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Indigenous Subjects

ABSTRACT. This Article tells the story of how race jurisprudence has become the most intractable threat to Indigenous rights—and to collective rights more broadly. It examines legal challenges to Indigenous self-determination and land rights in the U.S. territories. It is one of a handful of articles to address these cases and the only one to do so through the lenses of Indian law, the law of the territories, international law, and race law. These recent challenges rest on the 2000 case of *Rice v. Cayetano*, in which the Supreme Court struck down a Hawaii law that allowed only Indigenous Hawaiians, defined by reference to ancestry, to vote for trustees who controlled land and assets held in trust for them. The Court's holding—that ancestry can be, and was in that specific factual context, a proxy for race—rested on a thin conception of race as a static biological fact and a narrow construction of indigeneity. In the hands of aggressive litigants, it has been transformed into a shorthand rule that ancestry and race are equivalent; that ancestry-based classifications are therefore illegal under the Fourteenth and Fifteenth Amendments; and that legal protection for Indigenous rights is limited to a narrow class of American Indian tribal citizens. This rule has emerged as a significant threat to Indigenous rights and driven a deep wedge between the individual rights protected by the Reconstruction Amendments and the group-based harms they were intended to remedy. It threatens to juridically erase Indigenous peoples in the territories by equating any recognition of their historical claims with an illegal racial classification. This Article unpacks the doctrinal evolution of the *Rice* rule, examines its theoretical and practical consequences, and proposes a multitiered strategy to resist it.

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INTRODUCTION

American law protects the rights of subordinated people through different legal categories. Legislatures define the categories and courts shape them. But the categories also operate outside of the courtroom to shape identities and structure political movements. This Article considers the evolution of five such categories: Indigenous, Indian, colonized peoples, race, and ancestry. “Indigenous” and “Indian” are used interchangeably in popular discourse, but they are treated very differently by courts. “Race” and “ancestry” are also used interchangeably, a slippage that reflects popular confusion about the idea of race, a confusion shaped by and reflected in law. Colonization (the process and the category of colonized peoples) is rarely part of popular or legal discourse. In each instance, the legal meaning of the category has become progressively detached from the way it operates in people’s lives. This has led to absurd results that can dramatically threaten the fates of people who exist between or across the categories. This Article aims to bring clarity by tracing the historical and legal legacies of these categories and exposing a campaign to use the categorical distinctions to further subordinate the people affected by them.

This category confusion is especially dangerous for Indigenous peoples, as evidenced by recent lawsuits that have used the Reconstruction Amendments and civil-rights laws to attack Indigenous land, self-governance, and self-determination rights. These lawsuits argue that laws protecting such rights are actually illegal racial classifications. For example, in 2017, the U.S. Department of Justice sued Guam, alleging that a longstanding lease program implemented to protect the land rights of colonized Indigenous peoples violated federal civil-rights laws.¹ The same year, a Texas couple sued to invalidate the Indian Child Welfare Act (ICWA), leading a federal district court to strike down the law as a violation of the Equal Protection Clause in *Brackeen v. Zinke*.² These suits are the most recent in a series of cases that “highlight[] a conflict between an individual’s right to be free from race discrimination and the [I]ndigenous group’s claim for the protection of their lands and cultural rights.”³ Both plaintiffs argued that

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1. Complaint at 2, *United States v. Guam*, No. 17-00113, 2018 WL 6729629 (D. Guam Dec. 21, 2018).
 2. 338 F. Supp. 3d 514, 519, 536 (N.D. Tex. 2018), *aff’d in part, rev’d in part sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *aff’d in relevant part sub nom. en banc* *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022).
 3. Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 128 (2018). Professor Villazor characterizes these cases as “cultural.” *See id.* at 128-33. This understates the political nature of the claims of Indigenous and colonized peoples. *But see infra* notes 425 and 468 (discussing other work by Villazor in which she identifies the political nature of indigenous rights).

the laws in question were illegal because they singled out Indigenous people based on race. The law challenged in *Guam* applies to “native Chamorros,” defined as “those persons who became U.S. citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons.”⁴ In *Brackeen*, the plaintiffs challenged two classifications: “Indian famil[y]” and “Indian child[ren],” the latter defined as unmarried people under eighteen who are either “a member of an Indian tribe” or “eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe.”⁵ The plaintiffs in both cases characterized the laws as illegal racial classifications – illegal under the Fair Housing Act in *Guam*⁶ and illegal under the Fifth Amendment in *Brackeen*.⁷

The *Guam* suit ultimately settled,⁸ and the Court of Appeals for the Fifth Circuit reversed most of the district court’s *Brackeen* decision in panel and en

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4. Complaint at 4, *Guam*, 2018 WL 6729629 (No. 17-00113) (citing Guam Pub. L. 15-118 (1980)).
 5. Complaint at 3, 8, *Brackeen*, 338 F. Supp. 3d 514 (No. 4:17-cv-00868) (citing 25 U.S.C. §§ 1915(a), 1903(4) (2018)). The plaintiffs also challenged § 1915(b), which refers to an “Indian foster home.” *Id.* at 9. Neither “Indian family” nor “Indian foster home” is defined further in the statute. However, “Indian” is defined as “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in [the Alaska Native Claims Settlement Act].” 25 U.S.C. § 1903(3) (2018); *see also* 25 C.F.R. § 23.2 (2021). “Indian tribe” is defined as “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in [the Alaska Native Claims Settlement Act].” 25 U.S.C. § 1903(8) (2018). The plaintiffs also argued that the law and its implementing regulations violated the Commerce Clause, the Spending Clause, the Tenth Amendment, the Fifth Amendment’s Due Process Clause, the Administrative Procedure Act, and the Non-Delegation Doctrine. Complaint at 38-58, *Brackeen*, 338 F. Supp. 3d 514 (No. 4:17-cv-00868).
 6. Complaint at 10-11, *Guam*, 2018 WL 6729629 (No. 17-00113).
 7. Complaint at 39, *Brackeen*, 338 F. Supp. 3d 514 (No. 4:17-cv-00868) (alleging that DOI’s Final Rule implementing the statute violates the Administrative Procedure Act because its placement directives apply “to Indian children solely by dint of their or their parents’ membership in an Indian tribe—eligibility that often (as in this case) turns on blood quantum”); *id.* at 51 (“ICWA’s classification of Indians and non-Indians [in 25 U.S.C. §§ 1915(b) and (c)], and its discrimination against non-Indians, is based on race and ancestry and violates the constitutional guarantee of equal protection.”).
 8. *United States v. Guam*, No. 17-00113, 2020 WL 4043750, at *1 (D. Guam July 17, 2020) (“On June 5, 2020, . . . the parties settled this action.”); Settlement Agreement, *Guam*, 2020 WL 4043750 (No. 17-00113). A federal district court earlier denied the United States’s motion for judgment on the pleadings, holding that it could not determine on the facts alleged whether the Chamorro Land Trust Classification was political or racial and noting that the record would have to be developed to resolve “the question of whether the Chamorro Land Trust operates instead as a compensatory entity that seeks to implement the return to the people of Guam of land that the United States took from them.” *Guam*, 2018 WL 6729629, at 1 (No. 17-

