the dilemmas of overseas expansion.

This warped analytical orientation privileges artificial and ill-fitting doctrinal coherence at the expense of negotiated promises and functional self-government.<sup>202</sup> This problem, as other scholars have explored at higher levels of generality, runs throughout contemporary constitutional thought. As Aziz Rana observes, the omission of the *Insular Cases* and overseas empire from the study of the Constitution reflects an unbending “scholarly orientation towards the American constitutional project . . . presented as a story of the ‘domestic’ nation,” in

---

Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569 (2017); Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985 (2016); Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 YALE L.J.F. 180 (2014); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 579 (2014); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1 (2016); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 57 (2017); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389 (2010).

202. This, too, is shared in the whisper that is the contemporary conversation between Federal Indian law and the law of the territories. Describing a “new exceptionalism” in Federal Indian law, Sarah Krakoff adds to Philip P. Frickey’s notion of the “seduction of coherence” that erodes native rights under the Constitution by observing how the Court “lurches towards norms that appear to smooth over American Indian law’s frayed edges, only to tear holes in doctrinal and interpretive fabric elsewhere.” Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 47, 48 (2006). She adds that the Court’s “new exceptionalism is grounded in the erasure of, rather than the imperfect reconciliation of, the nation’s colonial origins.” *Id.*



which “dominant scholarly accounts of American constitutional development pay little to no attention” to the nation’s role in global events, including those of the late nineteenth century.<sup>203</sup> “[T]o the extent that commentators engage with the settler-colonial past,” Rana adds, “the overwhelming tendency is to treat this past as a previous historical period.”<sup>204</sup> Such a view, in addition to ignoring the ways in which late nineteenth-century expansion is constitutive of the American century’s centralization of political and economic power, actively obscures the ways in which contemporary communities today experience the lingering realities of colonial subjugation and further dispossession of native lands.<sup>205</sup>

We need look no further than the contemporary debate over non-Article III federal courts—the debate *Aurelius* ignored<sup>206</sup>—to appreciate this tendency. In contrast to the searching inquiry into the military and public-rights exceptions, contemporary territorial courts are missing from the discourse on non-Article III adjudication, even in the few places where that discourse engages directly with the present state of the territories exception.<sup>207</sup> Some scholars appear to assume that little about those courts or their constitutional significance has changed in the past half century. For example, Vladeck recently observed that

other than minor alterations to the structure of Article III *appellate* review of territorial courts, the last substantial changes to the jurisdiction of these courts themselves were the 1982 abolition of the District Court for

---

203. Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 YALE L.J.F. 312, 314, 315 (2020).

204. *Id.* at 330.

205. AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 281–90 (2010); Asli Bali & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI. L. REV. 257, 264–70 (2018); Henry R. Luce, *The American Century*, 10 LIFE 61 (1941), reprinted in 23 DIPLOMATIC HIST. 159, 171 (1999) (coining the term “American Century”); cf. Naomi Klein, *Puerto Ricans and Ultrarich “Puertopians” Are Locked in a Pitched Struggle over How to Remake the Island*, INTERCEPT (Mar. 20, 2018, 12:30 PM), <https://theintercept.com/2018/03/20/puerto-rico-hurricane-maria-recovery> [<https://perma.cc/KA8D-5J7Q>] (discussing various historical dynamics contributing to emergent “crypto-colonialism” concerns in Puerto Rico).

206. *See supra* Part II.

207. For example, F. Andrew Hessick has argued that “the territorial exception is now too broad” because of “[c]hanges in the law since the nineteenth century.” Hessick, *supra* note 100, at 745. But the changes he observes have nothing to do with the evolving composition of those territorial courts. Adopting a selectively domestic view of jurisdictional shifts, Hessick observes that the expansion of state courts’ personal jurisdiction in the wake of *International Shoe* enables those courts to “adjudicate many disputes in the territories,” to reach the conclusion that “[p]ermitt[ing] a territorial tribunal to hear those claims infringes on the states’ prerogative to adjudicate claims not subject to Article III jurisdiction.” *Id.*

the Canal Zone . . . and modest statutory revisions to the jurisdiction of the Guam and Northern Mariana Islands district courts in 1984.<sup>208</sup>

Here, too, a selective focus on direct congressional or Supreme Court intervention blinds Vladeck to the transformations realized by the action of *local* territorial institutions to divest their federal district courts of distinguishing local-law functions and to stand up new appellate tribunals. As recounted in Part II, those latter changes have fundamentally reshaped what territorial courts are today, evincing how far these institutional structures have drifted from what the Supreme Court had before it in *Canter* and what the Court analogizes to in *Aurelius*.<sup>209</sup> Vladeck's work on military courts foregrounds the proposition that "the Court's defense of the military exception has . . . failed to account for the *seismic changes to the nature and structure* of American military justice after and in light of World War II."<sup>210</sup> But even as he explores (and critiques) the supposed doctrinal link between Article III's military and territories exceptions, he fails to notice an equivalent seismic movement in territorial courts' jurisdiction during that same period.<sup>211</sup>

In another recent example, William Baude supplies one of the most comprehensive attempts to redraw the outer boundary of Article III without resorting to historical practice or functional necessity. Capturing the main doctrinal fault lines over the past forty years, Baude correctly notes that "[w]ithout a limiting principle, Article III's promise of judicial independence becomes empty."<sup>212</sup> Taking stock of his inventive reading, Baude suggests that these longstanding forms of non-Article III adjudication are not really exceptions to Article III's text at all, "but rather a more careful reading of it than many have realized."<sup>213</sup> Channeling a number of other scholars' work from the 1980s and 1990s, Baude contends that "[n]one of this needs to be so complicated."<sup>214</sup>

In his search for a more unifying theory of Article III's limits, Baude offers a highly formal taxonomy of non-Article III courts. First, there are public-rights courts, which he argues do not exercise any judicial power since they are creatures of executive power only.<sup>215</sup> And second, there are military and territorial

---

208. Vladeck, *supra* note 102, at 935 n.9 (citations omitted).

209. *Am. Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 511 (1828); *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 842-43 (1st Cir. 2019).

210. Vladeck, *supra* note 102, at 936 (emphasis added).

211. *Id.* at 935.

212. Baude, *supra* note 100, at 1517.

213. *Id.* at 1519.

214. *Id.* at 1521; see, e.g., Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1069-70 (1998).

215. Baude, *supra* note 100, at 1521.

courts, which do exercise judicial power, just not the “judicial power of the United States.”<sup>216</sup> Baude calls this taxonomy “a sympathetic reconstruction of historical practice,” arriving at the conclusion that “[e]ach of our longstanding traditions is in fact perfectly consistent with Article III.”<sup>217</sup> Importantly, he begins from the premise that “[w]hile the constitutionality of territorial courts is now widely accepted, commentators have found it difficult to discern exactly what theory can be used to sustain them.”<sup>218</sup> Baude’s theory, however, forces the “longstanding traditions” of American territorial courts onto similarly shaky ground.

Baude winds up with the same limited view of territorial courts—fixed on the domestic lens of *Canter*—to reach a cleanly divisible result: Congress creates lower federal courts to exercise the “judicial power of the United States,” but created the territorial court at issue in *Canter* to exercise the “judicial power of the territory of Florida.”<sup>219</sup> As in *Aurelius*, this approach completely jettisons the federalization of territorial courts and invites us to ignore any force that overseas expansion has exerted on this part of the Constitution or its attendant historical practice. Baude’s suggestion that today’s territorial courts are not “exceptions” upon his “more careful reading” of Article III invites exactly what is wrong with *Aurelius*—readings that carefully sidestep anything that has to do with the unresolved constitutional vestiges of late nineteenth-century imperialism.<sup>220</sup> Baude’s theory attempts to draw a clean bullseye around two-hundred years of jurisdictional scattershot. Unfortunately, that theory only works if you pretend that the federal courts in Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands were never on the dartboard.

These are just two recent examples of commentators’ collective failure to account for how the paradigm of American territorial courts transformed incident to overseas imperialism.<sup>221</sup> That these shifts go ignored amid a debate that takes a fine comb to historical practice and unearths “seismic shifts” in adjacent Article III settings says much about how deeply ingrained territorial communities’ deletion from the constitutional narrative has become. Without a proper accounting of the actual landscape of the nation’s territorial courts over time, it is not

---

216. *Id.*

217. *Id.* at 1521-23.

218. *Id.* at 1526 (footnote omitted).

219. *Id.* at 1527.

220. *Id.* at 1519.

221. See also SUTTON, *supra* note 62, at 136-90 (engaging in extensive dialogue with territorial and state courts for the purpose of “facilitating dialogue with the federal courts in interpreting the US Constitution” but deleting from that inquiry any mention of overseas imperialism or the forms of adjudication and governance owing to it, whether historical or contemporary).

possible to evaluate the relationship between Article III's text and historical practice in a rigorous way. Similar observations have recently been made across other constitutional domains, particularly the treaty power<sup>222</sup> and immigration.<sup>223</sup>

Another facet of the *Aurelius* Court's ill-fitting Article III prism is that the aforementioned Article III problems are not readily observable within the specific context of Puerto Rico, where – unlike the other overseas territories – Congress granted the island's district judges life tenure and salary protection in 1966.<sup>224</sup> Even beyond federal courts, there are countless facets of territorial law that can only be appreciated at the constitutional level by weaving together the many idiosyncrasies of individual federal territorial relationships. Those relationships are rarely, if ever, fungible within federal law. Areas like taxation, customs, immigration, and federal benefits historically reveal little to no commonality across the diversity of American islands.<sup>225</sup> Accordingly, interpreting the Constitution – or deciding the merits of any legal question with general application to U.S. territories – lends itself to distortion when a question of common interest proceeds to the Supreme Court on contextual assumptions that are unique to one territory's relationship to the federal government.<sup>226</sup> When schol-

---

222. See, e.g., Brian Richardson, *The Imperial Treaty Power*, 168 U. PA. L. REV. 931, 938 (2020) (critiquing historicist approaches to the treaty power upon examination of how purged understandings of that power were erased to accommodate overseas imperialism).

223. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 278 (2002) (“Rationales that allowed the exercise of governmental power based on doctrines of inherent powers and international law now parade as enumerated text without any recognition either of the international law origins of the principles or the racist, illiberal ideology on which they are based.”); see also Paul A. Kramer, *How Not to Write the History of U.S. Empire*, 42 DIPLOMATIC HIST. 911, 911-19 (2018) (discussing the main problems with scholarship on U.S. overseas colonialism).

224. Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764. For an account of Puerto Rico's judicial reorganizations in the 1950s and 1960s that led up to the Article III transformation, see Charles E. Clark & William D. Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 YALE L.J. 1147, 1153-66 (1952); and García-Passalacqua, *supra* note 144, at 153-55.

225. See Hammond, *supra* note 18, at 1675-76 tbls.1 & 2 (displaying the diversity of eligibility criteria for key federal benefits like SSI and SNAP, each of which includes the residents of certain territories but not others); see also *infra* Part V.

226. This problem is of wider theoretical interest. As Erman observes, status manipulation transcends the so-called law of the territories and finds expressions in Federal Indian law, immigration, and extraterritoriality doctrine. Erman, *Truer U.S. History*, *supra* note 51, at 1212-22 (describing how legal-status manipulation has defined the nation's history of race and borders, linking the “domains of empire, indigeneity, slavery, stateside racism, and immigration”); see Cleveland, *supra* note 223, at 31-42; Natsu Taylor Saito, *Asserting Plenary Power over*

ars and jurists apply a frame that ignores the territories' diverse legal relationships and prerogatives – most often by assuming that what is true of Puerto Rico is true of the other territories<sup>227</sup> – attempts to resolve legal ambiguity are likely to deepen it.

The stakes of *Aurelius's* misorientation to the doctrine emerge when we observe how the newly fashioned “enumerated” understanding of the Appointments Clause – born of Article III revisionism – threatens to delete the promises and interests that have matured around doctrinal uncertainty.

Perhaps the most obvious implication of *Aurelius's* Article III analogy is that it imperils the constitutionality of today's federal territorial courts. Assuming the Court does not dodge or otherwise ignore this impending collision between the *Palmore* analogy and the territorial-courts exception to Article III (as it did twenty years ago in *Nguyen*<sup>228</sup>), *Aurelius* could materially curtail one of the ways in which the political branches presently hold the territories in an exceptional status that is ripe for political manipulation (i.e., through judicial tenure) – something the Court conspicuously refused to do with the FOMB.<sup>229</sup> There are reasons to view this outcome as desirable.<sup>230</sup> The constitutional and political problems with the current state of federal adjudication in Guam, the Virgin Islands, and the Northern Mariana Islands are obvious, and mechanically applying

---

*the “Other”*: *Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 433-46 (2002). Inversely, a closer inspection of these adjacent doctrinal areas reveals that fears surrounding *Aurelius*-style judicial interventions – packing exceptional understandings of plenary power back into textual readings of the Constitution – are far from theoretical.

227. This can be true both where legal arguments constructed with Puerto Rico in mind fail to consider how those same arguments stand to affect the other territories, and where Puerto Rico is artificially isolated from other territories for the purposes of constitutional analysis. See, e.g., Brief of the National Disability Rights Network et al., *supra* note 18, at 3-7 (highlighting that the text of the SSI statute, which does not mention Puerto Rico by name, discriminates with equal force against four U.S. territories, whose common treatment under the Social Security Act is relevant evidence of that law's discriminatory purpose).
228. See *supra* Section II.B.2.
229. In this way, *Aurelius* suggests different stakes for creating novel oversight structures like the FOMB – through which Congress can more easily evade separation-of-powers constraints by masking federal activities by housing them in a structure of local government or bundling them with local functions – than for revising existing institutional structures like federal courts that are functionally integrated into a broader national system.
230. See Campbell, *supra* note 17, at 1931-44 (arguing that it is in the shared interest of territorial self-determination and an independent judiciary for Congress and the Judicial Conference to address glaring problems of federal judicial independence in U.S. territories and for defenders of federal judicial independence to articulate a vision of the federal judiciary that ceases to hide its vestiges of imperialism behind ill-fitting rhetoric of a singular and uniformly independent judiciary).

*Aurelius* would put an end to the President's power to quietly fire federal judges in response to an adverse decision.<sup>231</sup>

But while *Aurelius* might look like a doctrinally satisfying solution to that problem, employing its analytical approach would leave no room for reckoning with how the constitutional status of territorial courts is bound to other legal path dependencies—for instance, the legal status of agreements and negotiated promises like the CNMI Covenant, Puerto Rico Commonwealth agreement, and American Samoa Deeds of Cession, as contemplated in *United States v. Xiaoying Tang Dowai*.<sup>232</sup> As described in Part II, the Northern Mariana Islands' federal court is unique among the territories as the only such court created by virtue of a negotiated compact. The District Court for the Northern Mariana Islands, created after *Palmore* (the source of *Aurelius*'s analogy), was primarily federal from its inception. While there is good reason to question the wisdom of this particular structure as it exists today,<sup>233</sup> a ruling that revises the structure of this court by manipulating the historical practice of federal courts in Washington, D.C. or the early American frontier would destabilize the foundational understanding of the Northern Mariana Islands' political relationship with the United States.<sup>234</sup> Just as the *Aurelius* Court declined to engage with how or whether the Puerto Rico Commonwealth Constitution affects the limits of the FOMB's intrusions on the territory's promised self-government,<sup>235</sup> a ruling that invalidates the CNMI's district court by reflecting *Aurelius* back onto Article III would sidestep any meaningful inquiry into what understanding of the doctrine led the United States and Northern Marianas people to exchange promises that gave the CNMI Government functional control over the appellate jurisdiction of that court.

The 1976 Covenant to establish a CNMI in political union with the United States—the agreement by which the CNMI broke away from the now-dissolved United Nations Trust Territory of the Pacific Islands to formally become part of

---

231. *Id.* at 1901.

232. 839 F.3d 877 (9th Cir. 2016); see *supra* notes 172-174 and accompanying text; see also Horey, *supra* note 181, at 181-82 (“The terms of the [CNMI’s relationship to the United States], however, can be confusing. . . . Judicial decisions have sometimes acknowledged this confusion and other times contributed to it. Perhaps predictably, the overall federal tendency has been to ignore the unique circumstances of the CNMI . . .”).

233. See, e.g., Michael A. White, Remarks in Support of Resolutions No. 5 and 6 at the 1991 Ninth Circuit Judicial Conference 1 (1991) (on file with author).

234. See *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993) (“The Covenant has created a ‘unique’ relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations.”).

235. The prospect of such promises is similarly at play in Justice Sotomayor’s *Aurelius* concurrence, although her concerns go to the incursion of FOMB’s substantive powers (that is, not the appointments structure) on Puerto Rican self-government. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1677 (2020) (Sotomayor, J., concurring).



the United States<sup>236</sup>—took more than two years to negotiate. It expressly provides for a “District Court for the Northern Mariana Islands,”<sup>237</sup> endowed principally with “the jurisdiction of a district court of the United States”<sup>238</sup> and residual local matters subject to the territorial government’s control.<sup>239</sup> The CNMI’s federal court was designed in a unique way that set federal jurisdiction as the default but permitted additional jurisdiction to the court for certain local matters.<sup>240</sup> The Covenant also guarantees that “[t]he Northern Mariana Islands will constitute part of the same judicial circuit of the United States as Guam.”<sup>241</sup> This arrangement, while “primarily federal” from its inception, facilitated local control over the development of the CNMI’s local judiciary, which culminated with the creation of the CNMI Supreme Court in 1989. These features of the CNMI Supreme Court are part of the core bargain by which the Northern Marianas people agreed to link themselves to the United States in the first instance.

To be sure, the CNMI Covenant says nothing about the tenure of the judges or the status of that court vis-à-vis Article III. But the fact that this federal court was created outside Article III indicates that the promises exchanged in the Covenant proceeded from a substantially different understanding of what is and is not permissible under the Constitution with respect to the territories than what is suggested by *Aurelius*’s view of “unabated” historical practice.<sup>242</sup> The Covenant also contains separate provisions that explicitly purport to bind future Congresses with respect to modifications to the Covenant: “in order to respect the right of self-government guaranteed by this Covenant, the United States agrees

---

236. See generally WILLENS & SIEMER, *supra* note 182 (discussing issues with the Trust Territory of the Pacific Islands). While the CNMI and Puerto Rico both bear the formal label of “Commonwealth,” the Supreme Court has appeared to reject the once-popular notion that there is a substantive legal difference between “territory” and “commonwealth” status. See *supra* note 150.

237. See Campbell, *supra* note 17, at 1938 (discussing the separate naming conventions for territorial district courts and “mainland” district courts).

238. Act of Mar. 24, 1976, Pub. L. No. 94-241, §§ 401-402(a), 90 Stat. 263, 266 (codified as amended at 48 U.S.C. § 1801 (2018)) (CNMI Covenant).

239. For example, section 402(c) of the Covenant permits “such appellate jurisdiction as the Constitution or laws of the Northern Mariana Islands may provide.” *Id.* § 402(c), 90 Stat. at 267.

240. *Id.* § 402, 90 Stat. at 266-67.

241. *Id.* § 401, 90 Stat. at 266.

242. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020). The period of time between the Court’s decisions in *Dorr*—which ushered in the race-based logic of court differentiation for Puerto Rico, see *supra* notes 134-137 and accompanying text—and *Aurelius* (a period of 116 years), is longer than the period between the 1789 Judiciary Act and *Dorr* (115 years).



to limit the exercise of [its] authority” to enact legislation that would modify certain parts of the Covenant without the consent of the CNMI Government.<sup>243</sup>

It is entirely possible that *Aurelius*’s impending Article III problem and the judiciary provisions of the CNMI Covenant are judicially reconcilable, particularly in light of the transitional logic implied by the Covenant’s anticipated vesting of local-law jurisdiction in local courts and a CNMI Supreme Court that did not yet exist at the time the agreement was adopted into federal law. The problem remains, however, that by applying *Aurelius*’s analytical frame, courts will not have to contend with how *any* of these promises stand to be rewritten or broken altogether. They will not countenance how doctrine has bent to accommodate promise breaking and interference with self-government – and they will continue to bend doctrine, silently, like the majority in *Aurelius*.<sup>244</sup>

By erasing the ways in which territories have endeavored (and may yet endeavor) to ground legal recognition amid the doctrinal shapeshifting brought on by overseas expansionism, the Court loses sight of those promises and opens the door to new forms of status manipulation, shifting constitutional ambiguity yet again from one piece of doctrine to another.<sup>245</sup> This propensity to frame territorial exceptionalism as a relic in one limited context – or with respect to one single

---

243. § 105, 90 Stat. at 264. Article IV of the Covenant, which pertains to judicial authority in the CNMI, is not among the fundamental provisions identified by section 105. See *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993) (“The Covenant has created a ‘unique’ relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations.”); *Commonwealth of the N. Mar. I. v. Atalig*, 723 F.2d 682, 687 (9th Cir. 1984); cf. JOSE S. DELA CRUZ, *THE FUNDAMENTAL ISSUES AFFECTING THE NORTHERN MARIANA ISLANDS* 11 (2021) (arguing somewhat differently that pursuant to the CNMI Covenant, Congress “has expressly agreed under the Covenant not to exercise its ‘plenary powers’” under Article IV and instead agreed to be bound by the terms of the Covenant).

244. Justice Sotomayor’s troubled *Aurelius* concurrence centers on the majority’s tacit erasure of federal promises towards Puerto Rican self-government. See *infra* Part V.