banc decisions.⁹ However, the legacy of these cases lives on. The Supreme Court has agreed to review the decision in *Brackeen*,¹⁰ and the Guam government is working to rewrite a law authorizing a self-determination plebiscite after another classification in that law was struck down on similar grounds.¹¹ These lawsuits are just the most recent examples of race-based challenges to Indigenous rights. In such cases, plaintiffs argue that laws that apply only to a subset of people identified as Indigenous (or Indian) are illegal because indigeneity (or Indianness) itself is a racial category or because the laws use descent or ancestry as a criterion, and ancestry-based classifications are a stand-in for racial ones. Although the equal-protection guarantee in the Fifth and Fourteenth Amendments

00113) (order denying the plaintiff's motion for partial judgment on the pleadings; order granting in part and denying in part the defendant's motion for judgment on the pleadings and joinder therein). In the interim, Guam lost another challenge to a similar classification, which likely encouraged settlement in this case. See discussion *infra* Section II.C.

9. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *aff'd in relevant part sub nom. en banc Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022). The en banc decision was divided, and while it upheld most of the law, the court was equally divided on whether key sections were illegal, including the preferences for Indian families in section 1915, so the en banc decision affirmed this portion of the district court's holding. See *Brackeen*, 994 F.3d at 268-69. The challengers petitioned the U.S. Supreme Court for certiorari, asking the Court to strike down the law. Petition for a Writ of Certiorari, *Brackeen v. Haaland*, No. 21-380 (U.S. Sept. 3, 2021), 2021 WL 4116992. The United States filed its own petition in September 2021, asking the Court to uphold the law. Petition for a Writ of Certiorari, *Haaland v. Brackeen*, No. 21-376 (U.S. Sept. 3, 2021), 2021 WL 4080795. Four tribal nations asked the Court to uphold the law. Petition for a Writ of Certiorari, *Cherokee Nation v. Brackeen*, No. 21-377 (U.S. Sept. 3, 2021). Texas asked the Court to hold specifically that the "Indian child" classification (upheld by the Fifth Circuit) violates the Fifth Amendment. Petition for a Writ of Certiorari, *Texas v. Haaland*, No. 21-378 (U.S. Sept. 3, 2021), 2021 WL 4122397.
10. *Brackeen v. Haaland*, 142 S. Ct. 1205 (2022) (granting certiorari in Nos. 21-377, 21-378, 21-380).
11. Joe Taitano II, *Governor: Plebiscite Legislation in the Works*, PAC. DAILY NEWS (May 8, 2021), https://www.guampdn.com/news/local/governor-plebiscite-legislation-in-the-works/article_9e0afd49-3823-5dde-b296-fb8da155f86c.html [<https://perma.cc/Y23X-ZYPH>] (quoting the governor of Guam as recommending that the Legislature "amend the plebiscite statute, and write it in such a way that would comply with whatever the issues and concerns were from the court decision so that if we do it, there won't be . . . legal protests or legal objections" and describing one scholar's suggestion that the plebiscite be redesigned as a poll unassociated with the Guam Election Commission).

is the most common basis for such suits,¹² some allege violations of the Fifteenth Amendment¹³ or federal civil-rights laws.¹⁴

Recent claims cite the U.S. Supreme Court's 2000 opinion in *Rice v. Cayetano*¹⁵ to argue that that ancestry-based laws that project Indigenous rights are illegal because they classify people on the basis of race. In *Rice*, the Court relied on a thin conception of race as a static biological fact and a narrow construction of indigeneity as dependent on Federal Indian tribal status. These definitions fail to reflect the historical significance and material realities of race and indigeneity. They are also generally out of sync with how these concepts are understood in social and political movements.

The Court in *Rice* invalidated a voting rule that allowed only Indigenous Hawaiians to vote for the trustees responsible for land and assets held by the state in trust to benefit Indigenous Hawaiians. *Rice* rested on a shaky precedential foundation. The Court effectively invented a new rule about ancestry-based classifications in voting.¹⁶ For Indigenous peoples, this rule now threatens to limit all legal recognition of indigeneity to the framework of federal acknowledgement and tribal citizenship,¹⁷ leaving unrecognized tribes, Indigenous Hawaiians, Indigenous peoples in the U.S. territories, and anyone who is not a

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12. See, e.g., *United States v. Antelope*, 430 U.S. 641, 644 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005); *Waboll v. Villacrusis*, 958 F.2d 1450, 1451 (9th Cir. 1990).
 13. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 498 (2000); *Davis v. Guam*, 932 F.3d 822, 824 (9th Cir. 2019); *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087, 1089 (9th Cir. 2016).
 14. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 537 (1974); *United States v. Guam*, No. 17-00113, 2018 WL 6729629, at *1 (D. Guam Dec. 21, 2018).
 15. 528 U.S. 495 (2000).
 16. More precisely, the Court held that classifications based on Indigenous ancestry "can be a proxy for race" and were indeed such a proxy in the specific context of eligibility to vote in elections for the state-run Office of Hawaiian Affairs. *Rice*, 528 U.S. at 514. This rule has been reformulated by lower courts to suggest that any voting classification involving ancestry is illegal if it "refer[s] to specific ethnic or [Indigenous] groups" or "reference[s] blood quantum to determine descent." *Commonwealth Election Comm'n*, 844 F.3d at 1093.
 17. Only certain Indigenous groups have a formally recognized relationship with the U.S. government, and only certain individuals are formally citizens of those governments. Many other people may be considered Indigenous on the basis of noncitizenship affiliations, including those who are affiliated with Indigenous groups that do not have the same formal present-day relationship with the U.S. or that lack formal citizenship rules. See, e.g., Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 1015-25 [hereinafter Rolnick, *The Promise of Mancari*] (examining the Indian legal category); Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 428-34 (2016) [hereinafter Rolnick, *Tribal Criminal Jurisdiction*] (critiquing over-reliance on citizenship as the sole measure of tribal affiliation).

tribal citizen unprotected. As evidenced by *Brackeen*, it also occasionally threatens long-established federal laws that apply to Indian tribes and their citizens. These threats are not abstract: weakened legal protections for tribes and other Indigenous peoples can mean a loss of land and housing, loss of children, weakened political and judicial institutions, poorer health, greater poverty, language loss, and damage to cultural and religious practices.