245. See Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2748–49 (2022). The recent oral argument in *Vaello Madero* underscores the Court’s threshold confusion with how to approach the constitutional problems posed by U.S. territories’ liminal status. *Vaello Madero* asks whether or not it is constitutional for Congress to exclude residents of Puerto Rico from the nation’s largest and most generous income-assistance program – SSI – while extending that program to residents of all fifty states, Washington, D.C., and the CNMI. At oral argument, there was little basic agreement among the Justices or counsels as to which parts of the constitutional text were relevant to the case and whether it has anything to do with the *Insular Cases*. See Transcript of Oral Argument, *United States v. Vaello Madero*, 141 S. Ct. 1539 (2022) (No. 20–303). The United States adopted much the same approach as it did in *Aurelius*, disclaiming any reliance on the *Insular Cases* while locating similarly exceptional understandings of congressional power within the constitutional text. Early in the argument, Chief Justice Roberts asked directly: “Do the *Insular Cases* have anything to do with this litigation?” The

territory—risks significant collateral consequences for constitutional interests in adjacent areas. As in Federal Indian law, deleting these path dependencies from the doctrine will inevitably pave the way for federal promise breaking, erasure of territories' present legal interests, and further dispossession of native lands.<sup>246</sup>

Of all the ideas to emerge from the renewed scholarly interest in the *Insular Cases* and the constitutional law of American empire over the preceding two decades, those that reckon most seriously with its foundational ambiguities correctly observe that the puzzle of territorial exceptionalism is not a discrete doctrinal problem cabined to some appreciable body of “territorial law,” but a question about how we see the Constitution more generally.<sup>247</sup> Reading *Aurelius* only for what it failed to say about “talismanic opt out[s]”<sup>248</sup> or extraconstitutional zones comes at the expense of all it can tell us about the nuances of territorial exceptionalism as status manipulation. As the next Part will show, the stakes of that erasure go far beyond the composition of federal territorial courts.

#### IV. AURELIUS AS ANTIEXCEPTIONALISM'S FUTURE: THE TROUBLE WITH UNDERTHEORIZED JUDICIAL INTERVENTIONS CIRCLING THE *INSULAR CASES*

Before attempting to reorient the conversation on judicial engagement with U.S. territories' constitutional limbo, Part IV describes the ways in which contemporary calls for judicial intervention remain undertheorized. An overriding focus on getting the Court to formally overturn the *Insular Cases*' racist logic has

---

Government responded that the “[t]he *Insular Cases* were about whether there are different portions of the Constitution that apply differently to different territories. And, here, everybody has acknowledged this Court previously held that [equal protection] applies to Puerto Rico. And, therefore, we don't think the Court needs to address the *Insular Cases* here any more than it did last year in *Aurelius*.” *Id.* at 8-9. At the same time that the United States emphatically maintained that the Fifth Amendment's text applies to the territories, it thus argued that the Court's equal-protection analysis must be structured differently for territories than it is for states by virtue of the fact that “the Territory Clause gives Congress a different and unique source of authorities over territories.” *Id.* at 5. Observing that nothing about the government's position directly relies on finding power *outside* the Federal Constitution, Justice Gorsuch asked what was certainly the most provocative question of the morning: “Counsel, if that's true [that the Court need not address the *Insular Cases*], why . . . shouldn't we just admit the *Insular Cases* were incorrectly decided? . . . [I]f you're proceeding on a premise inconsistent with them, why shouldn't we just say what everyone knows to be true?” *Id.* at 9.

246. See *infra* Part V.

247. See, e.g., Cleveland, *supra* note 223, at 208-09; Saito, *supra* note 226. For a discussion of this point with reference to various calls to expand the constitutional-law canon, see *infra* note 438.

248. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1671 (2020) (Sotomayor, J., concurring).

yielded little in the way of workable frameworks for whatever comes next. Through the lens of contemporary calls for the *Insular Cases*' judicial overthrow, this Part explores the harms that ill-considered judicial engagement—even if well intentioned—stands to visit on territorial communities. Distilling key lessons from all that has yet to be observed about *Aurelius*, this Part challenges those who read that case principally as a missed opportunity.

In recent years, many of the loudest calls for judicial intervention in the *Insular Cases* suffer from—and indeed invite—the same analytical problem observed in *Aurelius*. Employing a similarly warped frame to paint the constitutional developments of U.S. empire as a relic or aberration, those who pushed hardest for the Court to overturn the *Insular Cases* in *Aurelius*—and have criticized it for failing to do so—do not appear to appreciate either the numerous ways in which territorial exceptionalism and the manipulation of legal ambiguity can survive without the *Insular Cases*, or the risks such interventions pose for the path-dependent legal interests that have grown around those indefensible rulings.

This Part begins by examining some prevailing threads among those who pushed the *Aurelius* Court to overthrow the *Insular Cases*, and then looks ahead to *Fitisemanu v. United States*, a case pending certiorari before the Supreme Court that illuminates the many problems with inviting those same interventions in *Aurelius*'s wake.

#### A. *The Insular Cases and Aurelius: Avoiding the Korematsu Trap*

Perhaps the most prominent voice urging the Court to overrule the *Insular Cases* in *Aurelius*, the American Civil Liberties Union, filed a brief alongside its Puerto Rico chapter that urged the following: “As it did in *Trump v. Hawaii*, . . . where the Court went out of its way to overrule *Korematsu v. United States* . . . because of that decision’s express racist assumptions, so, too, here, the Court should lay the *Insular Cases* to rest.”<sup>249</sup> Describing the *Insular Cases* as an expungable “stain” on the Court’s jurisprudence “long ‘overruled in the court of history,’”<sup>250</sup> it embraced *Trump v. Hawaii* as an invitation to reach *beyond Aurelius*’s merits to symbolically declare as much. It did so even as it admitted that “reaffirming the limits” of those decisions “would be sufficient to resolve th[e] case.”<sup>251</sup>

---

249. Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Puerto Rico at 3, *Aurelius*, 140 S. Ct. 1649 (Nos. 18-1334, 18-1475, 18-1496, 18-1514 & 18-1521).

250. *Id.* at 23 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)).

251. *Id.* at 3.

At oral argument, counsel for Puerto Rico's electrical union (UTIER) – who devoted her entire allotted time to urging the Court to overturn the *Insular Cases* – similarly invoked *Korematsu*, noting that “last [T]erm, [the] Court went ahead and overruled the [*Korematsu*] case” even though the Court “said that [*Korematsu*] had nothing to do with the Trump versus Hawaii case.”<sup>252</sup> She stressed that the circumstances attending *Trump v. Hawaii* were “[t]he same here with the *Insular Cases*,” insisting that *Aurelius* presented “the perfect opportunity to address them.”<sup>253</sup> Commentators have also criticized the *Aurelius* Court for not taking this path, accusing the Justices of “perpetuat[ing] ‘gravely injurious’ discriminatory treatment rooted in ‘dangerous stereotypes’”<sup>254</sup> by “fail[ing] to overrule this similarly ‘morally repugnant’ series of cases.”<sup>255</sup> This commentary has endorsed the reading of the *Insular Cases* as a “relic,” one that is both “historically and juridically, an episode of the dead past.”<sup>256</sup> These arguments, echoed by numerous others with respect to *Aurelius*, have since been taken further in the current Supreme Court Term by amici in *United States v. Vaello Madero*, a case that raises questions of territorial governance but in which no party has asked the Court to engage directly with the *Insular Cases*.<sup>257</sup>

---

252. Transcript of Oral Argument, *supra* note 33, at 87.

253. *Id.*

254. Cepeda Derieux & Weare, *supra* note 39, at 298 (quoting *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting)).

255. *Id.* The authors also note that “the invitation of multiple parties and amici on both sides to place the *Insular Cases* alongside *Korematsu* in the dustbin of history went unanswered.” *Id.* at 286.

256. *Id.* at 294 (quoting *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 844-45 (1st Cir. 2019)).

257. See Brief of LatinoJustice PRLDEF and Ten Amici Curiae in Support of Respondent at 3, 16-17, *United States v. Vaello Madero*, No. 20-303 (U.S. Sept. 7, 2021) (declaring the *Insular Cases* an “invidious relic of the past” and calling for the Court to follow *Trump v. Hawaii*); Brief of the Government of the U.S. Virgin Islands as Amicus Curiae in Support of Respondent at 23, *Vaello Madero*, No. 20-303 (contrasting the Court’s toleration of the *Insular Cases* as good law “still on the books” with *Trump v. Hawaii*’s handling of *Korematsu*, “in which wartime justifications for Japanese internment have mercifully been relegated to that limited context”). Notably, the American Civil Liberties Union (ACLU) and ACLU of Puerto Rico have not taken the same approach as amici in *Vaello Madero*, forgoing any reference to *Trump v. Hawaii* or *Korematsu* while noting that in general terms “[t]here have been increasing calls to overrule the *Insular Cases*.” See Brief of the American Civil Liberties Union Foundation, ACLU of Puerto Rico, Dēmos, Equally American Legal Defense and Education Fund, and the Washington Lawyers’ Committee for Civil Rights and Urban Affairs as Amici Curiae in Support of Respondent at 19, *Vaello Madero*, No. 20-303 (“[T]he Court has rightly refused to ‘extend’ these ‘much-criticized’ decisions. . . . But whatever the future of this line of cases, as a matter of historical fact they reflect the unfortunate reality that the United States’ relationship with these Territories was forged in a spirit of bigotry and subordination.” (citing *Aurelius*, 140 S. Ct. at 1665)).

To properly tease out the many problems with this presentation of the *Insular Cases* and its questionable assumptions about the likely effects of blunt judicial intervention, it is critical to take a closer look at what exactly the Court did with *Korematsu* in *Trump v. Hawaii*. There, a 5-4 majority upheld the President's highly controversial "travel ban," an executive order temporarily suspending the entry of foreign nationals from a handful of predominantly Muslim countries.<sup>258</sup> The case was arguably the most prominent constitutional litigation of the Trump presidency, with the Court's decision sparking sizable protests in D.C., New York, Portland, and Atlanta.<sup>259</sup>

Recognized alongside *Dred Scott v. Sandford*<sup>260</sup> and *Plessy v. Ferguson*<sup>261</sup> as part of the core trilogy comprising the American constitutional "anticanon,"<sup>262</sup> *Korematsu* upheld the presidential removal order that would relocate more than one hundred thousand Japanese Americans to internment camps across the western United States on account of "pressing public necessity."<sup>263</sup> *Korematsu*, of course, features prominently in the study and teaching of American constitutional law and is widely considered one of the Supreme Court's worst decisions.<sup>264</sup>

Notably, the *Trump v. Hawaii* majority overruled *Korematsu* immediately after declaring that "*Korematsu* has nothing to do with this case."<sup>265</sup> In fact, the Court's eventual pronouncement that *Korematsu* was "gravely wrong the day it

---

258. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

259. Joshua Kurtz, *Activists Protest Supreme Court Muslim Ban Decision*, HIAS (June 27, 2018), <https://www.hias.org/blog/activists-protest-supreme-court-muslim-ban-decision> [https://perma.cc/B659-WRHK].

260. 60 U.S. (19 How.) 393 (1857).

261. 163 U.S. 537 (1896).

262. See Greene, *supra* note 25, at 380.

263. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

264. Even before the Supreme Court formally overruled *Korematsu*, the case was widely acknowledged as a "mistake" across branches of government. In 1988, President Reagan signed legislation offering a formal apology for World War II Japanese internment, paying \$20,000 in compensation to each surviving victim. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903. President Clinton would later award Fred Korematsu the Presidential Medal of Freedom, the nation's highest civilian honor. See Craig McAndrew, *Fred Korematsu Awarded Presidential Medal of Freedom*, C-SPAN (Jan. 15, 1998), <https://www.c-span.org/video/?c4660995/fred-korematsu-awarded-presidential-medal-freedom> [https://perma.cc/WM2N-5WXL]. In 2011, the acting U.S. Solicitor General issued a statement attributing *Korematsu* in part to errors made by the Solicitor General's Office. See Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T JUST. (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/H7F9-GVCE].

265. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

was decided”<sup>266</sup> came only in response to Justice Sotomayor’s dissent, which assailed the “stark parallels between the reasoning of [the majority] and that of *Korematsu*.”<sup>267</sup> Specifically, Sotomayor connected the manner in which the two cases appeared to “invoke[] an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion.”<sup>268</sup> And so, despite rejecting Sotomayor’s parallels between *Trump* and *Korematsu* as “wholly inapt,”<sup>269</sup> the majority indulged the invitation to reach beyond its conception of the merits, noting that “[t]he dissent’s reference” that “afford[ed] this Court the opportunity to make express what [was] already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in the law under the Constitution.’”<sup>270</sup>

Thus, those who ushered the *Aurelius* Court towards *Trump v. Hawaii* were technically correct that, as a doctrinal matter, the merits of the travel ban did not run directly through *Korematsu*. Channeling the Chief Justice’s view that “*Korematsu* has nothing to do with this case,”<sup>271</sup> these advocates understandably saw the potential for a similar move to sweep the *Insular Cases* into the Court’s cross-hairs even as the FOMB’s lawyers had abandoned their reliance on them. But in doing so, they failed to appreciate how the *Trump v. Hawaii* majority artificially restricted *Korematsu* to its facts, treating it as a discrete doctrinal device whose operative significance belonged only to the specific historical context of wartime hostilities with Japan. In other words: a relic.

Accordingly, while the Court formally and symbolically overruled *Korematsu*, the majority did not reckon with the specific contours of the decision, and in particular, the modes of racialized thinking that were essential to its result. The Court summarily discarded *Korematsu* without any examination of that which unites it *conceptually* with *Trump v. Hawaii*—or with *Dred Scott*, *Plessy*, and other anticanonical decisions the Court has formally banished to history. Instead, the majority articulated the concrete legal significance of overruling *Korematsu* as simply that “forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.”<sup>272</sup>

*Trump v. Hawaii*’s treatment of *Korematsu* is troubling even to some of *Korematsu*’s most outspoken critics. Between the Court’s cursory and benign account

266. *Id.*

267. *Id.* at 2447 (Sotomayor, J., dissenting).

268. *Id.*

269. *Id.* at 2423 (majority opinion).

270. *Id.* (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

271. *Id.*

272. *Id.*



of *Korematsu*'s reasoning and its refusal to acknowledge connectivity to law beyond its facts, the *Trump* majority's unusual move is viewed as one whose principal effect is rhetorical.<sup>273</sup> These critiques of *Trump v. Hawaii*'s handling of *Korematsu*, which were entirely missing from the calls for the *Aurelius* Court to overrule the *Insular Cases*, observe that there are "remarkable commonalities in the language and arguments – not the facts" – of *Trump* and *Korematsu*.<sup>274</sup> They observe that *Korematsu*'s legal significance runs deeper than the specific legality of wartime internment and that a meaningful reckoning with the case would affirmatively recast the judiciary's role in policing the extent to which generalized claims of national security or military necessity may encumber other guarantees enumerated in the Constitution. Neal Kumar Katyal, an outspoken critic of *Korematsu* long before he argued *Trump v. Hawaii* at the Supreme Court,<sup>275</sup> recently wrote the following of the majority's approach:

[W]hen given the chance to memorialize *Korematsu*'s lessons, the Court instead made almost every mistake in *Korematsu*'s playbook—it accepted the government's arguments at face value, deferred to the executive branch without ensuring that deference was warranted, and confined itself to a narrow review of the Proclamation, examining a "figmentary and artificial" case instead of the one actually before it. For these reasons, it will come as no surprise when, one day in the future, *Trump v. Hawaii* is eventually overturned. But let us hope that when that happens, the Court ends this line of cases for good, rather than resurrect it by another name.<sup>276</sup>

To Katyal and many others, it meant little for the Court to formally overrule *Korematsu* while remaining free to "recreate[] its reasoning under a different appellation."<sup>277</sup> By casting *Korematsu* as a relic, the *Trump* Court's approach suggests nothing to curtail future harms born of *Korematsu*'s reasoning and approach to the Constitution.

But the harm in the Court's approach is not just that it fails to address *Korematsu*'s fundamental problems. As Justice Sotomayor noted, this approach may

---

273. Anil Kalhan, *Trump v. Hawaii and Chief Justice Roberts's "Korematsu Overruled" Parlor Trick*, AM. CONST. SOC'Y (June 29, 2018), <https://www.acslaw.org/expertforum/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick> [https://perma.cc/6Y5K-SKPP].

274. Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641, 644 (2019).

275. See Katyal, *supra* note 264.

276. Katyal, *supra* note 274, at 656 (footnote omitted).

277. *Id.* at 643.



have opened the door to “redeploy[ing] the same dangerous logic underlying *Korematsu*” by swapping “one ‘gravely wrong’ decision with another.”<sup>278</sup> Here, the Court’s ability to revive and refashion *Korematsu*’s logic in the twenty-first century is potentially *furthered* by its symbolic but nonsubstantive rejection of a publicly reviled precedent. The decision to formally overrule *Korematsu* acquires separate value as rhetorical top cover for *Trump v. Hawaii*’s resulting conceptions of executive power, to say nothing of the purposes it might serve for a Supreme Court entertaining other precipitous moves dispensing with longstanding precedent.<sup>279</sup> Anil Kalhan pointedly suggests that the Court “sought to clothe a decision upholding Trump’s Muslim ban in the garb of purporting to ‘overrule’ *Korematsu*,” a rhetorical move that he likens to “judicial clickbait.”<sup>280</sup>

Whether or not that is a fair characterization, it is important to observe how many of *Korematsu*’s outspoken critics, who have elsewhere expressed the view that the case retains no viability as precedent, view the Court’s actual approach to overruling it not just as unhelpful, but enabling of the very harms they wished to curtail. Notwithstanding *Korematsu*’s showy public burial, many of that case’s fiercest critics believe the Supreme Court succeeded in faking its death.

Though there are important contextual differences, those urging the Court to chart an equivalent course for the *Insular Cases* are headed for equally rough and uncertain waters. That today’s commentary calling for judicial intervention to overturn the *Insular Cases* has offered little if anything in the way of a workable framework of remedies is cause for concern. Overruling the *Insular Cases* will mean little to those suffering under them if doing so fails to craft clear limitations on the political branches’ capacity to manipulate the territories’ liminal status – which *Aurelius* shows will remain possible regardless of whether the Court formally acknowledges that the Constitution “applies” *ex proprio vigore*. Still worse, a blind leap risks martyring negotiated promises, cultural recognition, and self-determination for a ceremonious recitation of what “everyone knows to be true”<sup>281</sup> – that the *Insular Cases* were wrongly decided – irrespective of what might follow.

---

278. *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting) (citing *id.* at 2423 (majority opinion)).

279. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM EDT), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/QG4D-VPJZ>].

280. Kalhan, *supra* note 273.

281. Transcript of Oral Argument, *supra* note 245, at 9 (Gorsuch, J.).

B. *Antiexceptionalism and Erasure: American Samoa in the Judicial Crosshairs*

The recent Tenth Circuit case *Fitisemanu v. United States*<sup>282</sup> provides an even-clearer window into just how underdeveloped these calls for the *Insular Cases*' precipitous judicial overthrow are.

*Fitisemanu* — a reboot<sup>283</sup> of a 2015 predecessor case, *Tuaua v. United States*<sup>284</sup> — is a suit by American Samoa-born residents of Utah seeking, among other relief, a declaratory judgment that “persons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment.”<sup>285</sup> The litigation arises from a unique feature of American Samoa's relationship to the United States. Unlike Puerto Rico, Guam, the U.S. Virgin Islands or the CNMI, where Congress extended birthright citizenship by successive legislative enactments over a nearly seventy-year period, American Samoa remains the only U.S. territory where birthright U.S. citizenship is not recognized.<sup>286</sup> Persons born in American Samoa are not born U.S. Citizens but U.S. “Nationals.”

In the territories, U.S. Citizens and U.S. Nationals have much in common. Neither has voting representation in Congress or for the President, both owe their allegiance to the United States, and both can live, work, and travel freely throughout the nation. However, the *Fitisemanu* plaintiffs face a range of practical and dignity harms unique to noncitizen-national status when residing in the mainland United States; unless they complete the naturalization process and pay the required fees, they cannot vote as residents of Utah, cannot run for elective federal or state office in Utah, cannot serve on juries, and are restricted from certain public-sector employment that is open only to U.S. citizens, for example.

---

282. 1 F.4th 862 (10th Cir. 2021).

283. In a recent interview, an attorney for the *Fitisemanu* plaintiffs recounted how the same state-side attorney who “c[ame] up with the idea” for the *Tuaua* case and located the *Tuaua* plaintiffs by “s[ee]king” people out directly in American Samoa and up in the states” also found the named plaintiff for *Fitisemanu*, who is a relative of another attorney in the case. Fanachu! Podcast, *Addressing America's Colonies Problem Through a Civil Rights Lens*, FACEBOOK, at 40:00-44:00 (Jan. 18, 2022), <https://www.facebook.com/events/d41d8cd9/addressing-americas-colonies-problem-through-a-civil-rights-lens/408877357693627> [<https://perma.cc/YX6R-7VEV>]. The American Samoa government has emphasized forum-shopping concerns in the subsequent *Fitisemanu* litigation. See *Insular Cases Resolution: Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 170th Cong. 42-43 (2021) [hereinafter *Insular Cases Resolution Hearing*] (statement of Del. Aumua Amata Coleman Radewagen, Member, H. Comm. on Nat. Res.).

284. *Tuaua v. United States*, 788 F.3d 300, 306-07 (D.C. Cir. 2015).

285. Motion for Summary Judgment and Memorandum in Support at 3, *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019) (No. 18-cv-00036).

286. See Cabranes, *supra* note 191, at 486.

At a surface level, the case is marketed as a direct analog to *Plessy*—a discrimination relegating a predominantly nonwhite community to a formally separate constitutional status. But what those marketing *Fitisemanu* as *Plessy* fail to mention is that every single one of American Samoa's elected leaders opposes judicial resolution of this question. Indeed, the American Samoa government intervened in the litigation to oppose judicial imposition of birthright citizenship, advancing a position that is backed not just by the government in its corporate capacity, but by *unanimous* resolutions of both houses of its legislature, its Governor, and its nonvoting Delegate to Congress.<sup>287</sup> The American Samoa government, which is separately pursuing legislative and administrative reforms to ease the path to naturalization for those born in American Samoa who wish to move to the U.S. mainland, has made clear that it sees judicial imposition of citizenship over the objections of its entire elected government as an anomalous act of judicial imperialism.<sup>288</sup> Such a ruling would, in their view, usurp the territory's ongoing efforts towards political self-determination, open the door to dispossession of their native lands to outsiders, and threaten legal recognition of their way of life.