The jurisprudential story of *Rice* exemplifies the legacy of historical blindness in the Court's interpretation of the Reconstruction Amendments. As such, the case was an important step in a series of juridical moves to articulate a theory of race as diametrically opposed to group political consciousness. It is one of many cases remaking the Reconstruction Amendments, which addressed group harms, into individual dignitary protections and then conscripting those protections in the service of White people as a weapon against non-White group identity. It was also an important milestone in the Court's effort to connect century-old cases about anti-Black discrimination to modern attempts to amplify the political power of minority groups through voting, flattening any distinctions between the two by ignoring their historical context. This historical blindness is part of what Ian F. Haney López labels "reactionary colorblindness," and it is exemplified in the Court's treatment of race-conscious remedies as morally and legally equivalent to laws intended to subjugate racial minorities.¹⁸ Neil Gotanda has similarly pointed to a sense of "unconnectedness" that distinguishes "formal race" as used by the Court from "historical race."¹⁹ Indeed, the foundation of the *Rice* holding is almost entirely theoretical. The case reaches back more than a century for its primary precedent, and it connects present to past with the thinness of factual and doctrinal threads. It is, at bottom, a triumph of the Court's insistence that race is reducible to biological labels and devoid of political content or historical meaning.

It is striking that a case standing on such shaky doctrinal ground has not been more effectively cabined, or even overturned. If it threatens the self-determination rights, political identity, and material conditions of so many people,

18. Ian F. Haney López defines reactionary colorblindness as "an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility." Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007).

19. As Neil Gotanda describes, the Court's colorblind, formal-race approach "assumes 'equal protection of the law' based on common 'citizenship,'" Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 38 (1991), whereas in a historical race analysis "racial categories describe relations of oppression and unequal power," *id.* at 40. Tracing the lineage of the formal-race approach back to the segregation era, Gotanda remarks that "[b]esides presuming that racial classifications are unconnected to social status or historical experience, the Court's formal-race analysis fails to recognize ties between the classification scheme of one statute and the treatment of race in other legislation." *Id.* at 38.

why hasn't it been limited to its facts?²⁰ Instead, *Rice* has been honed into a doctrinal weapon in the cultural and geographic shadows of American law through a series of Fifteenth Amendment challenges to Indigenous rights in the Pacific territories. Because these cases involved Indigenous Pacific Islanders, who are not recognized as Indians, they are not Federal Indian law cases. Because they involved disputes over land rights and self-determination, they are also not typical civil-rights cases. Off the radar of Indigenous-rights²¹ and racial-justice lawyers, non-Native people and conservative voting-rights groups have successfully used *Rice* to undermine the rights of Indigenous peoples in the U.S. territories.²²

To fully comprehend the significance of these attacks on Indigenous rights in the U.S. territories, this Article engages directly with three areas of law that are not typically in conversation: Federal Indian law, constitutional race law, and the law of the territories. It is the first article to consider all three areas together, and one of only a few to consider any two of them together. The Article identifies the doctrinal framework that has discouraged such conversations and traces its effect on litigation and scholarship. In Indian law, this framework manifests in a failure to identify commonalities between Indigenous rights on the mainland and in the U.S. territories or between recognized and unrecognized tribal

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20. Indeed, some courts that have encountered questions about Kānaka Maoli rights and status have limited or distinguished *Rice*. See, e.g., *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1164 (D. Haw. 2003) (declining to apply *Rice* or a Fourteenth Amendment framework to a challenge to a private entity under 42 U.S.C. § 1981); *Akina v. Hawaii*, 141 F.Supp.3d 1106, 1125-1126 (D. Haw. 2015) (declining to apply *Rice* to invalidate an election held by a nonprofit organization to elect delegates to a Kānaka Maoli constitutional convention); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (holding that *Rice* does not govern classifications that treat Indigenous Hawaiians as a political group, and applying rational basis review to the federal government's decision to exclude Kānaka Maoli from regulations governing the acknowledgement of Indian tribes); see also *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 853 (9th Cir. 2006) (Fletcher, J., concurring) ("Unlike *Rice*, the case before us does not involve preferential voting rights subject to challenge under the Fifteenth Amendment. Rather, it involves the preferential provision of educational benefits. To the extent that the federal Constitution is implicated at all, the relevant text is the Equal Protection Clause of the Fourteenth Amendment. The Court in *Rice* never questioned the validity of the special relationship doctrine under the Fourteenth Amendment, and never even hinted that its Fifteenth Amendment analysis would apply to the many benefit programs enacted by Congress for Native Hawaiians, Alaska Natives, and American Indians.").
21. More than 400 tribes, more than 2 dozen states, about 20 law professors, and several nonprofit organizations filed briefs supporting the Indian Child Welfare Act (ICWA) in the *Brackeen* case. None filed briefs in the Guam Fair Housing Act case or in the two cases described in Section II.C. See text accompanying *infra* notes 394-395 (describing the *Brackeen* briefs).
22. *Davis v. Guam*, 932 F.3d 822, 824-25 (9th Cir. 2019); *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087, 1091 (9th Cir. 2016); see *infra* Section II.C (discussing the role of conservative voting-rights groups in both *Davis* cases).

groups. The marginalization experienced by territorial residents is thereby reproduced in the area of Indigenous rights. In race law, it appears as a reluctance to fully understand and appreciate the racialized harms experienced by Indigenous peoples. In the law of the territories, it has resulted in a near-total failure to grapple with the desires and contemporary struggles of Indigenous residents as a distinct group. In each area, shortsighted acceptance of the doctrinal divisions between race and Indianness, between recognized and unrecognized Indigenous groups, and between citizens and subjects has also resulted in missed opportunities to rethink important questions about racialized harm, history, and inclusion. The Article argues that scholars and advocates should reject, not accept, these doctrinal divisions – and it proposes both short- and long-term options for doing so.

Beginning with its 1974 decision in *Morton v. Mancari*, the Supreme Court has carved out a clear doctrinal distinction between indigeneity and race.²³ The law has long addressed the effects of colonization through a different structure than it addressed the effects of Black slavery and subordination. Until *Mancari*, however, it was possible to understand colonization as a racial harm, albeit a distinct one from enslavement.²⁴ I have previously described how the *Mancari* holding, while legally correct, formally bifurcated Indianness from race and how later applications of its rule compressed the legal meaning of both categories to make them oppositional.²⁵ In that article, I described *Rice* as the case that “solidified this oppositional framing” and argued that it was “a key step in the evolution of the political classification doctrine because the majority decision crystallized the dichotomy” first outlined in *Mancari*.²⁶ The decision was “driven in part by a concern that legal recognition of indigeneity, which implicates ancestry, would be in conflict with Equal Protection jurisprudence that eschews any use of racial classifications,” and I predicted that it would therefore make “classifications that rely on indigenous ancestry . . . difficult for some courts to square with the Court’s colorblind race jurisprudence.”²⁷ The cases described in this Article show that *Rice* has indeed been used to dismantle legal protections for indigeneity, first for non-Indian Indigenous peoples and eventually for Indian tribes as well.