Enter the *Insular Cases*. In the earlier *Tuaua* case, the D.C. Circuit declined to hold that people born in American Samoa are U.S. citizens by virtue of the Citizenship Clause, crediting American Samoa's concerns about how judicial imposition of birthright citizenship would threaten "social structures inherent to the traditional Samoan way of life, including those related to the Samoan system of communal land ownership."<sup>289</sup> To do so, the court surmised, would be "an exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa."<sup>290</sup>

---

287. See S. Con. Res. 37-3, 37th Leg., 2d Reg. Sess. (Am. Sam. 2021) (on file with author); Ausage Fausia, *Fono Passes Resolution Supporting Latest Fed Court Ruling on Birthright Status*, SAMOA NEWS (Aug. 9, 2021, 3:12 PM), <https://www.samoanews.com/local-news/fono-passes-resolution-supporting-latest-fed-court-ruling-birthright-status> [https://perma.cc/L936-55PH] (noting unanimous passage by American Samoa's House and Senate and support from American Samoa's nonvoting Delegate to Congress); *American Samoa Governor Writes to US Territory Counterparts over Citizenship*, RNZ (Mar. 30, 2021, 4:36 PM), <https://www.rnz.co.nz/international/pacific-news/439496/american-samoa-governor-writes-to-us-territory-counterparts-over-citizenship> [https://perma.cc/49AU-ZYFD] (describing the current Governor's position on the litigation).

288. Cf. Brief for Intervenor or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 34-35, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272) ("With statehood and nationhood foreclosed, American Samoa would be permanently precluded from equal voting representation at the national government level. Thus, if Plaintiffs-Appellants have their way, American Samoa will be rendered a permanent unequal territory of the United States. Ironically, under the guise of 'equality,' the judiciary would achieve what the U.S. Navy could not: the conquest of American Samoa.")

289. *Tuaua*, 788 F.3d at 309, 311.

290. *Id.* at 312.

However, in reaching that result, the D.C. Circuit also breathed life into the “sometimes contentious *Insular Cases*,” framing those cases as a necessary device for shielding the territories from “impractical and anomalous” applications of the U.S. Constitution.<sup>291</sup> The Supreme Court denied certiorari.

At the Tenth Circuit in *Fitisemanu*, a divided panel puzzled over how to reconcile, on the one hand, the “ignominious history . . . militating against application of the *Insular Cases*,”<sup>292</sup> whose purpose and reasoning are plainly “disreputable to modern eyes;”<sup>293</sup> and on the other hand, the realization that the “flexibility of the *Insular Cases*’ framework” creates room for courts “to preserve traditional cultural practices” and honor “the preferences of [I]ndigenous peoples, so that they may chart their own course.”<sup>294</sup> The Tenth Circuit decision, which produced three separate opinions, echoes *Tuaua* in that it proceeds from “grave misgivings about forcing the American Samoan people to become American citizens against their wishes.”<sup>295</sup> But unlike *Tuaua*, *Fitisemanu*’s dispositive holding does hinge on whether the *Insular Cases* remain good law. While the majority agreed that the *Insular Cases* are “not only the most relevant precedents, but also the ones that lead to the most respectful and just outcome,” the opinion immediately clarified that interpreting the text of the Citizenship Clause without any resort to the *Insular Cases* would command the same result.<sup>296</sup> The *Tuaua* court had concluded that “the scope of the Citizenship Clause, as applied to territories, may not be readily discerned from the plain text or other indicia of the framers’ intent, absent resort to the *Insular Cases*’ analytical framework.”<sup>297</sup> By contrast, the *Fitisemanu* court determined that “[c]onsistent historical practice

---

291. *Id.* at 306, 310. For this, the Court does not cite the *Insular Cases*, but a case that interprets the *Insular Cases*: *Reid v. Covert*, 354 U.S. 1 (1957). As discussed in Part V, *infra*, whether the “impractical and anomalous” standard actually belongs to the *Insular Cases* is open to debate. See *infra* note 452.

292. *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir. 2021) (typeface altered). Unsurprisingly, there is disagreement as to how the *Insular Cases* and Fourteenth Amendment’s Citizenship Clause interact. While some judges on the Tenth Circuit contend that the Citizenship Clause does not apply to U.S. territories because of those precedents—suggesting that the Court must either overturn the cases or declare that citizenship is “fundamental” under *Balzac*, *id.* at 878—others argue that the Citizenship Clause does not interact with the *Insular Cases* with respect to the question of whether it applies in American Samoa because that Clause “defines its own geographic scope,” *id.* at 899 (Bacharach, J., dissenting).

293. *Id.* at 870 (majority opinion).

294. *Id.* at 870-71 (typeface altered).

295. *Id.* at 874.

296. *Id.* at 877.

297. *Tuaua v. United States*, 788 F.3d 300, 306 (D.C. Cir. 2015) (typeface altered).

suggests this textual ambiguity be resolved so as to leave the citizenship status of American Samoans in the hands of Congress.”<sup>298</sup>

In some ways, the efforts to market *Fitisemanu* as a vehicle for overturning the *Insular Cases* go even further than those who asked the *Aurelius* Court to emulate what *Trump v. Hawaii* did with *Korematsu* and reach beyond the merits of a dispute that obviously does not turn on the symbolic ruling they ask for. Instead, they suggest that the Court should grant certiorari *for this very purpose*—over the same objections American Samoa raised just six years ago when the Court denied certiorari in *Tuaua* (which did rely on the *Insular Cases*), to say nothing of American Samoa’s additional forum-shopping concerns in the Tenth Circuit follow up.<sup>299</sup>

Looking more closely at the Tenth Circuit opinions in *Fitisemanu*, it is critical to appreciate how the majority framed the tension in the case. At the outset, Judges Lucero and Tymkovich highlight a friction between the “ignominious history . . . of the *Insular Cases*” and the “flexibility of the *Insular Cases*’ framework.”<sup>300</sup> This is not the same as asking whether the *Insular Cases* should be repurposed and retained, a question that their holding does not answer. What they are really framing is a more fundamental tension between (1) honoring territories’ prerogative to “chart their own course” out of a colonial condition in accordance with their own wishes and (2) arriving at a “[r]eputable” doctrinal result.<sup>301</sup> Indeed, they reach a result that neither repurposes the *Insular Cases* nor insists on a rigidly doctrinaire approach that deletes American Samoa’s agency from the equation.

Here, the *Fitisemanu* decision proves an important foil to one of *Aurelius*’s threshold analytical failures. The two judges in the majority—who did not agree about the doctrinal significance of the *Insular Cases* and whose decision apparently did not require them—framed the underlying tension in a way that required the Court to reckon with the legal developments and promises resulting from the nation’s overseas expansion. They required the Court to engage with the promises exchanged in the Deeds of Cession and the development of American Samoa’s own laws and institutions in arriving at its view of the controlling “historical practice” that ultimately decided the case.<sup>302</sup> And unlike the *Aurelius*

298. *Fitisemanu*, 1 F.4th at 877.

299. See Ponsa-Kraus, *supra* note 5, at 2537-38; Kimberly Strawbridge Robinson, *Gorsuch Call to Overturn ‘Rotten’ Cases Tested by New Appeal*, BLOOMBERG L. (Apr. 28, 2022, 12:18 PM), <https://news.bloomberglaw.com/us-law-week/gorsuch-call-to-overturn-rotten-cases-tested-by-new-appeal> [<https://perma.cc/7XTQ-ZTXJ>] (quoting Ponsa-Kraus as describing *Fitisemanu* as “exactly the opportunity the court needs to reconsider the doctrine and overrule it”).

300. *Fitisemanu*, 1 F.4th at 870 (typeface altered).

301. *Id.* at 870-71.

302. *Id.* at 877.

Court's warped account of an "unabated historical practice" that deletes all legal developments owing to overseas imperialism, they refused to substitute their analysis for readily available but misleading analogies to the Northwest Territory or Washington, D.C. Indeed, Judge Tymkovich's concurrence makes clear that the court's view of the "unbroken historical practice" controlling the case was not blind to institutional developments "over the past century," nor was it blind to the need to provide a mechanism for honoring "the wishes of the American Samoan people."<sup>303</sup>

Those insisting that *Fitisemanu* remains a vehicle for getting the Supreme Court to finally overthrow the *Insular Cases* follow in the path of *Aurelius*, erasing American Samoa's agency and insisting that we turn back the clock to unify and cohere the doctrine. Echoing *Aurelius*'s generalized but evasive antiexceptionalism, they assume that retethering American Samoa to the constitutional text more than a century after the fact is an unqualified triumph<sup>304</sup>—even as every one of American Samoa's democratically elected leaders is telling them it isn't.

Judge Bacharach's *Fitisemanu* dissent captures many of the problems with this mode of thinking. Judge Bacharach, who lacks constitutional authority to overturn the *Insular Cases*, strained to conclude that the Citizenship Clause—which predates the American Samoa Deeds of Cession—"unambiguous[ly]" applies to American Samoa, concluding that "[t]he Fourteenth Amendment realigned the Constitution's structure,"<sup>305</sup> and that "[s]ince colonial days, Americans understood that citizenship extended to everyone within the sovereign's dominion."<sup>306</sup> Whereas the majority opinion credits American Samoa's concerns that "imposition of birthright citizenship would be against their people's will and

---

303. Judge Tymkovich's concurrence is prescient in this regard. In his recent concurrence calling upon the Court to overturn the *Insular Cases* "in an appropriate case," Justice Gorsuch emphasized that ridding American law of these precedents is necessary in part to ensure that courts "employ legally justified tools" when they engage with the territories' intractable constitutional dilemmas. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring). Such tools, in his view, include "not just the Constitution's text and its original understanding but the Nation's historical practices (or at least those uninfected by the *Insular Cases*"). *Id.* As *Aurelius* makes plain, it is at this boundary line of relevant historical practice that orienting doctrine on path-dependent promises and expectations becomes essential. As Judge Tymkovich appeared to recognize in *Fitisemanu*, it cannot be that every legal development that has grown out of the *Insular Cases* framework is irretrievably "infected" on account of those cases' "rotten foundation." *Id.* at 1557; see *Fitisemanu*, 1 F.4th at 882-83 (Tymkovich, J., concurring).

304. See Ponsa-Kraus, *supra* note 5, at 2538 ("Any decision overruling the *Insular Cases* would be cause for celebration.").

305. *Fitisemanu*, 1 F.4th at 897 (Bacharach, J., dissenting).

306. *Id.* at 907.



would risk upending certain core traditional practices,”<sup>307</sup> Judge Bacharach sees these expressions of Indigenous opposition as largely irrelevant: “[t]he opposition of the American Samoan government does not, and cannot, affect the applicability of the Citizenship Clause to the natives of American Samoa.”<sup>308</sup> The dissent declares that “constitutional rights do not flicker with the practices of political majorities.”<sup>309</sup>

This framing, of course, blinds itself to the constitutional transformations born of overseas imperialism, which have caused much more than a “flicker” to the legal significance of U.S. citizenship in the territories. In the process of examining the constitutional and theoretical origins of American citizenship in fine detail, Judge Bacharach helpfully explains that “[t]he U.S. concept of citizenship originated in ancient Greece, where citizenship reflected membership *in the political body*: citizens were ‘defined by no other thing so much as’ voting,” and “[t]hrough this ancient concept of citizenship, [U.S. citizenship] remains tied to voting.”<sup>310</sup> While he is understandably concerned about the troubling disenfranchisement of the *Fitisemanu* plaintiffs as residents of Utah, his dissent fails to engage with how the link between voting and citizenship was severed and transformed for those *actually living in U.S. territories* in the wake of the *Insular Cases*.

Judge Bacharach’s *Aurelius*-style intervention, while ostensibly curtailing congressional manipulation of rights as the drafters of the Fourteenth Amendment intended, takes no stock of empire’s role in shaping constitutional doctrine. Those residing *in American Samoa* would remain wholly disenfranchised across all branches of our national government even if the Tenth Circuit had followed Judge Bacharach and imposed birthright U.S. citizenship on them. Like residents of Puerto Rico, who have had U.S. citizenship by birth since 1917, American Samoans would be no more enfranchised than they were one hundred years ago once given this new status.<sup>311</sup> Whether or not the framers of the Fourteenth Amendment intended for residents of yet-unacquired American Samoa to fall within the Citizenship Clause’s text, the transformed legal relationship between

307. *Id.* at 865 (majority opinion).

308. *Id.* at 906 (Bacharach, J., dissenting).

309. *Id.* at 904.

310. *Id.* at 901 (emphasis added) (quoting ARISTOTLE, *POLITICS* bk. 3, at 63 (Carnes Lord trans., Univ. Chi. Press 2d ed. 2013) (c. 350 B.C.E.)).

311. See 53 CONG. REC. 7472 (1916) (statement of Luis Muñoz Rivera, Resident Comm’r, Porto Rico) (“[Puerto Ricans] refuse to accept a citizenship of an inferior order, a citizenship of the second class . . . . Give us statehood and your glorious citizenship will be welcome to us and to our children. If you deny us statehood, we decline your citizenship, frankly, proudly, as befits a people who can be deprived of their civil liberties but who, although deprived of their civil liberties, will preserve their conception of honor, which none can take from them, because they bear it in their souls, a moral heritage from their forefathers.”).



citizenship, voting, and territorial status fundamentally realigns the normative desirability of that status in hindsight.<sup>312</sup> Now that there is no uncertainty about whether the granting of birthright citizenship to American Samoans would result in their automatic accession to voting rights in our national government, as it might have post-*Mankichi*,<sup>313</sup> the stakes of finally bringing American Samoans into this altered notion of “citizen” (now divorced from its historical connection to voting under the Federal Constitution, and in ancient Greece, for that matter) bear little resemblance to what they would have looked like at the signing of the Deeds of Cession in 1900 and 1904.

By framing the underlying constitutional problem as belonging to a purely doctrinal question of whether the Constitution’s text “applies,” courts have little hope of meaningfully curtailing the practical realities of the territories’ persistent status manipulation. Instead of orienting toward how judges bent the law of citizenship to limit Americans in the territories to an ambiguous and exceptional status – even when they bear the title “U.S. Citizen” – this approach is primed to symbolically repudiate territorial exceptionalism by finally handing over constitutional guarantees that have hollowed into “perfectly empty gift[s].”<sup>314</sup> These path dependencies cannot be ignored in evaluating the question of whether or not, as a matter of constitutional doctrine, the Citizenship Clause’s text “applies” more than a century after that question originally surfaced.<sup>315</sup> Turning back the clock to decide whether text applies – without considering how the significance of that text has been or will be changed – is a threshold failure to engage with the territories’ constitutional liminality in meaningful ways, paving the way for broken promises.

With an eye towards overseas imperialism’s unacknowledged path dependencies, it is not difficult to see why American Samoa’s elected leaders oppose judicial resolution of the citizenship problem so strongly, even if they might have

---

312. Ponsa-Kraus, *supra* note 193, at 1242; see *Gonzales v. Williams*, 192 U.S. 1, 12 (1904).

313. See *supra* Part III.

314. See Ponsa-Kraus, *supra* note 193, at 1224. Rose Cuison Villazor points the territories’ citizenship conundrum in a more helpful direction: “The overall point that [American Samoans] are making – that citizenship is not what they want – demonstrates the need to look more deeply into what citizenship represents.” Rose Cuison Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. 1033, 1044 (2022); cf. Hammond, *supra* note 18, at 1647–64, 1677–78 (observing that the disparities that accompany the territories’ second-class citizenship are an onramp to deeper questions about the future of U.S. citizenship more broadly).

315. Cf. Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2397–98 (2022) (“For generations, Western powers used 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 metropolises, cannot pursue arguments of unjust enrichment; or that they, having been treated like property, cannot now choose to transfer or sell their territory.”).

favored it a century ago. Attorney Charles Ala'ilima, co-counsel for the *Fitise-manu* plaintiffs, has written that when “American Samoa’s traditional leaders . . . transferred sovereignty over the islands to the United States” in 1900 and 1904, they “had very good reason to believe that after this event anyone born in American Samoa were citizens of the United States.”<sup>316</sup> However, once it is appreciated that a ruling in favor of birthright citizenship for American Samoa now – over a century later – carries little, if any, of the originally imagined upside for the legal rights or recognitions of American Samoans in American Samoa, the territory’s aversion to putting foundational questions of political self-determination before federal judges in the western United States comes into view. Why chance an *Aurelius*-style erasure of the promises in the Deeds of Cession when disenfranchisement of American Samoans moving to Utah can be remedied by modest administrative or legislative reforms?<sup>317</sup>

C. *The Legal Academy vs. The Unsophisticated Native Opposition: Fitise-manu v. United States*

To the extent that American Samoa’s concerns can be linked to a particular question of constitutional doctrine, the principal fear is that such a ruling – whether it overturns the *Insular Cases* or not – would throw open American Samoa’s relationship to equal-protection principles that could erode legal recognition of American Samoa’s land and culture as secured by the 1900 and 1904 Deeds of Cession, negotiated covenants between the United States and the islands’ paramount chiefs.<sup>318</sup> Today, the vast majority of land in American Samoa is owned communally through a traditional land-tenure system that predates western contact.<sup>319</sup> That system has a near total restriction on alienation to outsiders – most communal lands cannot be sold even if all those living on the land

---

316. *Case About the Right to Citizenship for People Born in U.S. Territories Heads to the U.S. Supreme Court*, V.I. CONSORTIUM (Jan. 4, 2022, 3:46 PM), <https://viconsortium.com/vi-us/virgin-islands-case-about-the-right-to-citizenship-for-people-born-in-u-s-territories-heads-to-the-u-s-supreme-court> [<https://perma.cc/8BE9-84N9>]; see Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, 60 AM. J. LEGAL HIST. 311, 329-39 (2020).

317. Daniel Aga, *Written Statement of the American Samoa Government on Behalf of the Honorable Lolo Matalasi Moliga, Governor of American Samoa*, at 6, U.N. Doc. CRS/2017/CRP.5/Rev.1 (May 2017).

318. Tutuila an Aunu'u Deed of Cession (April 17, 1900), <https://new.asbar.org/wp-content/uploads/attachments/cession1.pdf> [<https://perma.cc/GZ9G-3RS7>]; Manu'a Deed of Cession (July 16, 1904), <https://new.asbar.org/wp-content/uploads/attachments/cession2.pdf> [<https://perma.cc/5U4U-P3CG>].

319. LINE-NOUE MEMEA KRUSE, *THE PACIFIC INSULAR CASE OF AMERICAN SĀMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES* 136 (2018).

agree to do so, regardless of whether the potential buyer is Samoan or an outsider.<sup>320</sup> A smaller percentage of its land is owned in individual titles subject to blood-quantum restrictions preventing land alienation to non-Samoans.<sup>321</sup> An even smaller percentage is freely alienable to outsiders.<sup>322</sup>

Predictably, little of the news coverage or popular commentary on *Tuauua* or *Fitisemanu* engages with American Samoa's opposition to judicially imposed U.S. citizenship or the Indigenous interests that hang in the balance. Less predictably, those stateside academics and legal commentators who do notice them have been quick to dismiss their objections. For instance, Vladeck downplays the fact that "American Samoans have expressed concern that recognition of birthright citizenship would open the door to arguments that other constitutional provisions cannot be reconciled with some of American Samoa's unique legal traditions" by suggesting that the Indigenous leaders who articulate such fears have "misapplied the Supreme Court's precedents (which ask whether recognition of the right is impractical or anomalous from the federal government's perspective)."<sup>323</sup> He further dismisses those concerns on the ground that honoring them, as a general matter, "devalues the importance of constitutional rights in the territories."<sup>324</sup> Noah Feldman, while remarking in passing that "[c]oncern for the self-government of indigenous first peoples is legitimate," argued that the Supreme Court should have taken up this question over American Samoa's objections in *Tuauua* because "fundamental constitutional rights are at stake" and because "the equal protection clause of the 14th Amendment does follow the flag — and so it should already apply in American Samoa, regardless of whether the residents are citizens."<sup>325</sup> And Ponsa-Kraus has called American Samoans' concern that judicial intervention "would threaten their cultural practices" an "argument more emotionally than legally compelling, since the constitutional provisions that could

---

320. *Id.* at 179-80.

321. *Id.* at 169-70, 179-80.

322. *Id.* at 179-80.

323. Steve Vladeck, *American Samoans are the Latest Victims of These Ignorant Supreme Court Rulings*, MSNBC (June 18, 2021, 4:30 PM), <https://www.msnbc.com/opinion/american-samoans-are-latest-victims-last-century-s-racism-n1271341> [<https://perma.cc/7J5-7WFG>].

324. *Id.*

325. Noah Feldman, Opinion, *People of American Samoa Aren't Fully American*, BLOOMBERG (Mar. 13, 2016, 11:00 AM), <https://www.bloomberg.com/opinion/articles/2016-03-13/people-of-american-samoa-aren-t-fully-american> [<https://perma.cc/7LHC-6X4L>]; see Erman, *Status Manipulation and Spectral Sovereigns*, *supra* note 51, at 880 ("I cannot rule out the possibility that [judicial imposition of] such citizenship might draw further and unwelcome Supreme Court attention to American Samoa. But I judge the democratic imperative of universal citizenship to outweigh this risk, at least for now.").

threaten these practices, like the First Amendment's religion clauses, have nothing to do with birthright citizenship."<sup>326</sup>

---

326. Christina Duffy Ponsa, Opinion, *Are American Samoans American?*, N.Y. TIMES (June 8, 2016), <https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html> [<https://perma.cc/W2ME-KQR9>]. Ironically, some of the scholars who have credited the view that “[t]he citizenship that U.S. officials deemed too symbolically important to extend Puerto Ricans from 1899 to 1901 had come to be seen . . . as so hollow it was an insult” by the time the United States was willing to grant it in 1917 appear to support judicial imposition of birthright citizenship in American Samoa. ERMAN, *supra* note 188, at 134-35. Erman himself has coauthored op-eds calling for judicial imposition of birthright citizenship in American Samoa. Those writings, however, do not engage with or even mention American Samoa's intervention in the litigation, much less the substance of their concerns. In one such piece, Erman and Nathan Perl-Rosenthal flatten the dissensus around the litigation and simply describe American Samoans as “the last Americans . . . waiting to become citizens.” Sam Erman & Nathan Perl-Rosenthal, Opinion, *Not Another Dred Scott Case, Please*, CNN (Apr. 10, 2015, 6:13 PM), <https://www.cnn.com/2015/04/10/opinions/erman-rosenthal-american-samoans/index.html> [<https://perma.cc/55WP-DVN3>]. Ponsa-Kraus, who titled her recent review of Erman's book on U.S. citizenship in Puerto Rico, *A Perfectly Empty Gift*, has acknowledged that “even an affirmative answer [that the Citizenship Clause applies to American Samoa] would guarantee the inhabitants of the territories a U.S. citizenship devoid of full constitutional rights and equal representation” such that “[t]hey would remain, even then, almost citizens.” Ponsa-Kraus, *supra* note 193, at 1244. But she has also expressed the view that the Supreme Court “should hear the Tuaua appeal and clarify the scope of the Citizenship Clause once and for all” even in the face of American Samoa's “more emotionally than legally compelling” objections. Ponsa, *supra*.

This inclination to pay homage to the law of citizenship's colonial path dependencies when talking about Puerto Rico, while ignoring or downplaying those same implications as to American Samoa, is informed by other subtexts of the American Samoa litigation. The first orbits a concern shared by many in the four other territories that their present birthright citizenship arises not from the Constitution but from the statutes that originally conferred it. The principal fear is that if they are not *constitutional* citizens, Congress might someday be able to alter or revoke that citizenship status, such that a ruling that the Citizenship Clause applies to American Samoa would help calm those concerns. A recent press release reprinted in the *Virgin Islands Consortium* reports: “The American Samoan government has joined federal defendants in arguing that the question of citizenship is up to Congress. Meanwhile, current and former elected officials from Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands have argued . . . in the case that individuals born in the territories have a constitutional right to citizenship.” *Case About the Right to Citizenship for People Born in U.S. Territories Heads to the U.S. Supreme Court*, *supra* note 316. Observing the range of outside interests “looming over these [American Samoa] citizenship cases,” legal commentator Line-Noue Memea Kruse suggests that other territories' outsized influence in the Utah litigation portends “a form of inter-territorial hegemony.” Jennifer Sinco Kelleher, *American Samoa Culture Plays Role in US Citizenship Ruling*, U.S. NEWS & WORLD REP. (June 16, 2021, 2:06 PM), <https://www.usnews.com/news/politics/articles/2021-06-15/american-samoa-culture-plays-role-in-us-citizenship-ruling> [<https://perma.cc/VV4A-YWPC>]; cf. Ausage Fausia, *Fono Passes Resolution Supporting Latest Fed Court Ruling on Birthright Status*, SAMOA NEWS (Aug. 9, 2021, 3:12 PM) (noting a unanimous legislative resolution calling for outside interest groups to “cease disingenuously distorting in the federal courts and in national media the

In other words, these scholars argue that the American Samoans who hold these concerns – a group that happens to include every single one of American Samoa’s democratically elected leaders – do not understand constitutional law well enough to appreciate that they have nothing to fear from federal judges declaring that the text applies to them. Since the conventional doctrinal understanding of equal protection is (1) that the Clause applies equally to any “person” regardless of citizenship status and (2) that (in Feldman’s words) the Clause “should already apply” to American Samoa, what could go possibly go wrong from having federal judges declare that the text applies to them after 120 years of requiring American Samoa to shape its public institutions and discourse under different assumptions?<sup>327</sup> It is true, of course, that a ruling that the Citizenship Clause applies to American Samoa would not *necessarily* transform the facets of equal-protection law that stand to threaten Indigenous cultural recognition. But that statement is true primarily because this area of the law is so fundamentally indeterminate that no one can really say what the Court would or would not find relevant in scrutinizing American Samoa’s various Indigenous protections – with or without U.S. citizenship.<sup>328</sup> A closer look at the constitutionality

---

history and meaning of federal jurisprudence . . . defining the status and rights of Americans born in territories” and inviting those groups supporting the *Fitisemanu* lawyers to visit American Samoa to meet with its elected and traditional leaders and its people). A second, though less apparent, aim orbits the untested theories about how overturning the *Insular Cases* or constitutionalizing citizenship would affect the United States’s obligation to grant statehood to, or ability to de-annex, territories. Ponsa-Kraus, who in the wake of the 2020 U.S. presidential election declared in the *New York Times* that “[t]he time for Puerto Rican statehood is now,” has also expressed the view that “guaranteed U.S. citizenship requires statehood.” Christina D. Ponsa-Kraus, Opinion, *Make Puerto Rico a State Now*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/puerto-rico-state.html> [<https://perma.cc/FW69-AA85>]; Ponsa-Kraus, *supra* note 193, at 1243. She theorizes that the “Reconstruction Constitution” – and thus, the Citizenship Clause – was intended to establish a link between “citizenship, rights, and statehood.” Ponsa-Kraus, *supra* note 193, at 1255 (emphasis added).

327. Feldman, *supra* note 325.

328. *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, *supra* note 59, at 1697 (“With regard to *Tuaua*, for example, is it true that the extension of constitutional birthright citizenship would necessitate the further application of the Equal Protection Clause? And if so, would the Samoan laws in question necessarily fail to survive judicial review? Certain strands of case law lend support to both sides on this question.”); see also Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 103, 124 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (“Perhaps this situation might be altered if territorial residents were judged to be Fourteenth Amendment birthright citizens, not citizens granted that status by Congress. It is not evident, however, why treating their citizenship as constitutionally based would raise the bar against accommodationist policies.”); Cassandra Burke Robertson & Irina D. Manta, *Integral Citizenship*, 100

of other Indigenous land-alienation restrictions shows that courts are not in agreement about whether these restrictions count as a racial or political classification, what level of scrutiny they should command, or the weight of the government's interest in cultural preservation.<sup>329</sup> And it is entirely unclear how the Court would distinguish American Samoa's two different types of land-alienation protections (the blood-quantum restrictions and the matai communal-land ownership restrictions) for the purposes of equal-protection doctrine.

Those who downplay American Samoan leaders' concerns about federal judicial intervention as legally unsophisticated are short sighted on numerous fronts. For one, it is obvious that judges and litigants are elsewhere embracing the view that citizenship status is material to equal-protection claims predicated on discrimination against a territory or its residents.<sup>330</sup> That aside, they do not engage in meaningful depth with how these same concerns have been playing out in other territories, particularly in the CNMI. As Rose Cuison Villazor's work highlights, even if we accept that the constitutionality of Indigenous land-ownership frameworks escaped constitutional challenge thirty years ago despite CNMI's statutory birthright citizenship, the manner in which some of those protections have been upheld leaves them susceptible to challenge on account of background changes in political economy.<sup>331</sup> Cuison Villazor observes that even though the Court of Appeals for the Ninth Circuit upheld the CNMI's blood-quantum restrictions on land ownership in the 1980s, its ruling suggests that there is reason to fear that those laws may be under threat in the twenty-first century even without a major judicial intervention on the *Insular Cases*:

---

TEX. L. REV. (forthcoming 2022) (manuscript at 47), <https://ssrn.com/abstract=3907512> [<https://perma.cc/GY25-JXVB>] (noting that "at this time there is no affirmative legal authority" that commands a change to the equal protection rubric for Indigenous recognitions on account of citizenship and that "without precedent to this effect, there is no way to know" whether American Samoa's leaders' concerns will materialize).

329. Compare *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (1980) (subjecting alienation restrictions in American Samoa to equal-protection analysis), with *Wabol v. Villacrusis*, 958 F.2d 1450, 1463 (9th Cir. 1990) (holding that the Northern Mariana Islands' constitutional restrictions on alienation are not subject to equal-protection analysis); see also AGUON, *supra* note 52, at 63-67 (discussing the author's experience litigating *Davis v. Guam* and observing contextual nuance across Native Hawaiian, Native American, and other Indigenous efforts to obtain legal recognition).

330. At the recent oral argument in *United States v. Vaello Madero*, Justice Sotomayor questioned whether it is appropriate to apply the rational-basis standard of review towards discrimination against residents of Puerto Rico in public benefits when "Puerto Rico residents are a politically powerless minority" and "Puerto Ricans are U.S. Citizens." Transcript of Oral Argument, *supra* note 245, at 29; see also *id.* at 32 ("[W]hy one would say that it's rational to treat—a group of people, of citizens, differently from other citizens on the mainland when the need is the same." (emphasis added)).

331. Cuison Villazor, *supra* note 52, at 146-52.



Assuming such a lawsuit [renewing challenges to CNMI's land-alienation restrictions] is brought, at least one question that could be raised is whether the basis of the protection of culture and lands articulated twenty-five years ago . . . under the *Insular Cases* is still applicable today. That is, how might traditional claims to culture be addressed in light of changes that have taken place . . . including the presence of new hotels, abandoned buildings, and a new casino on lands that have been leased or occupied for decades by nonindigenous groups?<sup>332</sup>

Cuison Villazor concludes that the survival of these land protections – enshrined in Article XII of CNMI's negotiated Covenant to join the United States – is an imminent concern, even with circuit precedent on the books insulating that law from equal-protection challenges.<sup>333</sup> That concern is elevated for American Samoa, which does not have any baseline federal precedent upholding the constitutionality of its land-alienation laws. In CNMI, transformations to the background political dynamics – many of which have been ushered in slowly by collateral changes in federal law – pose a real threat, even if not an immediate one. Cuison Villazor warns that “[t]he Ninth Circuit's reasoning that highlights the connection between indigenous peoples and land seems out of step with contemporary use and value of lands in the CNMI.”<sup>334</sup> Perhaps for these reasons, Cuison Villazor recently offered only “qualified support” for a recent congressional resolution urging the Supreme Court to overturn the *Insular Cases*, observing American constitutional law's lack of conceptual terrain in which to ground “unique laws that are designed to promote the political and cultural rights of the people of Northern Marianas descent” and adding that the *Insular Cases* “may be seen in a different light . . . from the perspective of individuals who negotiated the political agreement known as the ‘Covenant’ that established the commonwealth of the Northern Mariana Islands.”<sup>335</sup>

As explained by American Samoa's representative before a United Nations committee in 2018, judicial imposition of birthright citizenship would create “political complications with a devastating impact on our land tenure system and

---

332. *Id.* at 148; see also *Insular Cases Resolution Hearing*, *supra* note 283, at 34 (statement of Rose Cuison Villazor, Professor, Rutgers School of Law) (noting that CNMI Article XII has also been expanded since *Wabot*).

333. *Insular Cases Resolution Hearing*, *supra* note 283, at 33-34 (statement of Rose Cuison Villazor, Professor, Rutgers School of Law); see Act of Mar. 24, 1976, Pub. L. No. 94-241, § 805, 90 Stat. 263, 275 (CNMI Covenant).

334. Cuison Villazor, *supra* note 52, at 148.

335. *Insular Cases Resolution Hearing*, *supra* note 283, at 34-35 (statement of Rose Cuison Villazor, Professor, Rutgers School of Law).

usurpation of our rights to determine the political format we wish to adopt.”<sup>336</sup> It is significant that American Samoa emphasizes the purely “political” complications that would result from such a judicial intervention, beyond whatever direct doctrinal significance citizenship status carries within the universe of equal-protection law. Viewing judicially imposed birthright citizenship through Cuison Villazor’s work on land-alienation laws, it follows that such a ruling would naturally alter the trajectory of American Samoa’s immigration patterns and demographics in ways that would prove eventually relevant under *Wabot* or other accommodationist precedents.<sup>337</sup> This is a sophisticated recognition of the second- and third-order effects that judicially imposed birthright citizenship would likely have on a longer-term horizon:

The real danger is not equal protection itself. It’s the toxic mix of free-market profiteering, artificially altered demographics, and legally sanctioned access that could set us down the slippery slope or deliver that fatal blow. We must exercise all the due diligence we can to prevent this from happening.<sup>338</sup>

The legal scholars quick to dismiss American Samoa’s concerns focus on the fact that those leaders have not offered any compelling legal—rather than “emotional”—argument for why a citizenship ruling that overturns the *Insular Cases* and applies the Clause to American Samoa would affect the viability of their Indigenous protections vis-à-vis equal protection.<sup>339</sup> But in their singular focus on how “citizenship” and “scrutiny” are doctrinally linked in Supreme Court precedent, they fail to see that American Samoa’s leaders do not defend their position in the language of doctrine because the problem they are seeking to protect against is not doctrinal—it is more the deeply embedded liminality of status manipulation.<sup>340</sup>

---

336. *Aga*, *supra* note 317, at 6.

337. *See, e.g.*, *Wabot v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990); *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (1980).

338. *Aga*, *supra* note 317, at 10.

339. They also uniformly frame American Samoa’s concerns against their own view of what they think is “unlikely” to happen, ignoring that likelihood comprises only one dimension of American Samoa’s assessment of legal risk. *See, e.g.*, Burke Robertson & Manta, *supra* note 328 (manuscript at 50-53); *supra* notes 323-326 and accompanying text.

340. To date, only one legal commentator has meaningfully engaged with American Samoa’s objections to judicial imposition of citizenship and observed the extent to which they are linked to other constitutional dilemmas facing Federal Indian law. Garrett Epps, *Can the Constitution Govern America’s Sprawling Empire?*, ATLANTIC (Dec. 20, 2015), <https://www.theatlantic.com/politics/archive/2015/12/can-the-constitution-govern-americas-sprawling-empire/421389/>

Furthermore, American Samoa's unique relationship to federal law reflects not only a deeply sophisticated understanding of the political and doctrinal threats, but a sensitivity to institutional dynamics. The history of American Samoa's legal development reveals deft navigation not just of the delicate relationship between American Samoa's land-tenure system and the equal-protection *principles* that stand to threaten it—but of the particular institutional arrangements that bring those principles within orbit. This helps to explain how and why the territory has successfully resisted federalization of its court system and immigration policy—indeed, American Samoa is the only place under the American flag that does not correspond to a federal judicial district, and the only place that maintains substantial local control over immigration.<sup>341</sup> That deliberate distance is part of a vastly understudied, institution- and procedure-sensitive strategy that has been essential to American Samoa's ability to resist forcible imposition of conformity with potentially assimilative devices in the Anglo-American legal tradition. This has not been easy or entirely successful. As described above, the “vast majority” of American Samoa's land is communally owned. The qualifier is necessary because the rest has been chipped away through the introduction of foreign property concepts like adverse possession.<sup>342</sup>

Indeed, the American Samoa government's position that the birthright-citizenship litigation “pose[s] an existential threat” to their self-determination and way of life is hardly an “emotional” argument.<sup>343</sup> In minimizing or caricaturing these concerns, these efforts to retether American Samoa to the Fourteenth Amendment's “original understandings” more than a century after the Deeds of Cession possesses a twisted irony: that those carrying the mantle of securing

---

[<https://perma.cc/Y23E-DNL8>]. The commentators and advocates who dismiss these complicating features of the dispute unduly obscure the agency of American Samoa in its own story, masking the sophistication of legal and political strategies that its leaders have adopted to keep the Deeds of Cessions' promises intact. In this way, it is possible to appreciate and engage with the legal dimensions of their position even if American Samoa does not articulate a particular doctrinal understanding or employ the vocabulary of American constitutional-law doctrine. Valeria Pelet del Toro has made similar observations about social movements in Puerto Rico. See Pelet del Toro, *supra* note 2, at 795-96 (noting how Vieques Island-related protests against the U.S. Navy focused on dignitary concerns and human-rights sensitivities); *id.* at 818 (discussing legal strategies declining to engage with the U.S. federal-court system); *id.* at 833-34 (describing how lawyers from the Puerto Rico Legal Project and Institute Puerriqueño articulated clear, non-doctrinal goals when taking on legal representations).

341. See DELA CRUZ, *supra* note 243, at 28-30 (recounting the CNMI's local control over immigration prior to 2006).

342. See MEMEA KRUSE, *supra* note 319, at 54-58, 179-80.

343. Aga, *supra* note 317, at 7-8.

constitutional protections to the territories may actually become the agents of their irreversible dispossession.<sup>344</sup>

A full accounting of these path-dependent interests lies beyond the scope of this Article,<sup>345</sup> as do the many nuances of the American Samoan citizenship question, the unique relationship between American Samoa and the federal

---

344. See Intervenor Defendants-Appellants' Opening Brief at 27, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017 & 20-4019) (contending that judicial "imposition of a mandatory compact of U.S. citizenship, directly conflicting with the will of the American Samoan people, therefore serves as a particularly egregious . . . 'exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa'" (quoting *Tuaua v. United States*, 788 F.3d 300, 312 (D.C. Cir. 2015))); cf. Rolnick, *supra* note 245, at 2758 (arguing that the Reconstruction Amendments' weaponization as a tool for undermining American law's protection of Indigenous peoples is an absurdity that results "when legal categories are restricted and unmoored from their historical purposes").

345. In addition to land-alienation laws and shared interests in self-determination and recognition of federal territorial agreements, some of the specific interests or cultural practices that have come before federal courts include the composition of local government under the CNMI Covenant, see *Rayphand v. Sablan*, 95 F. Supp. 2d 1133 (D. N. Mar. I. 1999), *aff'd sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000), procedural mechanisms for an Indigenous plebiscite in Guam, see *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019), efforts to establish a Virgin Islands constitution in what will soon be the territory's sixth attempt at a constitutional convention, see generally *Bryan v. Fifth Revision Const. Convention*, No. CA 2012-097, 2012 WL 4929170, at \*2 (D.V.I. Oct. 17, 2012) (referencing the U.S. Department of Justice's objections to the legal viability of the document produced by the Fifth Convention), varied claims to cultural practice, see, e.g., *Hernandez-Gotay v. United States*, 985 F.3d 71, 80 (1st Cir. 2021) (upholding federal cockfighting ban), and indigenous fishing rights, see *American Samoa v. Nat'l Marine Fisheries Serv.*, 822 F. App'x 650 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2797 (2021), just to name a few. This Article declines to canvass the territories' contemporary cultural and political landscape to commodify individual cultural practices that may be relevant, either as a way of measuring the stakes of this debate or as a way of implying that it is more relevant to American Samoa than it is to the U.S. Virgin Islands or Puerto Rico. See generally *Cuison Villazor*, *supra* note 52 (observing that "culture is not static" and that attempting to "freez[e]" a particular view of cultural practice invites harms); Letter from Leiataua Charles V. Ala'ilima, Att'y, Ala'ilima and Assocs. P.C., to Raúl M. Grijalva, Chair, H. Comm. on Nat. Res. & Bruce Westerman, Ranking Member, H. Comm. on Nat. Res. (May 26, 2021), <https://docs.house.gov/meetings/II/II00/20210512/112617/HHRG-117-II00-20210512-SD2324.pdf> [<https://perma.cc/R2KU-AGZ9>] ("There [is] no unifying set of laws defining *fa'a Samoa*, nor is there a single ultimate authority to determine what it is or what rules it follows."). Guam, the U.S. Virgin Islands, and American Samoa are all engaged in a robust public dialogue about potentially drafting new constitutions (the U.S. Virgin Islands and American Samoa have already approved conventions), which may seek certain rights or recognitions that those territories have yet to articulate formally in a legal setting. To the extent this Article orients on federal territorial agreements or promises, it does so by contemplating that the general question of their legal significance matters as much as the possibility of *new agreements* (which may seek formal recognition of new interests or rights not yet asserted) as it does to those already in existence. See *infra* Part V.

courts,<sup>346</sup> and the doctrinal underpinnings of Indigenous land-alienation laws.<sup>347</sup> They are mentioned here only to demonstrate that judges, as well as those who implore them to revise the past harms born of the *Insular Cases*, largely fail to reckon with them.<sup>348</sup>

Instead of engaging with these wrinkles or working to develop a framework for managing them, the prevailing tendency is to do what the *Aurelius* Court did—sweep them under the rug. Those who push for applying the *Korematsu* approach to the *Insular Cases* or otherwise insist that “applying” long-withheld constitutional text in 2022 is an unqualified good either ignore or downplay complicating factors about which there can be significant dissensus within and across the five territories.<sup>349</sup> Of course, the lack of engagement with complicating perspectives may also reflect other factors, such as a lack of Pacific Islands voices in the American legal profession and legal scholarship, American public-interest law’s selective focus on these questions as they affect Puerto Rico, and perhaps a perception that advocates would be working against their clients’ or their own interests by alerting the Court to the significant contestations over what to do about the problems of territorial exceptionalism.<sup>350</sup> It is easier to focus on the near-universal agreement that the *Insular Cases* are indefensibly anchored in theories of racial inferiority and “disreputable to modern eyes.”<sup>351</sup> Whatever its explanation, this discourse can and must move forward.

---

346. It is significant that American Samoa remains the only U.S. territory that does not have a federal court and exists outside any federal judicial district. Cf. MEMEA KRUSE, *supra* note 319, at 76 (highlighting the unusual status of American Samoa as the only unincorporated and “unorganized” overseas territory).

347. Scholarly work that captures Indigenous perspectives across these areas represents a significant gap in contemporary constitutional-law scholarship and is urgently needed. Cf. Susan K. Serrano, *Why the Insular Cases Should Be Taught in Law School*, 29 J. GENDER, RACE & JUST. 396 (2018).

348. *But see* Hueter v. Kruse, No.21-00226-JMS, 2021 WL 5989105, at \*5, \*18 (D. Haw. Dec. 17, 2021); *American Samoa v. Nat’l Marine Fisheries Serv.*, No. 16-cv-00095-LEK, 2017 WL 1073348 (D. Haw. Mar. 20, 2017).

349. See H. Nat. Res. Comm. Democrats, *Full Committee Hearing—Insular Cases Resolution*, YOUTUBE (May 12, 2021), [https://www.youtube.com/watch?v=\\_ZYBMHLn1mM](https://www.youtube.com/watch?v=_ZYBMHLn1mM) [<https://perma.cc/8YMU-HCFS>] (capturing a range of territorial perspectives on a proposed House resolution urging the Supreme Court to overturn the *Insular Cases*).

350. Cf. Erman, *Status Manipulation and Spectral Sovereigns*, *supra* note 51, at 828-46 (critiquing American Samoa’s opposition to judicially imposed citizenship but limiting its engagement with American Samoan perspectives to elected leaders’ federal-court findings).

351. *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir. 2021).