23. 417 U.S. 535 (1974).

24. See Brief of MALDEF, *Mancari*, 417 U.S. 535 (No. 73-362) (treating the employment classification at issue in *Mancari* as a benign racial classification and arguing that such race-conscious remedies should not be reviewed under strict scrutiny); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 304 n.42 (1978) (opinion of Powell, J.) (discussing the petitioner’s argument that *Mancari* was an example of a court reviewing benign racial classifications under a lower standard).

25. Rolnick, *The Promise of Mancari*, *supra* note 17, at 963-65.

26. *Id.* at 996, 1000.

27. *Id.* at 1000, 1016.

Rice's ancestry-race equivalence is central to a colorblind, anticlassification view of the Constitution. From the First Reconstruction through the Second Reconstruction, Black Americans were socially and legally classified according to race and subordinated as a result of that classification. Courts did not have to determine whether the central injury of racism occurred at classification or at subordination because the two were undeniably linked in almost every case.²⁸ When asked to decide the constitutionality of race-conscious remedies, the Court beginning in the 1970s embraced the anticlassification view, locating the harm of racism at the moment of classification.²⁹ As envisioned by the Court, the injury of classification is immediate and dignitary. That is, the harm is one to personal dignity; occurs at the moment of classification; and is equally experienced by anyone so classified, White or non-White, regardless of the purpose or material outcome of the classification. According to this view, classification alone causes harm because race is insignificant and irrelevant, and it therefore harms a person's dignity to be classified according to an insignificant trait. The anticlassification view is thus premised on an understanding of race as a static, biological fact, unconnected to history, political power, or collective identity. From that definition flows descriptive and normative colorblindness – the belief that physical or biological attributes are and should be unrelated to legal rights like voting and citizenship. Accordingly, laws that make rights turn on racial classifications must be carefully reviewed.³⁰

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28. The Amendments and major cases include language that appears to condemn both classification and subordination, though it is not clear that one would be condemned if not linked to the other. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (holding the act of separating by race unconstitutional regardless of equality of resources but reasoning primarily that segregation “generates a feeling of inferiority [in Black students specifically] as to their status in the community”); *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting) (using the language of colorblindness but recognizing a one-way stigma).
29. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 UNIV. MIA. L. REV. 9, 10 (2003); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1063-64 (2011); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2318 (1997); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142-43 (1997); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004) [hereinafter Siegel, *Equality Talk*]; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103, 105 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).
30. See *Shaw v. Reno*, 509 U.S. 630 (1993) (applying strict scrutiny to race-based redistricting); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (also applying a strict scrutiny framework to a school district's race-based admissions process).

On the other hand, an antisubordination view focuses on whether state action harms a historically oppressed group or enforces existing hierarchies.³¹ Racial classifications employed to dismantle hierarchies might thus be treated differently than racial classifications that reinforce them. This view understands race as a dynamic sociohistorical process by which hierarchies have been produced, not as an abstract question of biology. It requires attention to historical harm and relative political power.³² Although it may not be immediately apparent, the reflexive assumption that race is interchangeable with ancestry is thus tied to an anticlassification, as opposed to antisubordination, view of the Constitution.

The *Rice* decision itself was limited in many respects. It involved a state asserting authority over matters generally reserved to the federal government. It involved voting for officers of a state government. And it involved the unique situation of an Indigenous group whom Congress had declined to recognize as an Indian tribe. As precedent, however, the case has taken on a new life. Since it was decided, advocates have cited *Rice* for a rule that clumsily equates race with ancestry, categorically barring ancestry-based classifications under the Fifteenth Amendment and requiring strict scrutiny under the Fifth and Fourteenth.³³ It is cited in cases challenging the legality of “Indian” classifications generally,³⁴ as well as in cases challenging benign racial classifications in other contexts, such

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31. See Seigel, *Equality Talk*, *supra* note 29, at 1472-73; DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 162-77 (1987); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108, 157 (1976).
 32. See Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 300 (2014) (identifying group status, history of discrimination, and political powerlessness as key themes in scholarly discussions of antisubordination).
 33. See Brief for Appellant at 35-37, *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2013) (No. 13-15199); *Guam*, 932 F.3d at 834-35 (9th Cir. 2019) (describing and rejecting Davis’s argument that *Rice* prohibits all ancestry-based classifications); Plaintiffs-Appellees’ Answering Brief at 14, 22, 24-25, *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (No. 00-17213); Brief of Amici Curiae Goldwater Institute, Cato Institute, and Texas Public Policy Foundation in Support of Plaintiffs-Appellees on Rehearing En Banc at 4, *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479) (citing *Rice* for the proposition that an ancestry-based classification is unconstitutional even if it does not include all members of a racial group). See generally *infra* Part II (explaining how the rule of *Rice* has matured as it has been used in litigation).
 34. See, e.g., *Brackeen v. Bernhardt*, 937 F.3d 406, 429 (5th Cir. 2019) (distinguishing *Rice* from the classifications used in the ICWA), *aff’d in relevant part sub nom. en banc*, *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022); *K.G. Urban Enterprises L.L.C. v. Patrick*, 693 F.3d 1, 19 (1st Cir. 2012) (reasoning that “[t]he effect of *Rice* on a Fourteenth Amendment claim involving federally recognized tribes is unclear” in a challenge to a Massachusetts law authorizing tribal-state gaming-compact negotiations).

as majority-minority voting districts and affirmative action.³⁵ This Article traces the precedential life of *Rice* to show how these three areas (Indigenous rights in the territories, Indian law, and constitutional race law) are connected – and how courts have employed specific intellectual moves to endanger all three.

The claim that ancestry is equivalent to race, if taken to its logical conclusion in the hands of a colorblind, anticlassification Court, could juridically erase Indigenous peoples and fully sever the legal idea of race from its historical and material context of group harm. This will be the eventual consequence of American law's refusal to link colonization and racial subordination.³⁶ By centering racialized Indigenous peoples in the territories and demonstrating how their claims are illegible under Indian law, race law, and the law of the territories, this Article highlights the limits of current legal doctrine.³⁷ Together, the existing cases cabin the recognition of historical harm and group rights to a small subset of American people (subject to ultimate federal domination) and convert any recognition of group harm into illegal race discrimination.