D. *Developing the Undertheorized Insular Cases-Plessy Parallel*

1. *Drawing from Plessy, but not from Brown?*

Rather than theorize a tenable way forward that assures recognition of these path-dependent promises, contemporary calls for judicial intervention on the *Insular Cases* and territorial exceptionalism tend to narrow their focus to historical and doctrinal parallels between the *Insular Cases* and other anticanonical cases that have been overturned—namely *Plessy*, and now, *Korematsu*. The marketing of the *Insular Cases* as “the next *Plessy*” spotlights a number of striking commonalities between the Incorporation Doctrine and “separate but equal.”<sup>352</sup> For one, the same core group of Justices forming the *Plessy* majority fashioned the prevailing views in the opinions that comprise the Court’s holding in *Downes v. Bidwell*, the most famous of the *Insular Cases* that gave birth to the Incorporation Doctrine (albeit through a concurring opinion that would eventually be adopted by the Court years later).<sup>353</sup> Both controlling opinions were written by Justice Brown roughly five years apart, with notable dissents in both instances by Justice Harlan.<sup>354</sup> Both bear the mark of extralegal principles grounded in race inferiority, fashioning purposive yet formalistic regimes of second-class citizenship wholly divorced from the text of the Constitution. Essential to the contemporary call for the *Insular Cases* overthrow is thus an associative account of *Downes* “as a basis for Congress to maintain discriminatory laws that treat residents of the territories as second-class citizens, much as *Plessy* did for laws that discriminated against African Americans.”<sup>355</sup>

Within this paradigm of civil rights and antidiscrimination law, comparisons linking *Downes* and other *Insular Cases* to *Plessy* and *Korematsu* are apt and important. But they are of little value if they are not carried to their next logical station: the robust scholarship surrounding the judicial overturning of these anticanonical cases. This Article urges scholars and advocates to move beyond these useful historical and doctrinal explorations of the Court’s parallel histories of “separate but equal” to confront the critical-legal scholarship on *Brown v. Board of Education*. Such scholarship asks important questions about *how* an anticanonical precedent was overturned, other paths not taken, and what the precedent meant to those who suffered under it.

---

352. See, e.g., Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, HARV. L. REV. BLOG (Mar. 28, 2018), <https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy> [<https://perma.cc/6CL2-RSSD>].

353. These Justices are Brown, White, Shiras, and Gray.

354. *Downes v. Bidwell*, 182 U.S. 244, 248, 287 (1901); *id.* at 375 (Harlan, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896); *id.* at 552 (Harlan, J., dissenting).

355. Cepeda Derieux & Weare, *supra* note 39, at 286.



A rather obvious starting point is the work and legacy of Derrick Bell, which offer deep dives into the range of complexities surrounding *Brown*'s gestation and afterlife. Bell explores the range of consequences—both intended and unintended—that flow from the Court's chosen approach to overturning *Plessy*, and by extension, choices legal advocates made along the way. Bell, whose work evaluates the real-world significance of *Brown* in light of his extensive experience working to enforce the local court orders incident to the decision, offers a range of discrete lessons concerning impact litigation and judicial intervention, observing that the *Brown* Court's "school desegregation decision has achieved a far loftier place in legal history than is justified based on its failure to reform the ideology of racial domination that *Plessy* represented."<sup>356</sup> Bell's work also looks beyond jurisprudence to underappreciated domains shaping the legal work that led to the Court's overthrow of *Plessy*. For instance, he reveals how legal ethics, as well as the culture of civil rights lawyering, contributed to tensions between the material interests of those affected by school segregation and the idealism, psychology, or funding motivations of their elite lawyer-advocates.<sup>357</sup>

In a famous essay offered in the form of a hypothetical dissent to *Brown*, Bell offers a critique that calls to mind both Katyal and Justice Sotomayor's problems with how *Trump v. Hawaii* supposedly overruled *Korematsu*:

The majority's decision to overturn *Plessy* is inadequate because it systematically glosses over the extent to which *Plessy*'s stark formalism participated in the consolidation of American racism. Rather than critically engaging American racism's complexities, the Court substitutes one mantra for another . . . Rewiring the rhetoric of equality (rather than laying bare *Plessy*'s racist underpinnings and consequences) constructs American racism as an eminently fixable aberration.<sup>358</sup>

Bell's scholarship draws an entirely different sort of through line between *Plessy* and the *Insular Cases*—one that runs right through the framing problem on dis-

---

356. Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. REV. 1053, 1065 (2005).

357. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512-13 (1976) ("The quest for symbolic manifestations of new rights and the search for new legal theories have too often failed to prompt an assessment of the economic and political condition that so influence the progress and outcome of any social reform improvement . . . The risks . . . increase dramatically when civil rights attorneys, for idealistic or other reasons, fail to consider continually the limits imposed by the social and political circumstances under which clients must function even if the case is won.")

358. Derrick A. Bell, *Dissenting*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185, 198 (Jack M. Balkin ed., 2001).

play in *Aurelius* and in *Trump v. Hawaii*. It considers in concrete terms how judicial intervention might have otherwise been fashioned to achieve the ends that motivated the legal campaign leading up to *Brown*, suggesting that “[r]ealistic rather than symbolic relief for segregated schools will require a specific, judicially monitored plan designed primarily to promote educational equity.”<sup>359</sup> He then constructs a hypothetical framework that the court might have used to police education equality in detail.<sup>360</sup> For all the connections already opened between *Plessy* and *Downes*, those concerned with the future of territorial exceptionalism have no excuse for not capturing the many lessons offered on the successes and shortcomings of judicial intervention in *Brown*.<sup>361</sup>

---

359. *Id.* at 196-99.

360. *Id.*

361. These observations concerning advocates' high-level failures to carry the *Plessy* parallel forward to engage with the many lessons of *Brown* are fruitful terrain for exploring various rights/power critiques—especially when evaluated against the inherent limitations of employing the *Plessy-Brown* comparison as a paradigm in which to ground legal recognition of the territories' various Indigenous-rights interests. Cf. Vladeck, *supra* note 323 (opining that declining to apply the Citizenship Clause to American Samoa would “fundamentally devalue[] the importance of constitutional rights in the territories,” without applying any indigenous-rights framing to that proposition). This Part, while largely centered on distorted individual-rights-based framings that threaten path-dependent recognitions of native lands and culture, is not intended as any direct commentary on rights, their determinacy or indeterminacy, or what methods lawyers and social movements should or should not embrace in pursuing social change. How to best position advocacy to mobilize against harms born of the *Insular Cases* or territorial exceptionalism is an entirely separate question from how to shepherd judicial engagement with those harms once they have found their way into the courtroom. Recent work in critical legal studies underscores the pressing need for deeper exploration of whether and how prevailing critiques of rights properly map onto the problems of territorial exceptionalism that are overlaid with diverse race, ethnicity, and indigeneity dimensions. See Pelet del Toro, *supra* note 2, at 801-09. Similarly, the web of interests in the *Fitise-manu* litigation (e.g., the diverging interests between the individual Samoan-born plaintiffs, the American Samoa Government, and the Samoan diaspora, along with the considerable involvement in the case by other territorial governments and stateside public-interest law), present considerable opportunities for scholarship on movement lawyering, the legal profession, and the relationship between Indigenous-rights movements and the few elite public-interest law organizations who presently take an interest in this area. See generally Bell, *supra* note 357 (exploring this tension in the context of school-desegregation litigation); Fausia, *supra* note 287 (noting a unanimous resolution denouncing particular stateside public-interest organizations' lack of dialogue with or connection to impacted communities in American Samoa). In short, as Pelet del Toro's recent work illuminates, critical legal studies has much to gain from more sustained engagement with the law of the territories—especially in the Pacific Islands context. Cf. GREG ABLAVSKY, FEDERAL GROUND 12-15 (2021) (unearthing dynamics of federal law and accompanying “rights-talk” as a shared site of contestation among Natives, white settlers, and other constituencies in the early American territories, and observing that each “dragooned” federal claims-making to secure their interests, whether to “confront[] possibly

## 2. *The Insular Cases-Plessy Parallel's Inherent Limits*

Still more important are the voluminous lessons from Federal Indian law about the danger of failing to evaluate these questions outside *Brown's* antisegregation paradigm, in which federal courts take center stage. As Maggie Blackhawk notes, Federal Indian law “leads public law to a very different set of principles in the context of minority protection.”<sup>362</sup> A robust discourse surrounds the friction that sometimes arises in Indian law between that antidiscrimination paradigm and tribes’ collective rights in self-government and cultural preservation—a discourse that was uniformly ignored by the parties, amici, commentators, and every opinion in both *Aurelius* and *Fitisemanu*.

Even the most cursory attention to this adjacent context would reveal that the endeavor to cast the *Insular Cases* entirely within the mold of *Plessy* is fraught. As Blackhawk observes, not only does the history of colonialism and dispossession of native lands “offer[] different, yet equally important, lessons about how to distribute and limit governmental power;” it is also frequently the case that “[i]ntegrationist . . . frameworks like that of *Brown* are feared in Indian law, rather than celebrated.”<sup>363</sup> Noting that those frameworks and their rhetoric “have long been used as a tool to further the colonial project against Native peoples,” both directly as an instrument “of dispossession” and as a force “to disrupt the power of tribal governments,”<sup>364</sup> Blackhawk argues that “[t]he judiciary, long viewed as the ideal branch to empower in order to protect minorities, has been devastating to Indian law.”<sup>365</sup> Indeed, contemporary efforts to diminish tribal sovereignty and erase special federal recognitions for tribes like the Indian Child Welfare Act—efforts that trace back to some of the same lawyers behind *Tuaua*

---

profound loss” in the absence of alternative legal recognitions or to “chance[] enormous gain”); Maggie Blackhawk, *On Power and the Law: McGirt v. Oklahoma*, 2021 SUP. CT. REV. 367, 374-76 (2020) (linking the success of native movements to power-based approaches that are “distinct from movements organized around rights”); Lin, *supra* note 191, at 1282 (“[L]itigation is not a practical primary avenue for achieving meaningful progress in the near future for the Territories.”).

362. Blackhawk, *supra* note 201, at 1790.

363. *Id.* at 1793, 1798. Blackhawk also appears to quarrel with framing *Korematsu* as an aberration or relic: “*Korematsu* . . . continued a common practice of federal concentration camps and was not an outlier case attributable to the exigencies of war. *Korematsu* should not comprise the sole mention in our canon of the inherent dangers of unchecked national power in the context of war and race.” *Id.* at 1797.

364. *Id.* at 1798.

365. *Id.* at 1799.

and *Fitisemanu*<sup>366</sup>—is awash in rhetoric that likens solicitude for Indian tribes to “separate-but-equal.”<sup>367</sup> Addie Rolnick’s contribution to this *Yale Law Journal* Special Issue takes an even broader view of what this portends, foreseeing that aggressive constitutional litigation in the territories—litigation that has passed below the radar of even the many Indian-law scholars and advocates who are

---

366. For example, Matthew D. McGill, a Gibson Dunn attorney who has been centrally involved in the litigation seeking to overturn the ICWA, also represents the *Fitisemanu* plaintiffs. See *Episode 5: Pro Bono*, THIS LAND, at 06:20-24:00 (Sept. 13, 2021), <https://www.crooked.com/podcast/5-pro-bono> [<https://perma.cc/XU8N-FPQT>] (discussing McGill’s extensive pro bono involvement in ICWA litigation, and quoting Kevin Washburn, Dean of the University of Iowa College of Law, as describing this litigation as a “stalking horse” in its attempt to use equal-protection arguments to erase sovereignty interests and Indigenous-rights protections that have stood in the way of gaming and energy interests the firm represents in other contexts); *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 518 (N.D. Tex. 2018) (listing McGill as counsel for plaintiffs), *aff’d in part, rev’d in part sub nom.* *Brackeen v. Haaland*, 994 F.3d 249, 265 (5th Cir. 2021) (same); *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1156 (D. Utah 2019) (same), *rev’d*, 1 F.4th 862 (10th Cir. 2021) (same). Both *Brackeen* and *Fitisemanu* are at the door of the U.S. Supreme Court, which granted certiorari in the former on February 28, 2022. See *Docket for Nos. 21-376, 21-377, 21-378, 21-380*, SUP. CT. U.S. (2022), <https://www.supremecourt.gov/docket/docketfiles/html/public/21-376.html> [<https://perma.cc/VPM7-6JRN>] (listing McGill as counsel of record for respondents); see also Hans A. von Spakovsky, *The Good Guys Will Finally Get Paid by Guam*, HERITAGE FOUND. (Apr. 11, 2019), <https://www.heritage.org/crime-and-justice/commentary/the-good-guys-will-finally-get-paid-guam> [<https://perma.cc/22LD-HKW3>] (describing how Gibson Dunn represented a nonnative resident of Guam in his successful challenge to overturn an indigenous plebiscite registry, noting that “Guam’s elected officials . . . resemble segregationists of the Old South” for attempting to hold an indigenous vote on self-determination). Although this Article cannot engage with them in meaningful depth, commentators have largely not engaged with the range of outside constituencies showing interest in the American Samoa birthright-citizenship question. A recent congressional hearing on the *Insular Cases* makes clear that the question of the Fourteenth Amendment’s application to American Samoa—the only U.S. territory currently without birthright citizenship—is viewed as fruitful terrain among those who wish to tilt at *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), a contemporaneous decision foundational to birthright citizenship for essentially all persons born within the United States, including the children of immigrants. See House Nat. Res. Comm. Democrats, *supra* note 349, at 1:42:10-1:42:35, 1:43:30-1:44:10 (suggesting that it would be “not appropriate” for Congress to urge judicial action on the *Insular Cases* in a way that fails to include other “racially based decisions” such as *Wong Kim Ark* (statement of Dr. Peter S. Watson, President and CEO, Dwight Group, Former White House Director of Asian Affairs, National Security Council)).

367. See, e.g., George Will, *The Indian Child Welfare Act Puts Identity Politics Above Children’s Safety*, NAT’L REV. (Sept. 3, 2015, 12:00 AM), <https://www.nationalreview.com/2015/09/indian-child-welfare-act-overturn> [<https://perma.cc/DM96-G43E>] (“It has been a protracted, serpentine path from *Plessy v. Ferguson* (1896) and ‘separate but equal’ to today’s racial preferences. The nation still is stained by the sordid business of assigning group identities and rights. This is discordant with the inherent individualism of the nation’s foundational natural-rights tradition, which is incompatible with ICWA.”).

mobilizing against these same arguments in other types of litigation<sup>368</sup> – may be a new proving ground for legal strategies that seek to not only refashion the Reconstruction Amendments’ “race jurisprudence to prevent recognition of Indigenous rights,” but to carve a “newly strengthened vision of colorblindness” that will eventually boomerang to “further chip away at the rights of non-Indigenous minorities.”<sup>369</sup>

At the heart of the Supreme Court’s troubled history with Indian law is the seeming tension between the assimilative force of formal equality ideals and the Court’s perpetually wavering recognition of tribal sovereignty.<sup>370</sup> As for the American Samoan intervenors in *Fitisemanu*, Indian law is marked by threshold ambiguities concerning both the source and scope of federal power over Indian affairs. This widely manipulable ambiguity frequently forces Indian communities into a “double bind” when weighing exercises of their sovereignty and when arguing before federal courts. In the words of Angela Riley, Indian communities often “must continue to defend a system that produces inequities in order to stave off any further encroachment” of their tenuous sovereign recognition.<sup>371</sup> Because so many “questions remain as to whether and to what extent tribal governments are constrained by the Bill of Rights or comparable restrictions,” as

368. See Rolnick, *supra* note 245, at 2736 (noting that “when the en banc Fifth Circuit considered [the constitutionality of the ICWA in] *Brackeen*, 486 tribes, 59 tribal organizations, 26 states, the District of Columbia, 77 federal legislators, 31 leading child-welfare organizations, and 3 groups of legal academics filed amicus briefs defending the law” while “[i]n contrast, the territorial cases went almost unnoticed”). Rolnick’s work presciently illuminates the significance of forthcoming constitutional litigation regarding U.S. territories on account of its capacity to proceed “[o]ff the radar of Indigenous-rights and racial-justice lawyers” who are better mobilized in other settings. *Id.* at 2659 (internal citation omitted). She gestures towards cases involving Indigenous Pacific Islanders not recognized as Indians – such as Native Hawaiians, chamorus, and American Samoans – as a particularly attractive substrate for “hon[ing] . . . doctrinal weapon[s] in the cultural and geographic shadows of American law.” *Id.* at 2659 & n.21.

369. *Id.* at 2755.

370. *Id.* at 2722–28 (exploring juridical erasure of Indigenous peoples through legal approaches that employ the “Reconstruction Amendments as colonizing agents”); see also Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1166 (2010) (“Basic constitutional values and interpretive principles . . . militate against any false dichotomy that would undermine the principles of equality and respect on which both [equal protection and tribal rights] are based.”).

371. Angela R. Riley, *Native Nations and the Constitution: An Inquiry into “Extra-Constitutionality,”* 130 HARV. L. REV. F. 173, 176 (2017); cf. Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV L. REV. F. 1, 1–2 (2005) (“American Indian nations find themselves in a double bind. If they fail to exercise their retained sovereign powers, the Supreme Court leaves them alone, but in so doing they rob themselves of the ability to govern themselves . . . If they exercise their sovereign powers and begin to achieve the[] long-sought goals [that self-governance can achieve], the Supreme Court reins them in, worried about the effects of tribal sovereignty on . . . non-Indians . . .”).

well as “how inherent tribal sovereignty relates to the power of Congress to modify tribal rights,” tribes – and now American Samoa – have been forced onto a tightrope between invoking rigid constitutionalism as a shield against state-government or congressional domination and embracing arguments that sound in accommodating culture or autonomy in “extraconstitutional” zones.<sup>372</sup> Indeed, it should come as no surprise to find a recognition of the difficulties that federal judicial review has posed for Indian tribes at the surface of American Samoa’s discourse on birthright citizenship and land tenure.<sup>373</sup>

As with the law of territories, this dilemma does not belong to any particular doctrinal idea. Indeed, the source and scope of federal power over Indian affairs has, over the past two centuries, migrated both in and out of the Constitution’s text, giving muddled meaning to devices frequently misapprehended as “extraconstitutional” or “plenary” power. Thus, the core dilemmas “knocking at the door of federal Indian law and demanding to be answered”<sup>374</sup> are akin to those the *Aurelius* Court refused to acknowledge in determining the relationship between territorial governments, the Appointments Clause, and Article III’s historical practice. As I discuss in Part V, it is critical that any judicial engagement with the law of the territories hold a conversation with these features of Federal

---

372. Riley, *supra* note 371, at 177. This helps to explain why American Samoa officials have publicly endorsed the status of noncitizen national as “a unique first-class status,” see Fili Sagapolutele, *Lt Gov Testifies During Congressional Hearing Involving Citizenship Issues*, SAMOA NEWS (May 13, 2021), <https://www.samoanews.com/local-news/lt-gov-testifies-during-congressional-hearing-involving-citizenship-issues> [<https://perma.cc/P9BB-4575>], and have sounded alarm at the idea of judicial interventions that seek to “usurp the power of the U.S. Congress” on the view that the territories are “represented” in that body by nonvoting delegates, see Fili Sagapolutele, *Lemanu Urges Territories to Support Am. Samoa’s Self-Determination Claims Citizenship Case “Seeks to Usurp the Power of the U.S. Congress,”* SAMOA NEWS (Mar. 29, 2021), <https://www.samoanews.com/local-news/lemanu-urges-territories-support-am-samoas-self-determination> [<https://perma.cc/U7AA-KW98>]. The double bind forces them to deny the harms owing to their disenfranchisement in defense of their right to self-determination, even as that disenfranchisement and federal discrimination undermines their self-determination. See *Shadow Citizens: Confronting Federal Discrimination in the U.S. Virgin Islands*, *supra* note 16 (detailing the impact of federal-benefits discrimination and disenfranchisement on U.S. Virgin Islanders, who are often forced to leave the territory for medical or disability reasons); see also Berneta Akin, *USVI Population Shrank 18 Percent Since 2010*, ST. CROIX SOURCE (Oct. 29, 2021), <https://stcroixsource.com/2021/10/29/usvi-population-shrank-18-percent-since-2010> [<https://perma.cc/BGV3-Q7PB>] (indicating that the U.S. Virgin Islands’ population declined eighteen percent between 2010 and 2020).

373. See, e.g., Aga, *supra* note 317, 9-10 (“Some have argued, there is little to worry about – that the laws already exist to protect our lands, even saying that losing our lands will never happen. But from the perspective of the people who have the most at risk and the most to lose, there is a great deal of *historical evidence* that says otherwise. What happened to the Native Americans? . . . We understand our US constitutional rights are limited. But for now, we prefer the compromise that limits . . . risk to Samoan lands.”).

374. Riley, *supra* note 371.



Indian law—while also acknowledging the limits to their comparison. This is just as much a reason for Indian law scholars to begin paying closer attention to what is happening in cases like *Aurelius* and *Fitisemanu*, as they prove that the constitutional dilemmas attending constitutionalism and promise keeping in Indian law are not *sui generis* to the degree many have assumed.

In more practical terms, Blackhawk sees the limits of Reconstruction's race-dominant minority-rights paradigm—the dominant paradigm in American legal doctrine and pedagogy—as requiring that “[d]ebates over the role of the judiciary and judicial review should look beyond antidiscrimination law and the paradigmatic case of slavery and Jim Crow segregation in order to better articulate the Court’s role as arbiter of our constitutional values,” adding that “[m]uch of federal Indian law is absent from the constitutional law canon because much of it exists outside the courts.”<sup>375</sup> This points to still more adaptable lessons for those advancing calls for judicial intervention to curtail territorial exceptionalism and overturn the *Insular Cases*; for instance, that some theorists believe Indian law’s *Brown v. Board* moment was a legislative—and not judicial—intervention.<sup>376</sup> To be sure, this barely scratches the surface of what those calling for judicial intervention on territorial exceptionalism and the *Insular Cases* stand to

---

375. Blackhawk, *supra* note 201, at 1799.

376. *Id.* at 1802 (“Like slavery and Jim Crow segregation, colonialism also experienced its moment of constitutional redemption following dormancy. After decades of studying the effects of the reservation era on Native peoples and, especially, Native children, federal Indian law saw temporary salvation in its analogue to *Brown*: the Indian Reorganization Act of 1934 (IRA). . . . Pursuant to the IRA, the United States would recognize inherent tribal sovereignty as established by the Marshall Trilogy and facilitate local control by Native Nations. Like the ebb and flow of the years following *Brown*, the decades following the IRA have seen their successes and failures. But recent years have followed the familiar pattern of post-Civil Rights Era social reform—specifically, that of legislative successes soon subject to judicial dismantling. There are deep lessons in the parallels between these two histories that have yet to be explored. *However, despite the similarities between federal Indian law and our constitutional history of slavery and Jim Crow, there is as much to learn from their differences as from their similarities.*” (emphasis added)).

gain from more sustained engagement with the contours of Federal Indian law.<sup>377</sup>

377. Cuison Villazor's doctrinal work on the Pacific Islands' land-alienation laws is prescient in this respect. See Cuison Villazor, *supra* note 52, at 131-32 ("By contrast [to tribes], courts have struck down laws that were designed to promote the rights of Native Hawaiians and other non-American Indian indigenous groups because such laws were deemed to have had a racially discriminatory purpose. Such a narrow racial-versus-political binary suggests that traditional frameworks may be inhospitable to territorial Indigenous peoples' cultural or political claims because they are not federally recognized tribes.").

Posing particularly interesting challenges for navigating between race- and indigeneity-centered paradigms in the territorial context is the early administration of the U.S. Virgin Islands, which today is more than three-quarters Black, and which experienced dramatic episodes of white-Black racial unrest during the early years of U.S. administration by the Navy Department. The period immediately following U.S. acquisition of the islands from Denmark in 1917 was marked not only by policymaking grounded in racial stereotyping, but by regular episodes of racial violence and widespread fear of lynching. See J. ANTONIO JARVIS, BRIEF HISTORY OF THE VIRGIN ISLANDS 141 (1938) ("[T]he Negroes felt the heel of race prejudice [through physical violence and intimidation from the dawn of naval rule]."); WILLIAM W. BOYER, AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS 114-17 (2d ed. 2010) (recounting the numerous clashes between U.S. military personnel and native Virgin Islanders from 1917 into the 1920s). The Navy's own policies of racial exclusion (including but not limited to in-service segregation, an all-white officer corps, and a complete bar on all Black enlistments of any kind between 1919 and 1932) ensured that "an all-white service . . . ruled over an overwhelmingly Negro population." BOYER, *supra*, at 114; Dan C. Goldberg, *How the U.S. Navy's First Black Officers Helped Reshape the American Military*, TIME (May 19, 2020, 3:00 PM EDT), <https://time.com/5838843/us-navy-integration-world-war-ii> [<https://perma.cc/qq42-aadr>]; see *African American Sailors in the U.S. Navy: A Chronology*, NAVAL HIST. & HERITAGE COMMAND (Jan. 14, 2022, 9:05 EST), <https://www.history.navy.mil/browse-by-topic/diversity/african-americans/chronology.html> [<https://perma.cc/C65V-ZUP8>] (noting that the U.S. Navy suspended enlistment of American Americans from 1919 to 1932 "because officers believed that Filipinos made better messmen than Blacks"). The Navy Department's decision to select exclusively white Southerners as the islands' first six governors added to the appearance of a formal "institutionaliz[ation]" of "[w]hite supremacy . . . imposed on the predominantly black population of the Virgin Islands through military occupation." BOYER, *supra*, at 118, 119; *cf. id.* at 118 ("[A] leader of Virgin Islanders in New York City[] complained: 'Surely there must be some Northern white men in the Navy Department. Why this insistence on Southern whites for the governorship of the islands?'" (quoting Casper Holstein, *Shell Game in the Virgin Islands Exposed by Mr. Casper Holstein*, NEGRO WORLD (Sept. 19, 1925))). Indicative of the ways in which U.S. policy overlaid Jim Crow onto administration of the Virgin Islands is the manner in which Congress studied the social and economic conditions of the islands, which, unlike for other territories, relied on special commissions of scholars from Black colleges on the theory that they had special "knowledge of Negro educational institutions." See Letter from James E. Gregg, Principal, Hampton Inst. & Robert R. Moton, Principal, Tuskegee Inst., to Curtis D. Wilbur, U.S. Sec'y of the Navy (Jan. 30, 1929), *reprinted in* TUSKEGEE-HAMPTON COMM., REPORT OF THE EDUCATIONAL SURVEY OF THE VIRGIN ISLANDS (1929). Racial judgments overlay the history of federal support for these islands. In 1933, Congress spent more on a government-owned St. Thomas hotel—a hotel that refused to serve Blacks guests, see Eric Williams, *Race Relations in Puerto Rico and the Virgin Islands*, 23 FOREIGN

\* \* \*

For all its critique of those who urge imminent judicial intervention on the *Insular Cases*, this Article does not suggest that the problems of territorial exceptionalism and status manipulation exist beyond the judicial sphere. And it is not an endorsement of the idea that retaining the *Insular Cases* is the best or only way to preserve Indigenous cultural interests or processes of self-determination. There is no viable defense of the *Insular Cases* in their second century—qualified or otherwise—because no good-faith theory of the Constitution can abide their reasoning. This regime’s supposedly temporal and developmentalist logic is a fiction stretched far past plausibility. The territories’ liminal status quo must be banished to history if the Constitution’s commitments to republican government are to be taken seriously.<sup>378</sup> For this reason, the CNMI’s delegate to Congress presciently foresees that those “holding onto these racist *Insular Cases* as a way of keeping [land-alienation laws] afloat, they may be holding onto an anchor, not a life preserver.”<sup>379</sup>

But as David Alan Sklansky presciently wrote of *Korematsu* two years before *Trump v. Hawaii* overturned it, “[j]udicial overruling is not the only way that a decision can lose its status as ‘law.’”<sup>380</sup> If the goal is to actually resolve the territories’ present colonial condition, then *Aurelius* gives us every reason to believe that inviting federal judges to shoot first and ask questions later is a terrible strategy. Turning the page requires us to think much harder about the tangled web of interests that have surfaced in overseas imperialism’s wake and the many possible post-*Insular Cases* worlds that the judiciary could fashion, including those where territorial exceptionalism finds a new home within the text.<sup>381</sup>

---

AFFS. 308, 314-15 (1945)—than it did on the individual budgets for health, education, or sanitation for the island’s entire native population during the following year, see ANNUAL REPORT OF THE GOVERNOR OF THE VIRGIN ISLANDS 10 (1933) (noting Congress appropriated \$60,000 for hotel accommodations); ANNUAL REPORT OF THE GOVERNOR OF THE VIRGIN ISLANDS 6 (1934) (noting the yearly expenditures for education, health, and public works were all less than \$50,000 each). See generally Brief of the National Disability Rights Network et al., *supra* note 18 (highlighting and contextualizing the history of race discrimination that has overlaid the territories’ exclusion from Social Security programs from their inception).

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

379. *Insular Cases Resolution Hearing*, *supra* note 283, at 41 (statement of Rep. Gregorio Sablan, Member, H. Comm. on Nat. Res.).

380. David Alan Sklansky, *Japanese Internment Case Not “Good Law,”* STAN. L. SCH. BLOGS (Nov. 18, 2016), <https://law.stanford.edu/2016/11/18/korematsu-is-not-good-law> [<https://perma.cc/U678-D679>].

381. This will also require engaging with the many ideas about the nature of the judicial role. See, e.g., José A. Cabranes, *Closing Remarks on Judge Juan Torruella*, 130 YALE L.J.F. 852, 855 (2020) (raising the “counterpoint of judicial self-restraint” in reference to his account of Judge Levin

By the same token, it requires deeper thinking about how to ask courts to appreciate and honor those interests without licensing permanent and unreviewable colonialism or talismanic constitutional opt-outs. Judge Lucero's highly idealized picture of the *Insular Cases*' framework—namely, its capacity to be “repurposed” in the name of “respect” for local autonomy and Indigenous self-determination—is frequently weaponized as a justification for blind judicial acceptance of relationships plainly rooted in invidious discrimination.<sup>382</sup> Similarly, the unqualified position advanced by the American Samoan government that “the political branches rather than the courts are best positioned to consider the wishes of the American Samoan people” may be of use in the instant litigation,<sup>383</sup> but ignores the plain institutional reality that accompanies the territories' disenfranchisement in the nation's political process.<sup>384</sup>

#### V. IMPROVING JUDICIAL ENGAGEMENT WITH “THE LAW OF THE TERRITORIES”—WITH OR WITHOUT THE *INSULAR CASES*

In view of *Aurelius*'s lessons, the final Part of this Article proposes a conversation with Federal Indian law as a starting point for getting judges to reckon with—rather than delete—the complexity of the territories' colonial condition under the Constitution and the diversity of interests caught up in it. This analytical posture is a prerequisite to conceptualizing the role of courts, if any, in supervising the territories' course out of that colonial condition, and it will continue to matter whether or not the *Insular Cases* are soon to be ceremoniously overturned.<sup>385</sup>

---

Campbell's remarks at a 1985 conference “that ‘Puerto Rico's long-term political future will be shaped by forces over which the federal courts have little control. We work within the existing political framework, whatever it may be at the time.’”; cf. *AGUON*, *supra* note 52, at 67 (“[F]irst we have to know—way down deep in our moonpit—that the imagination that got us into this mess will not be the one to get us out of it.” (footnote omitted)); Efrén Rivera Ramos, *The Insular Cases: What Is There to Reconsider?*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE*, *supra* note 328, at 29, 36-37.

382. *Fitisemanu v. United States*, 1 F.4th 862, 870, 874-75 (10th Cir. 2021); cf. Erman, *Status Manipulation and Spectral Sovereigns*, *supra* note 51, at 813 (“Academic critics of colonialism should not allow the uncertainty that status manipulation produces to induce their silence.”).

383. Brief of Intervenor Defendants-Appellants Opposing Rehearing En Banc at 13, *Fitisemanu*, 1 F.4th 862 (No. 20-4017) (quoting *Fitisemanu*, 1 F.4th at 880 n.26).

384. Cf. Rolnick, *supra* note 245, at 2758 (“While the realities of litigation require different groups to advance arguments to distinguish themselves from other groups, this defensive posture should not stand in the way of efforts to reimagine law.”).

385. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring) (“I hope the day comes soon when the Court squarely overrules them.”); *id.* at 1560 n.4 (Sotomayor,

The Article concludes by exploring what is meant by “the law of the territories,” the phrase that was chosen to unite this Issue but—perhaps befitting of the legal regime it refers to—has no settled meaning. It concludes that the term is useful for moving forward vague calls for the *Insular Cases*’ symbolic overthrow to workable theories of how to resolve the liminal and second-class existence for which those cases are an imperfect shorthand.

A. *The Territories and Promise-Keeping: Holding Conversation with Federal Indian Law*

Often viewed as “exceptional,” “an anomaly,” or a constitutional “backwater,” Federal Indian law is immersed in its own struggle for the future of the Constitution’s tenuous but unbroken footholds for functional sovereignty, self-government, cultural accommodation, and protection of Indigenous lands from continued public and private encroachment.<sup>386</sup> Constitutional law’s commitment to these protections has endured since the Marshall Court, despite unceasing efforts to paint them as a target in the crosshairs of the Constitution’s more recognizable dual federalism and formal equality ideals.<sup>387</sup>

Of critical significance is that the substance of these protections is defined by promises between tribes and the federal government—not just formal treaties, but agreements occupying a range of procedural forms over the nation’s 250-year history. As observed in a recent *Harvard Law Review* commentary:

Recent Supreme Court cases do suggest that tribal nations have cause for hope. The addition of Justice Gorsuch seems to have brought about a reorientation to the Court’s approach to [F]ederal Indian law. Other commentators have noted that Justice Gorsuch has tilted the Court toward a jurisprudence of promise keeping, and, perhaps, might be willing to overrule poorly reasoned past precedents in the field. For now, tribes can celebrate Justice Gorsuch’s recognition that “[o]n the far end” of a

---

J., dissenting) (“I share the concurrence’s ‘hope [that] the Court will soon recognize that the Constitution’s application should never depend on the government’s concession or the misguided framework of the *Insular Cases*.” (typeface altered)).

386. Blackhawk, *supra* note 201, at 1794–95, 1874.

387. For background on the so-called “Marshall Trilogy” of Indian law cases and its various interpretations, see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1577–78 (1996).

nearly 1,000 mile “ostensibly voluntary” Trail of Tears “was a promise.”<sup>388</sup>

In the territories, the contemporary conversation on the legal significance of the American Samoa Deeds of Cession, CNMI Covenant, and Puerto Rico Constitution – and of the new constitutions and agreements that are being discussed in U.S. Virgin Islands, American Samoa, and Guam – is woefully disconnected from Indian law, where renewed emphasis on promise keeping is indeed a “re-orientation” from previous approaches reminiscent of *Aurelius*.<sup>389</sup>

*McGirt v. Oklahoma*, handed down just days after *Aurelius* and a near-perfect foil to the latter’s analytical failures, is glaringly absent from today’s conversation on the territories.<sup>390</sup> Where *Aurelius* tacitly erased the promises the United States has exchanged with Puerto Rico and other overseas territories,<sup>391</sup> *McGirt* recognized that erasure itself is part of the problem. *McGirt* – which considered the contemporary operation of promises exchanged between the Muscogee (Creek) Nation and Congress in 1832 – meaningfully and rigorously confronted the uncomfortable history of promise breaking in Indian Country.<sup>392</sup> Looking far beyond the confines of any particular doctrinal concept, *McGirt* framed its textualism through a much broader recognition of intrusions into native lands and self-government abetted by the Court.

In no uncertain terms, the Court acknowledged that its Indian law jurisprudence, in all of its shapeshifting doctrinal expressions, has “follow[ed] a sadly

388. Case Comment, *United States-Muscogee (Creek) Nation Treaty—Federal Indian Law—Disestablishment of Indian Reservations—McGirt v. Oklahoma*, 134 HARV. L. REV. 600, 609 (2020) (quoting *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459–60 (2020)).

389. Sarah Krakoff describes this blunt antiexceptionalism in Indian law as “lurch[ing] towards norms that appear to smooth over American Indian law’s frayed edges, only to tear holes in doctrinal and interpretive fabric elsewhere.” Sarah Krakoff, *The Renaissance of Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 48 (2006). This describes perfectly the majority’s approach to Article III in *Aurelius*.

390. 140 S. Ct. 2452 (2020). Erman opens an extremely valuable conversation between the territories and Indian Country by linking the role of courts and historical erasure in the territories to the example of the United States’ western expansion and the “heads we win, tails you lose” approach to native status in Indian affairs. Erman, *Truer U.S. History*, *supra* note 51, at 1213–15. Erman’s book review was published just a few months after *McGirt* and unfortunately does not engage with the decision.

391. See *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1679 (2020) (Sotomayor, J., concurring) (“One would think the Puerto Rican home rule that resulted from that mutual enterprise might affect whether officers later installed by the Federal Government are properly considered officers of Puerto Rico rather than ‘Officers of the United States’ subject to the Appointments Clause.” (quoting U.S. CONST. art. II, § 2, cl. 2)).

392. The majority opinion begins: “On the far end of the Trail of Tears was a promise.” *McGirt*, 140 S. Ct. at 2459 (emphasis added).



familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye.”<sup>393</sup> Decrying that history as a regrettable chapter during which Congress was allowed to break “more than a few of its promises” with total impunity, the Court now emphatically “reject[s] that thinking.”<sup>394</sup> *McGirt*, hailed as one of the most remarkable victories by an Indian tribe at the U.S. Supreme Court in that institution’s history, portends a sea change in Federal Indian law textualism and sends a powerful message to the other branches of government.<sup>395</sup>

Justice Sotomayor’s concurring opinion in *Aurelius* approaches this mode of thinking, shifting focus away from the *Insular Cases* (which receive no mention), and directing it towards a framework that begins with recognition of promises concerning autonomy, self-government, and sovereign attributes – but she fails to link it to the Indian-law paradigm. Where the *Aurelius* majority narrows its gaze, Sotomayor addresses territorial exceptionalism and manipulable ambiguity at a higher level of generality, declaring broadly that “territorial status should not be wielded as a talismanic opt out of prior congressional commitments or constitutional constraints.”<sup>396</sup> Importantly, Sotomayor foregrounds the “commitments,”<sup>397</sup> suggesting that a substantive law of promise keeping could potentially fill the space that the incorporation framework’s “flexibility” currently supplies for Indigenous cultural accommodation and other unique territorial interests.<sup>398</sup> She reads the FOMB’s constitutional license as extending only as far as it comports with the agreement that underlies Puerto Rico’s Constitution, noting that the federal government “relinquished its control over [Puerto Rico’s] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States.”<sup>399</sup>

Discarding the “truism” that “one Congress cannot bind a later Congress,”<sup>400</sup> Justice Sotomayor essentially seeks to carve out new and enduring legal recognition for federal territorial agreements that procedurally fall short of a treaty. She does this by centering on the promises themselves, rather than beginning

---

393. *Id.* at 2482.

394. *Id.* at 2462, 2482.

395. See Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963 (2022).

396. *Aurelius*, 140 S. Ct. at 1671 (Sotomayor, J., concurring).

397. *Id.*

398. *Fitisemanu v. United States*, 1 F.4th 862, 870-71 (10th Cir. 2021).

399. *Aurelius*, 140 S. Ct. at 1673 (Sotomayor, J., concurring) (citation omitted).

400. *Id.* at 1677-78 (citing *Dorsey v. United States*, 567 U.S. 260, 274 (2012)).

with the question of formal sovereign status.<sup>401</sup> Regardless of how Puerto Rico fits into the Court's conception of the original meaning of the Appointments Clause, Sotomayor emphasizes her skepticism that "the Constitution countenances this freewheeling exercise of control over a population that the Federal Government *has explicitly agreed to recognize as operating under a government of their own choosing, pursuant to a constitution of their own choosing.*"<sup>402</sup>

Unfortunately, Justice Sotomayor's opinion—like the *Aurelius* majority's handling of Article III—failed to exit its Puerto Rico-dominant frame. Accordingly, the opinion has been met with pointed criticism concerning its supposed political valence. Erman observes within Sotomayor's opinion the potential for further status manipulation on the idea that it seeks to confer a "previously unarticulated, . . . quasi-sovereign constitutional status" on Puerto Rico.<sup>403</sup> Ponsa-Kraus accuses Sotomayor more concretely of "[t]aking] sides in the decisive political debate over Puerto Rico's future," suggesting that "[e]ither she does not know the debate exists, which is inconceivable, or she does and ignores it, which is unforgivable."<sup>404</sup>

---

401. By centering promise keeping and "commitments" over formal sovereignty, the opinion offers a somewhat different angle from Justice Breyer's dissent in *Puerto Rico v. Sanchez Valle*, which Justice Sotomayor joined and which does explore a parallel between Puerto Rico and Indian tribes on the question of whether Puerto Rico is a separate sovereign for Double Jeopardy purposes. 579 U.S. 59, 84-87 (2016) (Breyer, J., dissenting); cf. Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 472 (1992) ("If the Congress agrees to a negotiated compact or covenant with an island community, does that agreement serve to restrict the power of subsequent Congresses to legislate under the Territory Clause?").

402. *Aurelius*, 140 S. Ct. at 1683 (Sotomayor, J., concurring) (emphasis added).

403. Erman, *Truer U.S. History*, *supra* note 51, at 1240.

404. Ponsa-Kraus, *supra* note 7, at 101, 107. Ponsa-Kraus's critique is fair to the extent that it questions Justice Sotomayor's decision to pronounce something with such broad political implications in a concurring opinion with limited relevance to the narrow merits of *Aurelius*. Delaney and Ponsa-Kraus have previously described the debate over the legal significance of the Puerto Rico Constitution as an impasse between two well-defined camps: "If Puerto Rico is a separate sovereign, then Puerto Ricans have *already* realized the basic goals of self-determination and, pursuant to Public Law 600, have structured a binding, sovereign-to-sovereign bilateral union with their former imperial overlord. On this view, perfecting Puerto Rico's status merely requires addressing a few remaining flaws in the arrangement—for example, finding a way to compensate for the island's continuing lack of representation in the federal government. But if Puerto Rico remains a territory, then it remains a colony, and self-determination has not been achieved. . . . Commonwealthers hold the former view; statehooders and *independentistas* the latter. And there they have stood, staring each other down, neither side blinking, for nearly seventy years." Delaney & Ponsa-Kraus, *supra* note 187. Exploring any constitutional alternative to this understanding is a sensitive but important task that inevitably risks advantaging one side or the other within this existing two-way gridlock. Cf. José A. Cabranes, *Judging in Puerto Rico and Elsewhere*, 49 FED. LAW. 40, 40-46 (2002) (discussing the

It would have benefited Justice Sotomayor — as well as those who have criticized her — to explore this idea beyond the specific context of Puerto Rico.<sup>405</sup> She could have explored, for example, whether such an approach could produce a different legal understanding of the covenant underlying the nation's other territorial "commonwealth": the Northern Mariana Islands.<sup>406</sup> She could have asked what this would mean for territories like Guam and the U.S. Virgin Islands, who do not yet have constitutions or negotiated equivalents and whose pursuit of such agreements has been constrained by executive-branch objections.<sup>407</sup> She could have examined what this commitments-oriented framework might mean for American Samoa, which simultaneously (1) admits the voluntary cession of full sovereignty to the United States, (2) asserts the existence of independently enforceable rights under its Deeds of Cession, and (3) has plans for an upcoming constitutional convention that would displace its presently operative 1960 Constitution.<sup>408</sup> Engaging with these adjacent questions would have forced a more robust theory of these promises' constitutional significance at a distance from the local political gridlock in which she is accused of taking

---

legal and political challenges involved in exploring questions bearing on Puerto Rico's status). But the substance of Sotomayor's concurrence can be read to suggest an interpretive approach that is capable of reinforcing the promise of Puerto Rican self-government as possessing sovereign attributes, but that does not amount to a judicial declaration that Puerto Rico is now and forevermore in a sovereign-to-sovereign relationship with the federal government. In this respect, it need not be read as one-sided validation of the "Commonwealth" understanding of the Puerto Rico Constitution to the extent it tests assumptions of how that existing debate is framed. Nor must it be read to refer exclusively to existing commitments under a retroactive lens, rather than to future promises that may yet be made.