Because this Article is fundamentally about the law's unwillingness to capture the overlap, distinction, and nuance of political identity categories, I begin in Part I by identifying several interrelated categories – Indigenous, Indian, colonized peoples, race, and ancestry – and describing the meaning, significance, and boundaries of each one. Three of them (Indianness, colonization, and race) are associated with distinct bodies of U.S. law (Federal Indian law, law of the territories, and civil-rights law),³⁸ so that the axis of categorization determines

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35. See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2221 (2016) (quoting *Rice* in a Fourteenth Amendment challenge to a university's admissions policy); *Prejean v. Foster*, 227 F.3d 504, 519 & n.25 (5th Cir. 2000) (quoting *Rice* in a Fifteenth Amendment challenge to the creation of a majority-minority voting district); see also *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013) (citing *Rice* for the proposition that the Fifteenth Amendment is focused on the present and future, not the past).
36. As scholars of territorial law have insisted, how American law treats the inhabitants of America's territories speaks volumes about American identity and the meaning of the Constitution itself. See, e.g., SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* (2018); AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); Christina Duffy Burnett [Ponsa-Kraus], "They Say I Am Not An American . . .": *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L LAW 659 (2008). But the territories rarely even make it into the law-school curriculum. Instead of leaving indigeneity as a footnote to the status of territorial residents overall, this Article centers their legal situation and potential claims and considers how they can be made legible under the Constitution.
37. Cf. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019) (rethinking public-law principles by centering Indian nations); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) (rethinking constitutional originalism by centering Indian nations).
38. Ancestry is closely associated with race but, as this Article explains, it is not always a matter of civil-rights law. Indigeneity has meaning in international, but not domestic, law.

the body of law that will apply to a case. In addition, when a classification is challenged in court as a violation of equal protection, the test that courts apply turns on the way the classification is characterized. Most obviously, if it is racial or can be characterized as racial, a court will apply strict scrutiny. This analysis presumes illegality unless stringent conditions are satisfied and a court's decision to apply it often signals that it will strike down the law or policy.³⁹ Opponents of Indigenous rights can manipulate these categories to invoke the body of law most likely to result in their desired outcome, as the litigants did in *Rice*. More broadly, the tight association between category and body of law can mean that the law is unresponsive to the situations of groups or people who fall into more than one category.

In Part II, I trace *Rice* from its holding in 2000 to its use as precedent in later cases. In that case, the State of Hawaii, seeking to invoke Federal Indian law, argued that Indigenous Hawaiians were like Indians.⁴⁰ Meanwhile, the challenger, seeking to invoke constitutional prohibitions on racial classifications, argued that the class was defined by ancestry and that ancestry should be treated the same as race.⁴¹ When the Court held in favor of the challenger, it did so by holding that the use of ancestry to identify Indigenous Hawaiians was a proxy for race, and juxtaposing both concepts against political Indianness.⁴² The decision thus set Indigenous Hawaiians apart from Indian tribes as a matter of constitutional law and crystallized a political-versus-racial dichotomy. Part II examines how the Court used Fifteenth Amendment precedent to accomplish this

39. Constitutional-law scholars have questioned the conventional wisdom that strict scrutiny is “strict in theory and fatal in fact,” e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794-796 (2006), but it remains very difficult for race-conscious laws that benefit non-White people to survive it, see David Schraub, *Post-Racialism and the End of Strict Scrutiny*, 92 IND. L.J. 599, 601-02 (2017); Ian F. Haney-López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 n. 3 (2007); see also Winkler, *supra*, at 824-25, 839 (describing strict scrutiny as becoming more difficult to satisfy since 1990 and demonstrating that certain types of race-conscious remedial laws fare worse under the standard). While strict scrutiny arguably became less rigid and more contextual in the 2000s, see Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOWARD L.J. 241, 245 (2006); Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. UNIV. CHI. L.J. 21, 22-23 (2004), certain uses of race continue to fare better than others, see Ancheta, *supra*, at 47-48 (describing the limited nature of deference to academic institutions in diversity-based affirmative action cases); Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 UNIV. PITT. L. REV. 1, 49 (2010) (describing courts’ application of strict scrutiny to racial profiling by law enforcement as “stingy”).

40. See *infra* notes 187-188, 194-195 and accompanying text.

41. See *infra* notes 188 and accompanying text.

42. See *Rice v. Cayetano*, 528 U.S. 495, 514, 518-19 (2000).

result more expediently. It then examines how the limited holding of *Rice* has been expanded into a broad rule through circuit-court cases applying its Fifteenth Amendment analysis to the territories and later in lawsuits that move its analysis beyond the context of voting. It concludes by examining the return of *Rice* in lawsuits challenging the rights of Indian tribes. Part II thus provides a detailed map of the doctrinal evolution of the *Rice* rule through individual cases.

Part III focuses on the implications of the broad rule that emerged from the process described in Part II and its potential effects on Indigenous sovereignty and self-determination. It also considers how the delineation between categories of law has implications beyond Indigenous rights. It argues that the modern rule of *Rice* employs constitutional race jurisprudence to perfect the colonization project. First, it argues that prohibiting any use of ancestry juridically erases Indigenous and colonized peoples as a separate class in the present day and paves the way for members of colonizer nations to complete the project of colonization by outnumbering and outvoting them. Second, it argues that the equivalence between ancestry and race is an important pillar of the Court's understanding of race as a matter of individual, immutable, biological characteristics. This definition of race is what enables the Court to insist, as it did in *Rice*, that race is irrelevant to rights, identity, and peoplehood. Biologizing race further divorces it from social, political, and historical reality, making possible the Court's colorblind, anticlassification theory of race and turning the Reconstruction Amendments into a tool to dismantle collective racial identity and forbid structural remedies for racial subordination. That neither Indianness nor race are closely associated with the U.S. territories supports a territorial jurisprudence that inadequately addresses the role of racialization and forced inclusion in U.S. colonization, while positioning full incorporation as the solution to colonial subordination.

Finally, Part IV returns to the question of how to protect Indigenous peoples in the territories. It presents five strategies and analyzes their practical consequences and the theoretical challenges they could pose to the doctrinal puzzle described in this Article. The purpose of Part IV is not to advocate for a particular solution, but to illustrate that nearly all strategies benefit one group while harming another. I suggest that parties and amici advance the most practical and available defenses, while also challenging the larger doctrinal structure in which cases arise.