405. This is also true of those who have explored aspects of the territories-Indian law parallel using the example of Puerto Rico in isolation. See Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?*, 94 *IND. L.J.* 1, 38-44 (2019).
406. Former CNMI Chief Justice Jose S. Dela Cruz has recently highlighted the extent to which these same questions hover over the legal significance of the CNMI Covenant and its accession to so-called "Commonwealth" status. His work is not in conversation with Justice Sotomayor, but he advances the view that the U.S. Congress has agreed "not to interfere with the exercise of internal self-government" and "in effect 'waived' its plenary powers over the CNMI under the Territorial Clause" on account of the promises it has made. DELA CRUZ, *supra* note 243, at 13-21.
407. See Stephen K. Cohen, Letter to the Editor, *How Do We Guarantee Against Mistakes of Past Constitutional Conventions?*, V.I. DAILY NEWS (Nov. 21, 2020), [http://www.virginislandsdailynews.com/opinion/how-do-we-guarantee-against-mistakes-of-past-constitutional-conventions/article\\_ea4e9fa2-8686-5607-ad3e-f80a55foab8c.html](http://www.virginislandsdailynews.com/opinion/how-do-we-guarantee-against-mistakes-of-past-constitutional-conventions/article_ea4e9fa2-8686-5607-ad3e-f80a55foab8c.html) [https://perma.cc/4LYY-5NAN].
408. 2022 *Constitutional Convention: "Is There a Need to Make Changes to the Constitution?"*, SAMOA NEWS (Nov. 26, 2021, 1:18 PM), <https://www.samoanews.com/local-news/2022-constitutional-convention-there-need-make-changes-constitution> [https://perma.cc/Q6VF-5476].

sides. And it would have helped her critics appreciate that a framework centered on promise keeping is not a synonym for “compact theory.”<sup>409</sup>

To take this even further, Justice Sotomayor might have observed – as Erman and Aziz Rana do – that confronting the legal mechanisms of status manipulation points us to adjacent doctrinal areas and larger questions about boundaries of membership in the American political community. This is where Indian law could have taken center stage. From the perspective of a tribal government, allowing the Court to overwrite the legal significance of the CNMI Covenant, American Samoa Deeds of Cession, or Puerto Rico Constitution by fashioning doctrine from the historical practice of Washington, D.C. would be to endorse and revive precisely what *McGirt* disavowed.<sup>410</sup> The Court’s view of promises broken on the American continent should have to square with its view of promises beyond its shores.

There are many potentially relevant doctrinal threads with which to link the notion of promise keeping in the territorial and Indian law contexts. For instance, the Supreme Court’s Indian-law jurisprudence appreciates the significance of agreements and compacts with native nations even when they are not, in the procedural sense, treaties. The Court has declined to distinguish between treaty and nontreaty agreements with the federal government, subjecting both to interpretive rules that are designed to vindicate those promises and prevent diminishment of reservation borders.<sup>411</sup>

That interpretive approach flows from a meaningful interrogation of historical practice of late nineteenth century expansion, which reveals that the reason many federal tribal agreements did not occur through formal treaty-making owes to changes in federal legislation and Indian policy that unilaterally channeled those agreements into different forms. For example, the Court has observed that

---

409. See Ponsa-Kraus, *supra* note 7, at 121 (“According to the compact theory, Congress lacks the power to repeal the grant of self-rule, period. If it can do so for even a minute, then the compact is not irrevocable and compact theory fails.”); cf. 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, 941 (2022) (describing Justice Sotomayor as having “invoked the compact theory in the face of a majority decision that completely undermined it” in her *Aurelius* concurrence).

410. For how this promise keeping paradigm is playing out in *McGirt*’s aftermath, see Blackhawk, *supra* note 361, at 390–421.

411. See Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 8 n.35 (2017) (“The canons are basically four in number: (1) treaties are construed as the Indians would understand; (2) treaties and treaty substitutes (like statutes and executive orders) are liberally construed in favor of the Indians; (3) ambiguities are resolved in favor of the Indians; and (4) tribal sovereignty and property rights are preserved unless Congress clearly and unambiguously provides otherwise.”).

in “1871, Congress had forbidden thereafter recognition of Indian nations and tribes as sovereign independent nations, and thus had abrogated the contract-by-treaty method of dealing with Indian tribes.”<sup>412</sup> This 1871 legislation, which ushered in an “Era of Allotment and Assimilation” by attempting to erase legal recognition of tribal governments and their claims to promises undergirded by the Treaty Power,<sup>413</sup> yielded a new body of promises enshrined largely in “treaty substitutes”: agreements that look procedurally like any ordinary legislation or executive order, but whose objects capture the same enduring objectives as the treaties that preceded them. As the Court noted in *Antoine v. Washington*, the post-1871 shift away from formal treaty-making “in no way affected . . . the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties,” and the Court has accordingly declined to diminish the legal significance of these promises for want of legal formalisms.<sup>414</sup> An exhaustive WestLaw search suggests that no American court has ever explored this link between federal territorial agreements and Federal Indian law’s concept of treaty substitutes.

Like Indian tribes, territories have exchanged promises with the federal government that, despite being procedurally short of a treaty, gave rise to settled expectations about enduring and fundamental objectives. Three of those promises—the CNMI Covenant and the two American Samoa Deeds of Cession—were bargains through which the people of those respective territories agreed to become part of the United States in the very first instance—calling to mind the dozens of tribes whose reservations were established by treaty substitute.<sup>415</sup> And as with the changes to Indian treaty-making post-1871, the reason federal territorial compacts are not understood as “treaties” reflects legal innovations of the same expansionist era. One of the consequences of the Incorporation Doctrine’s “foreign . . . in a domestic sense” liminality is that it denied to Puerto Rico and

---

412. *Antoine v. Washington*, 420 U.S. 194, 201-02 (1975) (citation omitted).

413. See Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200-06 (1984); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2465 (2020) (“No doubt, this is why Congress at the turn of the 20th century ‘believed to a man’ that ‘the reservation system would cease’ ‘within a generation at most.’” (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984))); Seth Davis, *The Constitution of Our Tribal Republic*, 65 UCLAL. REV. 1460, 1468-70 (2018).

414. *Antoine*, 420 U.S. at 203; see CHARLES F. WILKINSON, AMERICAN INDIANS TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 63-65 (1987) (noting that “[a] majority of tribes have been recognized by [nontreaty] procedural means” and that “in a series of decisions, some major, some not, the Court has treated tribes and reservations as a unitary group” despite procedural differences in recognition); cf. Frickey, *supra* note 64, at 408-17 (providing structural arguments to view Indian treaties as constitutive documents).

415. See Brief of Members of the Congressional Native American Caucus as Amici Curiae in Support of Petitioners at app., *Penobscot Nation v. Frey*, No. 21-838 (U.S. Jan. 6, 2022).

the other newly acquired islands the retained-sovereignty fictions that undergirded treaty recognition for the Native peoples of the early North American frontier in the same stroke that it denied them assured accession to statehood or voting rights.<sup>416</sup> Nevertheless, that the promises were exchanged remains a political and legal fact—one that is essential to interpretive method in the Indian law context but entirely missing from contemporary judicial engagement with the Constitution in the territories.

*B. Doing the “Hard Work”*

In the field of Federal Indian law, Frickey illuminated Chief Justice Marshall's doctrinal innovations that secured a foothold for Indigenous rights within the Constitution, opening a way forward from what had once seemed an inescapable conflict between constitutionalism and colonialism before the “Courts of the conqueror.”<sup>417</sup>

Recounting the Marshall Court's journey from *Johnson v. M'Intosh*, which painted the exercise of colonialism as essentially nonjusticiable and the Constitution as exclusively assimilationist, to *Worcester v. Georgia*, which domesticated these questions within the Constitution “by conceptualizing the relationship of tribes with the federal government[,] . . . by envisioning an Indian treaty as [] constitutive[,] . . . and by protecting treaty-recognized sovereignty and structure from erosion,”<sup>418</sup> Marshall's innovation “built a complex, institutionally sensitive interpretive scheme” by which to give Indian nations legal recognition.<sup>419</sup> While the Marshall Court would pave the way for countless forms of Indigenous dispossession—especially at federal hands—this scheme undergirds the legal recognition that tribes have and are fighting to hold on to 200 years later.<sup>420</sup>

---

416. See *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

417. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).

418. Frickey, *supra* note 64, at 417.

419. *Id.*

420. Matthew L.M. Fletcher has called the Marshall Trilogy “a study in contradiction,” observing that while some aspects of the Trilogy are considered “part of the canon of American Indian law, even American law” on par with *Brown v. Board*, “[o]ther portions or even the same portions may be, for others, part of the anti-canon of American Indian law,” comparable to *Dred Scott* and *Plessy*. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 693-94 (2006).



Frickey's aim was—controversially<sup>421</sup>—to “retrieve” Chief Justice Marshall’s approach for contemporary Indian law, inviting judges today to follow in the Chief Justice’s example and

do the hard work . . . to challenge rather than to accept blindly assumptions rooted in colonialism, of which there are many today; to interpret documents of positive law flexibly in order to promote the ongoing sovereign-to-sovereign relationship of the tribe and the federal government; to keep the judiciary out of the business of imposing new forms of colonialism; and to refuse to relieve Congress of the responsibility to determine expressly whether future exercises of colonialism should occur.<sup>422</sup>

Emulating Marshall’s approach, he added, would require many things, including a great measure of “judicial courage,” noting that Marshall’s *Worcester* decision “outraged not only the State of Georgia, but . . . produced what was, up to that point, the most serious conflict between the Supreme Court and another federal branch in American constitutional history.”<sup>423</sup>

Frickey’s work supplies no prefabricated doctrinal answers for the territories, and many of his assumptions—including the very premise that constitutionalism and colonialism are in a tension requiring judicial “mediation”—deserve to be questioned as they are adapted to the territorial context.<sup>424</sup> But his notion of the “hard work” is a useful on-ramp for thinking about how to fashion judicial interventions that resist *Aurelius’s* impulse to collapse colonialism’s path dependencies into an artificial doctrinal coherence at the expense of promise keeping.

421. Frickey himself acknowledged that the endeavor to paint Chief Justice Marshall’s innovations in this light would “strike some critics as wrong, not because it comes far too late, but because [Chief Justice Marshall’s] vision is irredeemably tainted by the poison of colonization” and, therefore, an inappropriate foundation on which to ground a paradigm of contemporary judicial engagement. Frickey, *supra* note 64, at 427.

422. *Id.* at 428.

423. *Id.* at 439–40.

424. Responding to Frickey, Ezra Rosser adds an observation of tremendous value for appreciating how Frickey’s ideas might be misapplied in conversation with a law of the territories:

[J]udicial and academic work that conceptualizes and analyzes tribes independently rightly hedges against the conceit that pan-Indian jurisprudence is appropriate . . . . Articles that focus on the individual needs of particular tribes need not be considered mere case studies, for from such case studies courts might begin the process of recognizing that a decision related to the relationship of a tribe with the federal government or with non-Indians need not be the final word for all other tribes.

Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141, 141–47 (2005).

The “hard work” appreciates that reckoning with promises that create a doctrinal tension within the Constitution is part of the task of remaining faithful to it.

Meaningful judicial engagement with territorial exceptionalism must hold this conversation with Indian law. Yet it must also proceed with the self-awareness that a “law of the territories,” for obvious reasons, is not and cannot be part of Indian law.<sup>425</sup>

The most obvious differences between the Indian and territorial contexts orbit (1) the absence of an equivalent state-versus-tribal-jurisdiction conflict in U.S. territories and (2) the territories’ lack of voting rights, the essence of their colonial condition.<sup>426</sup> Indian tribes’ claims to durable separateness reconciles differently with statutory birthright citizenship (another thing they share with territories),<sup>427</sup> because tribes are geographically bound within states, where their

---

425. A conversation does arise from time to time about communities in U.S. territories seeking federal recognition as tribes. See John O’Connor, *Tribal Designation Sought*, GUAM DAILY POST (Oct. 4, 2017), [https://www.postguam.com/news/local/tribal-designation-sought/article\\_a46782a4-a813-11e7-a27d-67b542a4a2a8.html](https://www.postguam.com/news/local/tribal-designation-sought/article_a46782a4-a813-11e7-a27d-67b542a4a2a8.html) [<https://perma.cc/W4EL-YNLF>]. These efforts deserve greater attention to the extent they shed light on the stakes of grounding a law of the territories in existing paradigms of federal recognition. See, e.g., Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451 (2014) (exploring the evolution and implementation of the federal acknowledgement process). It is also possible to imagine territories proceeding toward self-determination in both a law of the territories and Federal Indian-law frame—for example, by considering the theoretical possibility that one or more of these territories might eventually become a state *and* that communities within that state could gain tribal recognition. This points directly to the understudied link between the territories, Federal Indian law, and Native Hawaiian debates over the prospect of seeking federal recognition, and the debates over federal recognition in Indian law generally. See, e.g., *Developments in the Law: Aloha ‘Āina: Native Hawaiian Land Restitution*, 133 HARV. L. REV. 2148 (2020); Le’a Maila Kanehe, *The Akaka Bill: The Native Hawaiians’ Race for Federal Recognition*, 23 U. HAW. L. REV. 857 (2001); Justin L. Pybas, Note, *Native Hawaiians: The Issue of Federal Recognition*, 30 AM. INDIAN L. REV. 185 (2005); Anita Hofschneider, *Biden Raises Hopes for Hawaiians Seeking Federal Recognition*, HONOLULU CIV. BEAT (Jan. 26, 2021), <https://www.civilbeat.org/2021/01/biden-raises-hopes-for-native-hawaiians-seeking-federal-recognition> [<https://perma.cc/L6X6-9ZZU>]; see also Blackhawk, *supra* note 201, at 1867-68 (discussing tribal sovereignty outside of federal recognition).

426. See SUTTON, *supra* note 62, at 142 (noting the “key difference” between British imperialism and the Northwest Ordinance’s framework of territorial governance: the prospect of political representation through admission to the Union).

427. See Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2018)). There is considerable room for work to explore deeper connections between the American Samoa citizenship question, the territories’ statutory citizenship, and the Indian Citizenship Act of 1924, particularly in the wake of Erman’s recent work. See ERMAN, *supra* note 188, at 121-61.

votes can be counted.<sup>428</sup> Not only do they have voting representation in national elections, but they also in many cases wield significant political power in those elections,<sup>429</sup> particularly in smaller states. By contrast, as the territories' ties to the United States deepen – whether formally through accession to citizenship or informally through their outsized military service – their liminality strains the very premise of republican government.<sup>430</sup>

For the territories, then, Frickey's "hard work" takes on greater complexity. Alongside the shared questions of how to accommodate culture or self-government, judges engaging with the territories must also appreciate how solicitude for self-determination can be manipulated into a license for unchecked invidious discrimination and de facto shadow states.<sup>431</sup> At a minimum, this suggests a slightly different frame for equal-protection law in U.S. territories than in Indian Country.<sup>432</sup>

### C. Sketching the So-Called "Law of the Territories"

Like essentially every other phrase orbiting the matter of these islands' legal and constitutional status, "the law of the territories" is a phrase without settled

428. While beyond the scope of this Article, representational deficits in Washington, D.C. must also be brought into this conversation. See Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEO. L.J. (forthcoming 2022), <https://ssrn.com/abstract=4009101> [<https://perma.cc/5LAH-CNBA>].

429. See, e.g., *Often Overlooked Native American Voters Poised to Become Powerful Voting Bloc in Michigan*, MICH. RADIO (Nov. 11, 2020, 5:47 PM EST), <https://www.michiganradio.org/politics-government/2020-11-11/often-overlooked-native-american-voters-poised-to-become-powerful-voting-bloc-in-michigan> [<https://perma.cc/JDF7-KH46>] (quoting Matthew Fletcher's assertion that the Native vote "is upwards of 10% of the population" in states like New Mexico and Arizona).

430. Cf. Torruella, *supra* note 133, at 98 ("It is obvious that Congress will not correct the constitutional and moral injustices created by the democratic deficit that exists in the U.S.-Puerto Rico relationship, just as it failed to do so for African Americans, thus requiring the Supreme Court to redress their festering grievances after almost a century of those grievances being tolerated. Clearly, it is up to the courts as guardians of the Constitution, and as the originators of this unequal treatment when they validated it in the *Insular Cases*, to correct this condition.").

431. See Brief for Petitioner, *supra* note 18, at 23, 24 n.2 (abandoning a previous argument that it is rational to exclude low-income disabled and elderly residents of Puerto Rico from SSI benefits because doing so might cause "economic[ ]disruption" and introducing the argument that it is rational to exclude them in the interest of "respecting and advancing" Puerto Rican autonomy and self-government).

432. See generally Adriel I. Cepeda Derieux, Note, *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) (arguing for heightened, not lessened, scrutiny when facially discriminatory laws are challenged under equal-protection claims in Puerto Rico due to the territory's disenfranchised status).

legal meaning. Does it refer simply to law as it affects the territories? The unique wrinkles and exceptionalisms reserved to that context? If the *Insular Cases* are overruled, does a “law of the territories” still exist? Or does the term imply an intent to carve an appreciable and more lasting substantive domain of constitutional law—a field, even, complete with its own enduring treatises or casebooks? To continue our conversation with Indian Country: is a law of the territories more like “Indian law”<sup>433</sup> or “tribal law?”<sup>434</sup>

How one answers this question inevitably carries some view as to how durable the territories’ present limbo is. If one is of the view that Puerto Rico can remain indefinitely under U.S. sovereignty without voting representation in our national government, then conceiving of the law of the territories as a sort of permanent field on par with Indian law might make sense. If one believes that 100 years of citizenship-without-voting and self-government-without-sovereignty can be redressed tomorrow by a single judicial ruling, then it probably shouldn’t, except maybe as a historical device.

I submit that it is useful, for now, to imagine this law of the territories as a concept adjacent and connected to Federal Indian law. While sometimes misapprehended as seeking “extraconstitutional zones,” both gesture at faithful constitutionalism that is sometimes challenged by questions of promise keeping amid the Constitution’s encounter with new subjects through the course of expansion—peoples once thought to be firmly outside the American political project.<sup>435</sup> They orbit deeply ingrained but less familiar principles of minority protection that are overshadowed in the constitutional canon by civil-rights frames that delete that expansion from existence.

Thus, the law of the territories can and should be more than a descriptive term for the sphere of legal questions and concepts that inhere in confronting the constitutional liminality born of turn-of-the-twentieth-century overseas imperialism. Framed properly, the law of the territories has inherent momentum. It can orient on promise keeping while seeking constitutionally faithful inclusion in the American project en route to meaningful self-government and a politically

---

433. See J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 151 (1995) (describing “Indian law” as “the system of federal laws and regulations that govern U.S. relations with the various Indian tribes”).

434. See *id.* (describing “tribal law” as “the law that the Indian tribes enact and enforce within their own communities”).

435. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823) (describing Indians as “fierce savages, whose occupation was war”); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 543 n.322 (2017) (reading *Johnson v. M’Intosh* as “likening [Native Americans] to the ‘game [that] fled into thicker and more unbroken forests’” (quoting *Johnson*, 21 U.S. (8 Wheat.) at 590-91)); see also *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (describing Puerto Rico as a “possession[] inhabited by alien races, differing from us”).

legitimate, self-determined future. It can acknowledge that the various relationships between the United States and individual territories may “strengthen in ways that are of constitutional significance” while taking stock of workable (and unworkable) judicial remedies for their core representational deficits. It can recognize that the ends of self-determination are entirely defeated if constitutionalism serves only to assimilate or erases the lands and cultural interests of those wishing to exercise it. It can be self-aware of the disagreement about whether the *Insular Cases* are doctrinally necessary to this constitutional friction’s successful mediation. And it can combat status manipulation by validating that pervasive ambiguity has been and is now abused inexcusably by the political branches to impose on these Americans every burden of membership in the political community while withholding from them its most substantive benefits.<sup>436</sup>

However, rather than circumscribing “the law of the territories” into its own “emerging field” defined primarily by “unique legal questions,”<sup>437</sup> this Article ultimately invites a broader and more unified conversation on promise keeping and Native recognition, ushering the so-called law of the territories and Federal Indian law toward a broader conceptual umbrella that helps both domains recognize that their deepest challenges are not *sui generis*. Accounting for both the value and the limits of this comparison will also help cohere disjointed calls for expanding the constitutional canon to include cases and materials highlighting the role of continental and overseas expansion in constitutional development.<sup>438</sup>

---

436. See DISABILITY RTS. CTR. V.I., *supra* note 16; AGUON, *supra* note 52, at 53–58.

437. *Announcing Volume 131’s Special Issue on the Law of the Territories*, YALE L.J. (Mar. 23, 2021), <https://www.yalelawjournal.org/news/announcing-volume-131s-special-issue-on-the-law-of-the-territories> [<https://perma.cc/9855-EYE9>] (calling for papers and describing “the law of the territories” as “an emerging field that explores novel legal questions facing residents of the U.S. territories”).

438. See Levinson, *supra* note 24 (urging inclusion of the *Insular Cases* and the saga of American expansion); Blocher & Gulati, *supra* note 315, at 2427 (arguing that in addition to the *Insular Cases*, *Jones v. United States*, 137 U.S. 202 (1890), and a 1932 State Department legal memo on Navassa island deserve a greater share of attention); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 98 (2004) (“[L]egal questions about Federal Indian tribes already play a significant role within materials read regularly in the (now) traditional Federal Courts’ canon.”); Serrano, *supra* note 347; see also Blackhawk, *supra* note 201, at 1799 (“Much of federal Indian law is absent from the constitutional law canon because much of it exists outside the courts.”); Rana, *supra* note 203, at 333 (agreeing with Levinson’s view “that constitutional law must expand its ‘canon’ . . . to cases that highlight the continuing imperial logics of collective life” but arguing that “scholars [must] approach their work with far greater creativity than simply adding new cases at the margins”); cf. Cleveland, *supra* note 223; Saito, *supra* note 226. For an example of a recent first-year constitutional-law syllabus attempting such an endeavor, see Monica Bell, *Constitutional Law* (Yale Law School Fall 2020) (course syllabus) (on file with author).