I. CLASSIFICATIONS IN U.S. AND INTERNATIONAL LAW

Indigenous peoples have rights under international law because they belong to groups that occupied land within contemporary nations before other people

arrived.⁴³ Although these rights may benefit individuals, they are collective rights, and they accrue to individuals based on affiliation with a group.⁴⁴ In U.S. courts, Indigenous rights are recognized and protected through the “Indian tribe” legal category.⁴⁵ “Indian tribe” in this context usually refers to a group who inhabited American states before they became American states and with whom the United States continues to have a government-to-government relationship.⁴⁶ Individuals affiliated with Indian tribal governments have rights as “Indians” because of their affiliation.⁴⁷ But as it is most commonly used in contemporary U.S. law, this category excludes many Indigenous peoples.⁴⁸ Most notably, it excludes members of any Indigenous group not officially recognized as an Indian tribe by the federal government. It therefore excludes the approximately 500,000 Indigenous Hawaiians throughout the United States,⁴⁹ the approximately 150,000 Indigenous Chamorros and Carolinians of Guam and the Commonwealth of the Northern Mariana Islands (CNMI), and the approximately 184,000 Indigenous Samoans.⁵⁰

Colonized peoples, many of whom are Indigenous, also have rights under international law based on their presence in, and national identity with, a nation

43. See G.A. Res. 61/295 (Sept. 13, 2007) (establishing rights for Indigenous peoples under international law); S. James Anaya, *Indigenous Peoples and International Law Issues*, 92 AM. SOC. INT’L L. PROC. 96, 96-97 (1998) (defining “Indigenous peoples” and summarizing the status of their rights under international law).

44. See Alexandra Xanthaki, *Collective Rights: The Case of Indigenous Peoples*, 25 AMICUS CURIAE 7, 7 (2000).

45. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 959 n. 1714, 959 n.2, 963-64, 1000-01.

46. See *id.* at 977-78; Rolnick, *Tribal Criminal Jurisdiction*, *supra* note 17, at 374. Since the 1990s, the Department of the Interior (DOI) has published an annual list of Indian tribes with which the United States acknowledges a government-to-government relationship. See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7,554 (Jan. 29, 2021).

47. Rolnick, *The Promise of Mancari*, *supra* note 17, at 972-73.

48. Historical uses of the term “Indian” were broader and could arguably support a decision by Congress to embrace the Indigenous groups described here within the legal definition of Indian. I return to this point in Section IV.C. Generally, however, Congress and the courts have declined to interpret the category broadly enough to encompass these groups.

49. For more information about population estimates, which are usually based on self-identification, see Sara Kehaulani Goo, *After 200 Years, Native Hawaiians Make a Comeback*, PEW RSCH. CTR. (Apr. 6, 2015), <https://www.pewresearch.org/fact-tank/2015/04/06/native-hawaiian-population> [<https://perma.cc/CGB4-B8UP>].

50. Population estimates are based on census categories. See U.S. CENSUS BUREAU, *THE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER POPULATION: 2010*, at 14 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf> [<https://perma.cc/CAV2-82RA>].

before it was annexed or absorbed by another nation.⁵¹ Colonized peoples in U.S. territories that eventually became states are now U.S. citizens, legally indistinguishable today from other U.S. citizens, unless they are also Indians. Residents of nonstate territories are either citizens or nationals today, but their constitutional status is unique because they live in a territory.⁵² While the territorial resident category lumps together Indigenous peoples, colonized peoples, and new residents, local laws sometimes distinguish between territorial residents based on indigeneity or colonized status.⁵³ However, as this Article will demonstrate, those classification systems are vulnerable because they do not match the broader constitutional categories used in American law.

When policy makers attempt to enshrine protections for Indigenous peoples who are not members of federally acknowledged tribes, or to distinguish between Indigenous and non-Indigenous (or colonized and settler) residents of territories, they often define the protected category with reference to ancestry or descent as a way to trace the connection between present-day people and historical groups that directly experienced colonization or settlement. The resulting rules are confused with racial classifications, or labeled as ancestry-based classifications, which are then treated the same as racial classifications.⁵⁴ For example, the Bush Justice Department raised concerns about the constitutionality of a law authorizing federal health services for Indian people because it covers “urban Indians” – Native people living in cities,⁵⁵ a category that includes people who

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51. See *infra* notes 114-117 and accompanying text (describing the rights of colonized peoples under international law).
52. See ERMAN, *supra* note 36, at 1 (“This book tells the story of ‘almost citizens’—the people of Puerto Rico who were deemed neither citizens nor aliens, and who lived in a land deemed neither foreign nor domestic.”); Valérie Vézina, *Navigating Citizenship and National Identity in American Territories: Nationalism in American Samoa and Puerto Rico*, 14 SHIMA 168, 172-75 (2020) (contrasting the status of citizen Puerto Ricans and national American Samoans).
53. See text accompanying *infra* notes 251, 253-257, 274-278, 272, 301, 307, 310-313, 401, and 432 (describing local laws in the Commonwealth of the Northern Mariana Islands (CNMI), Guam, and American Samoa).
54. See *infra* Part II.
55. See *Urban Indian Eligibility*, INDIAN HEALTH SERV., <https://www.ihs.gov/california/index.cfm/health-programs/eligibility/urban-indian-eligibility> [<https://perma.cc/29Z7-BJSS>]; see also *Urban Indian America*, NAT’L URB. INDIAN FAM. COAL. 4-14, <https://www.aecf.org/m/researchdoc/AECF-UrbanIndianAmerica-2008-Full.pdf> [<https://perma.cc/MF9C-E32S>] (describing the urban Indian population). See generally DONALD LEE FIXICO, *TERMINATION & RELOCATION: FEDERAL INDIAN POLICY, 1945-1960* (1986) (describing a federal policy of relocating Indian people to cities and some reasons for severed or weakened ties between individuals and their tribes).

are lineal descendants of tribes but are not tribal citizens.⁵⁶ Similarly, the lack of an Indigenous legal category in U.S. law, and the failure of Congress, the Executive branch, and the courts to extend the Indian category to encompass Indigenous Pacific Islanders, makes it increasingly difficult to legally distinguish between Indigenous and non-Indigenous residents of the U.S. territories.

While there is judicial and scholarly clarity on the idea that “Indian” classifications are not racial,⁵⁷ courts often treat “race” and “ancestry” as interchangeable.⁵⁸ Indeed, a commonly cited definition of race is an “identifiable class[] of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”⁵⁹ This slippage, though, has undone the legal rights of Indigenous peoples who exist outside the boundaries of federally acknowledged Indian tribes and threatened the rights of all Indigenous peoples.

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56. See DOJ Stumbles to Explain Indian Health “White Paper,” INDIANZ (Mar. 14, 2007), <https://www.indianz.com/News/2007/001843.asp> [<https://perma.cc/DV8M-8C7N>] (describing a controversy about the Department of Justice’s 2007 white paper that “derailed” the Indian Health Care Improvement Act); *Bush Administration Takes Limited View of Indian Health*, INDIANZ (Mar. 12, 2007), <https://www.indianz.com/News/2007/001803.asp> [<https://perma.cc/FKS6-GN78>] (“As part of its long-standing objections to the Indian Health Care Improvement Act, the Department of Justice is questioning whether urban Indians, lineal descendants and certain Alaska Natives can receive federal services at all.”); Republican Off., *Native Hawaiian Recognition Bill Creates Unconstitutional Race-Based Government*, COMM. ON NAT. RES. (Feb. 22, 2010), <https://republicans-naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=171333> [<https://perma.cc/HVV4-234W>] (Republican statement opposing a Native Hawaiian recognition bill on the grounds that it creates a race-based government); see also Rolnick, *The Promise of Mancari*, *supra* note 17, at 1016–17 (describing challenges to health-care law and other “Indian” classifications that rely on descent).
57. *Morton v. Mancari*, 417 U.S. 535, 548 (1974) (finding “clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed”); *United States v. Antelope*, 430 U.S. 641, 645 (1977) (“The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.”); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 479–80 (1976) (holding that tax immunity for reservation Indians is not “invidious racial discrimination”); Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1056–60 (2012); Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1179–87 (2010); Gregory Ablavsky, “*With the Indian Tribes*”: *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1028 (2018).
58. *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943); *Korematsu v. United States*, 323 U.S. 214, 217 (1944). *But see* *Davis v. Guam*, 932 F.3d at 836 (“Just as race is a difficult concept to define, so is ancestry’s precise relationship to race. Ancestry identifies individuals by biological descent. Racial categories often incorporate biological descent . . . [b]ut ancestry and race are not identical legal concepts.”).
59. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

Below, I explain five possible axes of classification—indigeneity, Indianness, colonization, race, and ancestry—identifying their different purposes, their uses and definitions, and areas of overlap between them. Some groups may be classified along multiple axes. For example, Chamorros in Guam and the Northern Mariana Islands are Indigenous peoples who are also colonized peoples.⁶⁰ “Chamorro” has been listed as a racial category on the census.⁶¹ And some modern-day laws identify Chamorros with reference to ancestry.⁶² However,

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60. See Keith L. Camacho, *Filipinos, Pacific Islanders, and the American Empire*, in *THE OXFORD HANDBOOK OF ASIAN AMERICAN HISTORY* 13 (David K. Yoo & Eiichiro Azuma eds., 2016); Michael P. Perez, *Colonialism, Americanization, and Indigenous Identity: A Research Note on Chamorro Identity in Guam*, 25 *SOCIO. SPECTRUM* 571 (2005); Michael P. Perez, *Pacific Identities Beyond U.S. Racial Formations: The Case of Chamorro Ambivalence and Flux*, 8 *SOC. IDENTITIES* 457 (2002).
61. See Rachel Marks & Merarys Rios-Vargas, *Improvements to the 2020 Census Race and Hispanic Origin Question Designs, Data Processing, and Coding Procedures*, U.S. CENSUS BUREAU (Aug. 3, 2021), <https://www.census.gov/newsroom/blogs/random-samplings/2021/08/improvements-to-2020-census-race-hispanic-origin-question-designs.html> [<https://perma.cc/WG5K-2KQX>] (discussing the 2020 census); Clare Kluskens, *1950 Census: Form P85, 1950 Census of Population – Guam*, HIST. HUB (Nov. 3, 2021), <https://historyhub.history.gov/community/genealogy/census-records/blog/2021/11/03/1950-census-form-p85-1950-census-of-population-guam> [<https://perma.cc/TU4K-KXWB>] (describing use of Chamorro designation in 1950 Guam census); see also C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 *ANN. REV. SOCIO.* 563, 577-578 (2003) (discussing the complex relationship between shifting racial categories for Native Hawaiian and Pacific Islander groups and legal claims to Indigenous rights). See generally MAILE ARVIN, *POSSESSING POLYNESIANS: THE SCIENCE OF SETTLER COLONIALISM WHITENESS IN HAWAII AND OCEANIA* (2019) (describing how Indigenous Pacific Islanders have been racialized in opposition to White people).
62. See, e.g., 5 GUAM CODE ANN. § 87105 (conditioning eligibility to serve on the board of trustees of the Department of Chamorro Affairs on Chamorro ancestry); 21 GUAM CODE ANN. § 75102 (conditioning eligibility to serve on the Chamorro Land Trust Commission on Chamorro ancestry); see also *infra* notes 274-278279 and accompanying text (describing plebiscite law).

Chamorros are not usually classified as Indians. On the other hand, Black people⁶³ are generally described as a racial group, and may also be identified by reference to ancestry, but are neither Indigenous to the present-day United States nor colonized peoples under international-law definitions.⁶⁴

Under American law, how a group is classified according to these axes is important because the Constitution (and the civil-rights laws passed to carry out its mandates) is interpreted differently depending on the type of classification. That is, racial classifications are strictly scrutinized under the Fourteenth Amendment⁶⁵ and expressly forbidden under the Fifteenth Amendment⁶⁶ and many statutes.⁶⁷ “Indian” classifications are generally upheld under both the Constitution and statutes so long as they are rationally related to federal power over Indian affairs.⁶⁸ Classifications based on indigeneity, colonization, and/or ancestry thus survive and fall depending on whether they seem more racial or more Indian.

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63. Even in the example, this categorical distinction obscures the experience of individuals who are Black and Indigenous, and of freedmen – that is, Black people formerly enslaved by Indian tribes who were later granted tribal citizenship in those nations. See generally KENDRA TAIRA FIELD, *GROWING UP WITH THE COUNTRY: FAMILY, RACE, AND NATION AFTER THE CIVIL WAR* (2018) (providing a historiography and family history of people of African descent who migrated to Indian territory and made families with Creek and Seminole people); TIYA MILES, *THE TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM* (2005) (providing a history of an Afro-Cherokee family); Kyle T. Mays, *Blackness and Indigeneity*, in *FOUR HUNDRED SOULS: A COMMUNITY HISTORY OF AFRICAN AMERICA, 1619-2019*, at 123-24 (Keisha N. Blain & Ibram X. Kendi, eds., 2021) (highlighting the history of Afro-Indigenous people – “those with a relationship not only to the mark of Blackness but also to U.S. indigenous roots”); CIRCE STURM, *BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA* (2002) (describing the history of Cherokee freedmen). It also erases the pre-enslavement history of African-descended Americans. Kyle T. Mays, *A Provocation of the Modes of Black Indigeneity: Culture, Language and Possibilities*, 44 *ETHNIC STUD. REV.* 41, 43 (2021) (introducing the concept of Black Indigeneity and asking “what if we take seriously that those Africans who were Indigenous peoples stolen from their own places of home and forced to labor on dispossessed land, were actually Indigenous?”).
64. The fact that international-law definitions of colonized peoples do not usually encompass peoples who were enslaved and displaced from the land to which they are Indigenous raises difficult questions that are beyond the scope of this Article.
65. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).
66. U.S. CONST. amend. XV.
67. E.g., 42 U.S.C. §§ 1981, 1982 (2018).
68. See *Morton v. Mancari*, 417 U.S. 535, 551, 555 (1974); Rolnick, *The Promise of Mancari*, *supra* note 17, at 995.