Without a law of the territories, there is only denial. *Aurelius* suggests that in a post-*Insular Cases* world, we might say that the Constitution “applies” equally to the territories, but the foreseeable reality is that their wholesale disenfranchisement and subordination will endure if not deepen.<sup>439</sup> A law of the territories is necessary to police promise breaking and to reinforce the political legitimacy of forthcoming self-determination at the same time that it is necessary to prevent the notion of “respect” for self-determination, Indigenous rights, or autonomy from weaponizing into a license for invidious discrimination and permanent neglect. Without this, *Aurelius*-style constitutionalism foreshadows twin harms: the further entrenchment of second-class citizenship and – to borrow the words of Judge Poole – “a genocide pact for diverse native cultures.”<sup>440</sup>

---

439. See *Sanchez v. United States*, 376 F. Supp. 239 (D.P.R. 1974) (dismissing a Puerto Rico resident’s action seeking judicial remedy for an alleged constitutional violation stemming from a denial of her right to vote for President and Vice President as “wholly without merit,” noting that statehood or constitutional amendment would be required for residents of Puerto Rico to obtain the right to vote); see also *Igartua de la Rosa v. United States (Igartua I)*, 842 F. Supp. 607 (D.P.R. 1994), *aff’d*, 32 F.3d 8, 9-10 (1st Cir. 1994); cf. DELA CRUZ, *supra* note 243, at 11. *But see* *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 147 (D.P.R. 2000) (“The right preexists the potential amendment by virtue that the Constitution itself provides that right.”); *Igartúa v. United States*, 626 F.3d 592, 639 (1st Cir. 2010) (Torruella, J., dissenting) (“I would issue a declaratory judgement to the effect that Appellants’ rights under domestic law (arising from the ICCPR by way of the Supremacy Clause) have been violated by the failure of the United States to take any action to grant Appellants equal voting rights to those of other citizens of the United States, and further I would declare that Appellants’ rights have been violated by the failure of the United States to meet its obligations under the treaty to provide Appellants with an ‘effective remedy’ to cure their current lack of representation.”). Ten years earlier, Judge Torruella had opined in an earlier iteration of *Igartua*:

This is not the case, nor perhaps the time, for a federal court to take remedial action to correct what is a patently intolerable situation, it is time to serve notice upon the political branches of government that it is incumbent upon them, in the first instance, to take appropriate steps to correct what amounts to an outrageous disregard for the rights of a substantial segment of its citizenry.

*Igartua de la Rosa v. United States*, 229 F.3d 80, 90 (1st Cir. 2000) (Torruella, J., concurring). Torruella viewed direct judicial intervention inappropriate in this earlier iteration of *Igartua* in part because “the particular issue of the presidential vote is governed by explicit language in the Constitution providing for the election of the President and Vice-President *by the States* rather than by individual citizens.” *Id.* Notwithstanding the clear textual obstacles in the path, Torruella warned that the political branches failure to do so would “countenance[] corrective judicial action,” citing not just to *Brown v. Board of Education*, but also Chief Justice Marshall’s Indian law trilogy. *Id.* (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.) (“It may be that the federal courts will be required to take extraordinary measures as necessary to protect discrete groups ‘completely under the sovereignty and dominion of the United States.’”). While Torruella takes a distinctively aggressive view of its limits, his view of judicial intervention thus credits this view of Marshall’s judicial innovations for managing constitutional-colonial friction.

440. *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1990).



Its usefulness comes into view when one shifts focus away from the singular focus on the mired debate over the meaning of Puerto Rico's commonwealth status and towards the many yet unrealized federal territorial agreements and constitutions that are currently the subject of robust debate. Recall that Guam and the U.S. Virgin Islands are presently without any equivalent to the Puerto Rico Commonwealth Constitution, CNMI Covenant, or American Samoa Deeds of Cession. But this is not for lack of effort. Guam has previously invested significant resources into revising its relationship to federal law by way of a "commonwealth" agreement or constitution, and there is currently considerable public discussion about drafting a Guam constitution during a time when Guam's strategic significance vis-à-vis China and North Korea is rapidly increasing.<sup>441</sup> American Samoa has plans to hold a constitutional convention in 2022, and the U.S. Virgin Islands will soon hold its sixth constitutional convention, having tried and failed on five other occasions over the past half-century to adopt and obtain approval of governmental revisions viewed as legally acceptable by the Department of Justice (DOJ) and Congress. Of course, the United States has conferred upon these two territories a substantially similar degree of self-government through their respective organic acts, and within each territory, there are considerable efforts towards eventual political self-determination and attempts to fashion protections for native land ownership and political participation.

But much of what stands in the way of these agreements' realization has to do with the ambiguity that surrounds the perceived limits of their constitutionality. DOJ, for instance, recommended that Congress reject the last two proposed Virgin Islands constitutions adopted by convention, expressing concern with the viability of native rights in the Virgin Islands and concerns about "litigation that

---

441. See, e.g., Joe Tatiano II, *San Nicolas: Guam Constitution a Possibility*, PAC. DAILY NEWS (Jan. 27, 2022), [https://www.guampdn.com/news/san-nicolas-guam-constitution-a-possibility/article\\_8f05e68e-7f3d-11ec-adeb-2bff6cce705f.html](https://www.guampdn.com/news/san-nicolas-guam-constitution-a-possibility/article_8f05e68e-7f3d-11ec-adeb-2bff6cce705f.html) [https://perma.cc/59YK-U8XB]; Phill Leon Guerrero, *Delegate: Guam Constitution Less "Prohibitive" than Organic Act Route*, GUAM DAILY POST (Feb. 5, 2022), [https://www.postguam.com/news/local/delegate-guam-constitution-less-prohibitive-than-organic-act-route/article\\_82f96656-7f45-11ec-9bfe-830dd9bf3a6a.html](https://www.postguam.com/news/local/delegate-guam-constitution-less-prohibitive-than-organic-act-route/article_82f96656-7f45-11ec-9bfe-830dd9bf3a6a.html) [https://perma.cc/74BF-NYST]; *Our View: Constitution, New Political Status Not Mutually Exclusive Goals*, PAC. DAILY NEWS (Feb. 6, 2022), [https://www.guampdn.com/opinion/our-view-constitution-new-political-status-not-mutually-exclusive-goals/article\\_60c4d4dc-8646-11ec-bb85-b7a34d1a7ade.html](https://www.guampdn.com/opinion/our-view-constitution-new-political-status-not-mutually-exclusive-goals/article_60c4d4dc-8646-11ec-bb85-b7a34d1a7ade.html) [https://perma.cc/N63M-VY47]; Michael Lujan Bevacqua, *Guam Constitution Should Be More than an American Copy*, PAC. DAILY NEWS (Feb. 10, 2022), [https://www.guampdn.com/opinion/bevacqua-guam-constitution-should-be-more-than-an-american-copy/article\\_d939boce-8a18-11ec-9590-5b06b8957e85.html](https://www.guampdn.com/opinion/bevacqua-guam-constitution-should-be-more-than-an-american-copy/article_d939boce-8a18-11ec-9590-5b06b8957e85.html) [https://perma.cc/HVH5-N8QU]; Richard R. Burgess, *U.S. Will Fight from Guam and for Guam*, U.S. Indo-Pacific Commander Says, SEAPOW (Mar. 4, 2021), <https://seapowermagazine.org/u-s-will-fight-from-guam-and-for-guam-u-s-indo-pacific-commander-says> [https://perma.cc/T57E-YE4M].

could burden or curtail effective local government.”<sup>442</sup> Orienting on these territories’ existing claims to self-government and the path-dependent interests for which they seek recognition from Congress will enable courts to appreciate the ambiguities in which negotiated agreements are and have been mired. A law of the territories can reduce barriers for the territorial governments who wish to come to the table to secure path-dependent interests as they chart a course towards a new political status and out of the colonial status quo. By reflecting Indian law’s orientation towards promise making and promise keeping, the Court can thus get itself out of the business of adjudicating “cultural preservation.”<sup>443</sup>

---

442. Dep’t of Just. Views on the Const. Adopted by the Const. Convention of the V.I., 4B Op. O.L.C. 759, 761 (1980); see *The Proposed Virgin Islands Constitution from the Fifth Constitutional Convention: Oversight Hearing Before the Subcomm. on Insular Affs., Oceans & Wildlife of the H. Comm. on Nat. Res.*, 111th Cong. 8 (2010) (statement of Jonathan G. Cedarbaum, Deputy Assistant Att’y Gen., U.S. Department of Justice) (“[S]everal provisions of the proposed constitution give special advantages to ‘Native Virgin Islanders’ and ‘Ancestral Native Virgin Islanders.’ These provisions raise serious concerns under the equal protection guarantee of the U.S. Constitution.”).

443. As Cuison Villazor’s work emphasizes, federal courts cannot be arbiters of culture, because culture is not static. Accordingly, “the legal protection of cultural rights should be done with caution particularly where the assertion of rights affects the individual rights of others.” Cuison Villazor, *supra* note 331, at 132. Similarly, American Samoan attorney and counsel for the *Fitisemanu* plaintiffs, Leiatua Charles V. Ala’ilima, recently noted before Congress that “[t]here are no unifying set of laws defining *fa’a Samoa*, nor is there a single ultimate authority to determine what it is or what rules it follows.” Memorandum from Charles V. Ala’ilima, Ala’ilima and Associates P.C., to, Raúl M. Grijalva, Chair, House N. Res. Comm., & Bruce Westerman, Ranking Member, House N. Res. Comm., at 2 (May 26, 2021), [https://d3n8a8pro7vhmx.cloudfront.net/wethepeopleproject/pages/210/attachments/original/1623862065/CVA\\_Testimony\\_with\\_Exhibits.pdf?1623862065](https://d3n8a8pro7vhmx.cloudfront.net/wethepeopleproject/pages/210/attachments/original/1623862065/CVA_Testimony_with_Exhibits.pdf?1623862065) [https://perma.cc/825D-583R]. This difficulty was clearly on display in cases like *King v. Morton* and *King v. Andrus* during the 1970s, in which the D.C. courts had to confront American Samoa’s assertion that instituting a jury-trial requirement would be “impractical and anomalous within its culture” and “undercut the preservation of traditional values and harmonious relationships on the relatively small island.” *King v. Andrus*, 452 F. Supp. 11, 12-13 (D.D.C. 1977). The D.C. Circuit declined to apply the jury-trial right to American Samoa in 1972, but in 1977 a D.C. district court held after a lengthy inquiry into Samoan cultural practice that American Samoa’s laws denying the right to trial by jury in American Samoa were “unconstitutional on their face.” *Id.* at 17. This ruling was based in part on the judge’s view that the relevant aspects of Samoan culture that it threatened were of “waning influence.” *Id.* at 15. The judge ultimately softened the ruling by concluding that “when should it be instituted, and by whom . . . should be resolved by the American Samoans themselves.” *Id.* at 17. American Samoa adopted a criminal jury-trial statute shortly thereafter. Perhaps of use in navigating the many problems with asking federal courts to litigate particular cultural practices (and asking territorial communities to commodify and litigate them), is an implied distinction between cultural practices and cultural “anchors” — land being chief among them. In upholding CNMI’s indigenous land-protection law in *Wabob v. Villacrusis*, the Ninth Circuit observed that the law’s legitimate purpose was to prevent Native inhabitants from “selling their *cultural anchor* for short-term economic

Ponsa-Kraus suggests that “instead of trying to rehabilitate the *Insular Cases*, scholars should apply their creative legal minds to developing arguments that certain cultural practices survive strict scrutiny”<sup>444</sup>—in other words, to developing arguments that find purchase within the bounds of the Constitution. This is undoubtedly correct, and the essence of Frickey’s “hard work.” The problem is that, right now, the Court appears more inclined to delete those interests from existence than to give them something else to latch onto.<sup>445</sup> She and Charles Ala’ilima point to *Craddick v. Territorial Registrar*,<sup>446</sup> a case from the High Court of American Samoa’s Appellate Division, decided by a panel that included one Article III judge sitting by designation of the Secretary of the Interior, as an example of how courts might theoretically uphold land-alienation laws without the *Insular Cases*. A conceptual alternative to *Wabul*, *Craddick*’s divided panel held that American Samoa’s blood-quantum land-alienation restrictions are a narrowly tailored means of furthering a compelling interest in cultural preservation—surviving strict scrutiny. Of course, pointing to *Craddick* offers little in the way of creative thinking, since that brief and divided decision merely suggests

---

gain, thereby protecting local culture and values and preventing exploitation . . . at the hands of resourceful and comparatively wealthy outside investors.” 958 F.2d 1450, 1461 (9th Cir. 1990) (emphasis added). In the absence of reference to specific cultural protections enshrined in promises like the CNMI Covenant or the American Samoa Deeds of Cession, this concept is legally useful in thinking about how to craft judicial intervention that reinforces Native recognition without making itself culture’s arbiter. Accordingly, it is especially worth deeper exploration for Guam and the U.S. Virgin Islands, where there is not yet an equivalent of those written instruments. Recent territorial claims seeking to challenge federal laws as infringing on “cultural practice” should sound an urgent call for retheorizing the framework of Indigenous recognition under equal-protection law beyond the land-ownership context. See *Linsangan v. United States*, No. 20-17024, 2021 WL 6103047, at \*1 (9th Cir. Dec. 22, 2021) (upholding the federal cockfighting ban as applied to Guam, noting that the pro se challenger’s “evidence of cockfighting as a cultural practice both predating and outside of American history does not show that cockfighting is objectively deeply rooted in *our Nation’s tradition*” for purposes of applying heightened scrutiny (emphasis added)); *Hernandez-Gotay v. United States*, 985 F.3d 71, 80 (1st Cir. 2021) (upholding the federal cockfighting ban in Puerto Rico as within Congress’s commerce power over the assertion that the practice “express[es] . . . culture and deeply rooted sense of self-determination”), *cert. denied sub nom. Ortiz-Diaz v. United States*, 142 S. Ct. 336 (2021); see also Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 1019-20 (2011) (exploring the inconsistency of “Indian authenticity” assessments and the “gap between the federal definition of Indian and the subjective understandings of Indian people and tribes about who belongs to the Indian community”).

444. *Hearing on Resolution 56-36 Supporting U.S. House Resolution 279*, 36th Guam Legislature (May 4, 2021) (statement of Christina D. Ponsa-Kraus, Professor, Columbia Law School).

445. See Erman, *Status Manipulation and Spectral Sovereigns*, *supra* note 51, at 839 (“[R]eclamations [of the *Insular Cases*] are only attractive because the rest of the constitutional landscape is abysmal.”).

446. 1 Am. Samoa 2d 10 (1980).

the best possible outcome from a daunting uncertainty that American Samoa and the CNMI surely do not wish to test in federal court under today's doctrinal landscape.<sup>447</sup>

New solutions are needed that look for combinations of doctrinal tools that will secure these recognitions without resorting to constitutional opt-outs.<sup>448</sup> Beyond Indian-law frameworks and the compelling-interest theories, there are other tools with which to conceptualize judicial review.<sup>449</sup> Some of them are

---

447. Cf. *Insular Cases Resolution Hearing*, *supra* note 283, at 33-36 (statement of Rose Cuisson Villazor, Professor, Rutgers School of Law). To be sure, there are potentially more creative ways of looking at *Craddick*; for instance, by interrogating the unique structure of adjudication at the Appellate Division of the High Court of American Samoa. Among the High Court's distinctive features is that its appellate panels include both law-trained "Justices," AM. SAMOA CODE ANN. § 3.1001(a) (2021), and non-law-trained "Judges," who are "appointed based on their knowledge of Samoan culture and tradition" and advise the Justices accordingly, U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-1124T, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 24 (2008). Moreover, that *Craddick* was decided in this forum at all is bound up in the fact that American Samoa, unlike the other territories, has no federal district court. Cf. Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. 35 (2000); 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 (2008); *Hueter v. Kruse*, No. 21-00226, 2021 WL 5989105, at \*18 (D. Haw. Dec. 17, 2021) ("[A]bstaining in favor of the High Court Land and Titles Division is particularly appropriate here because it implicates perhaps the paramount sovereign interest in American Samoa—the determination of land rights. Land is foundational to American Samoa's culture, identity, and system of governance. . . . [T]he Land and Titles Division, more than any other tribunal, has the competence and expertise to resolve the land dispute underlying this case." (citations omitted)). For a discussion of proposals to alter or abolish the federal district court in Puerto Rico, see CARMELO DELGADO CINTRON, *IMPERIALISMO JURIDICO NORTEAMERICANO EN PUERTO RICO* (1898-2015), at 279-322 (2015), which discusses early 1900s efforts; and 4 JOSE TRIAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 234 (1980), which discusses mid-twentieth-century proposals. See also BARALT, *supra* note 137, at 342-52.

448. It is only with an eye towards reinforcing a politically legitimate resolution of the territories' constitutional limbo and disenfranchisement that such "hard work" does not collapse into Torruella's notion of territorial "experimentation." See Torruella, *supra* note 133, at 68 ("At this point in history, further experimentation by substituting one unequal framework for another, rather than one that puts Puerto Rico's citizens on equal footing with the rest of the nation, is no more acceptable than the concept of 'separate but equal.'").

449. International law is the best-traveled one. See Torruella, *supra* note 133, at 103-04 ("[R]emedying Puerto Rico's unequal treatment . . . simply requires giving effect to the binding obligations that the United States has assumed [in the International Covenant on Civil and Political Rights (ICCPR)]."); see also *Igartua v. United States*, 626 F.3d 592, 628 (1st Cir. 2010) (Torruella, J., dissenting) ("I would hold that the task of determining whether the ICCPR is self-executing, and gives rise to enforceable rights, is for the courts.").

newly kindled by this Issue,<sup>450</sup> including Joseph Blocher and Mitu Gulati's groundbreaking exploration of adaptable private-law concepts.<sup>451</sup> Others may still be beyond it.<sup>452</sup> But the answer cannot be to require the territories to blindly

- 
450. See Blocher & Gulati, *supra* note 315, at 2439 (“A private-law-based vision of corrective justice, ‘with its emphasis on vindicating property entitlements and disgorging ill-gotten gains,’ adds another lens that makes other harms more visible and potentially subject to redress.” (quoting Adrienne D. Davis, *The Coxford Lecture: Corrective Justice and Reparations for Black Slavery*, 34 CAN. J.L. & JURIS. 329, 338 (2021))); Rolnick, *supra* note 245, at 2732-57 (sketching, at a high level, five potential paths forward for reshaping doctrine to secure rights and recognitions for Indigenous Pacific Islanders, “who have been pushed outside the margins of protection in all areas of law”).
451. See generally Blocher & Gulati, *supra* note 315. This work should unite with other work that conceptualizes trust or fiduciary relationships in the territories and Indian Country. See, e.g., *American Samoa v. Nat’l Marine Fisheries Serv.*, No. 16-cv-00095, 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (noting American Samoa’s claim that the American Samoa Deeds of Cession “establish a trust relationship between the United States and American Samoa, and therefore the United States has a fiduciary duty to American Samoa”), *rev’d*, 822 F. App’x 650 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2797 (2021); Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV’T & ADMIN. L. 397 (2017); Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009); cf. Chimene I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT’L L.J. 1, 33-61 (2006) (exploring Pacific Islands Trust Agreements under international law).
452. For example, there is considerable room to explore the relationship between the *Insular Cases* and the “impractical [and/or] anomalous” standard those cases are said to have supplied to the Court’s extraterritoriality jurisprudence. *Tuaua v. United States*, 788 F.3d 300, 302 (2015) (“impractical and anomalous” (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring))); see Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 360 (2005) (“It will be noted that the court in *Wablol* . . . stated the test in the disjunctive, i.e., “impractical or anomalous.”); Letter from Julian J. Aguon to Tina Muña-Barnes, Vice-Speaker of the 56th Guam Legislature (May 10, 2021) (regarding testimony on Resolution 56-36) (“For all its flaws, the impractical and anomalous test . . . provided a framework for upholding [CNMI’s land protections] . . . an integral part of the bargained-for exchange between the U.S. and the then-newly-constituted CNMI.”). This “impractical [and/or] anomalous” test, despite being the doctrinal centerpiece of arguments that entertain repurposing the *Insular Cases*, points only indirectly to the cases themselves. The relevant language only appears decades later in extraterritoriality cases into which the *Insular Cases* were grafted. Robert A. Katz, *The Jurisprudence of Legitimacy*, 59 U. CHI. L. REV. 779, 783-84 (1992) (recounting the origins of the “impractical and anomalous” test, which first appeared in a concurrence by Justice Harlan in *Reid v. Covert* that reasons broadly from his view of a singular “basic teaching” from both the *Insular Cases* and *In re Ross*, a pre-*Insular Cases* decision); see *Reid*, 354 U.S. at 74 (Harlan, J., concurring) (“The basic teaching of *Ross* and 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.”).

accept the legal risk of judicial interventions that tend to delete Native recognitions from existence or to abandon efforts to preserve lands and culture because contemporary equal-protection law's space for them is shrinking.

At a fundamental level, this law of the territories suggests a path forward that is more political, more movement-based, and more grounded in self-determination than is presently imagined by this discourse.<sup>453</sup> After all, it was judges and scholars acting in isolation – from these very pages, no less – that gave us the *Insular Cases*.

## CONCLUSION

As Richard Primus has put it, “[t]he [C]ourt is the chief narrator of American constitutional history, so an ugly chapter from the past can never be fully closed until the [C]ourt itself writes the better ending.”<sup>454</sup> But *Aurelius*'s chief failure was not that it refused to write an ending that ceremoniously overthrows the *Insular Cases*; it was that it quietly rewrote the story. The Court's predilection for erasing overseas expansion from historical practice suggests that judicial intervention in the mold of *Trump v. Hawaii* is likely to deepen the territories' colonial condition, not resolve it. So long as American legal thought overlooks empire's path dependencies, judicial resolution of its foundational questions will imperil self-determination and invite promise breaking. While this does not mean that a resolution to the *Insular Cases* and status manipulation lies beyond the judicial sphere, it does sound an urgent call for better theories of judicial engagement with the law of the territories, *McGirt v. Oklahoma*, and empire's role in American constitutional development.

---

Thus, although the test as it exists today is fundamentally in the vein of extraconstitutionalism, a closer inspection of its origins may reveal useful space between the points of law attributable to the *Insular Cases* and those owing to inventions of their “progeny” or “framework.” Cf. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (noting some parties' request to overrule “the much-criticized ‘*Insular Cases*’ and their progeny” (emphasis added)).

453. *But see* Erman, *Status Manipulation and Spectral Sovereigns*, *supra* note 51, at 880 (“Rather than throw one's hands up in the face of status manipulation and colonial governance, the better approach for the constitutional expert within the imperial structure may be to do more.”).

454. Richard Primus, *How Trump Gave the Supreme Court a Second Chance on Japanese Internment*, POLITICO (May 30, 2017), <https://www.politico.com/magazine/story/2017/05/30/donald-trump-korematsu-japanese-internment-supreme-court-215208> [https://perma.cc/U85R-R5FX].