Each of these classifications is also associated with a different legal framework. Laws that include racial classifications demand application of the Reconstruction Amendments and civil-rights laws.⁶⁹ Laws that address the rights of Indians fit within the framework of Federal Indian law, generally separate from race law. The rights of colonized peoples in the U.S. territories are governed by territorial law, which is distinct from both race law and Indian law. Indigeneity has meaning in international law, which is also a source of different rights and protections for colonized peoples. Indigenous and colonized peoples under international law, and Indians under domestic law, have present-day group rights connected to a recognition of past collective harms. Race law generally does not include a similar recognition of group identity, historical harm, or collective rights.

This Article contrasts the three domestic regimes implicated here – Federal Indian law, race law, and law of the territories – by examining cases about Indigenous Pacific Islanders (a group that spans multiple categories). Each regime incorporates certain assumptions, highlights certain themes, and elides certain realities. For example, modern Federal Indian law cases include a robust engagement with history and sovereignty and an acknowledgement that forced assimilation has harmed Native people.⁷⁰ But they are premised on an assertion of expansive federal power⁷¹ and they do not engage with the way racialization has facilitated Native dispossession and subordination.⁷² Race law directly acknowledges the role of racism in subordination of various groups, but in its modern form it employs an individualized analysis of discrimination and does a poor job of acknowledging group identity and collective harm. Law of the territories comprehends the harm of colonization but obscures its unevenness by treating all present-day residents the same and incorporating near-total federal power without a group remedy.

Highlighting a particular category thus means invoking a particular framework at the expense of other frameworks. This is illustrated by the cases discussed in Part II, which involved multiple axes of classification and therefore fell between several possible legal frameworks. A court's decision about which framework to apply is consequential because of what the different frameworks

69. Ancestry is not associated with any specific body of U.S. law, but it is most commonly treated as race-adjacent and analyzed as a racial classification would be.

70. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 976, 991-92.

71. See Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 *UCLA L. REV.* 666, 680-82 (2016); Natsui Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 *YALE L. & POL'Y REV.* 427, 430 (2002); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 *U. PA. L. REV.* 195, 233-34 (1984).

72. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 987-88.

highlight and obscure. Most importantly for Indigenous peoples, among domestic regimes, only Indian law acknowledges historical harms and present-day group political identity. For non-Indigenous peoples, claims to group political rights and remedies for collective harms are nearly always out of reach because of the individual, anticlassification bent of modern race law. This Article describes how Indigenous peoples could similarly be denied group rights and identity, leaving them vulnerable to loss of territory and blocked pathways to self-governance and collective liberation. As those cases demonstrate, all frameworks have their shortcomings, but the inability of courts to employ more than one at a time has caused the greatest damage.

A. *Indigeneity*

Indigeneity does not have independent legal significance in U.S. law—that is, Indigenous status alone does not trigger any specific set of doctrinal protections. Indigeneity is a political status and a racialized category,⁷³ but it is more than what is encompassed by either racial Indianness or political recognition as an Indian under U.S. law. Those two categories overlap but are not identical. The “American Indian/Alaska Native” racial category (for example, on the census) includes people who are not legally considered Indians.⁷⁴ The “Indian” legal category includes many people of mixed racial backgrounds. Neither the “Indian” racial category nor the “Indian” legal category is coextensive with the “Indigenous” category, which may encompass anyone descended from peoples colonized by the United States.

“Indigeneity” is an important category in international law. The United Nations Declaration on the Rights of Indigenous Peoples does not include a precise definition of “indigeneity,” but its drafters identified several factors that define Indigenous populations: descent, land occupation, cultural distinctiveness, and nondominant status.⁷⁵ As S. James Anaya explains,

73. See generally *id.* at 967 (examining the relationship between the Indian legal and racial categories).

74. See Malia Villegas, Amber Ebarb, Sarah Pytalski & Yvette Roubideaux, *Disaggregating American Indian and Alaska Native Data: A Review of Literature*, NAT’L CONG. OF AM. INDIANS, POL’Y RSCH. CTR. 14-15 (2016), <https://www.policylink.org/sites/default/files/AIAN-report.pdf> [<https://perma.cc/834Y-TQHU>] (discussing the difference between tribal affiliation and racial self-identification in census data). For example, a person may identify as American Indian based on family history or genetic evidence of connection to an American Indian community, but if that person is not recognized as a citizen or affiliate by the contemporary tribal government, they would not qualify as Indian for legal purposes.

75. Erica-Irene A. Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. INT’L AFFS. 7, 9-10 (2008); U.N. DEP’T OF ECON. & SOC. AFFAIRS, THE CONCEPT OF INDIGENOUS PEOPLE, at 2-3, U.N. Doc. PFI/2004/WS.1/3 (2004).

[Indigenous peoples are] the culturally distinctive and more or less cohesive groups whose ancestors were the original inhabitants of lands now dominated by others. These include Indian tribes or communities of the American continents and aboriginal peoples in Australia and New Zealand, as well as other insular groups whose origins predate the settler societies that have developed around them.⁷⁶

In the context of the United States, a group should be considered Indigenous if all or part of its ancestral territory is within the present-day boundaries of the United States, without regard to present-day national⁷⁷ or state⁷⁸ borders or relocation to other territory within the United States.⁷⁹

Although connection to occupied land is only one part of the definition above, it is the factor that most distinguishes “indigeneity” from related categories. As Taiaiake Alfred and Jeff Corntassel explain:

The communities, clans, nations and tribes we call Indigenous peoples are just that: Indigenous to the lands they inhabit, in contrast to and in contention with the colonial societies and states that have spread out from Europe and other centres of empire. It is this oppositional, place-based existence, along with the consciousness of being in struggle

76. Anaya, *supra* note 43, at 96.

77. The Jay Treaty recognizes the right of Canada-U.S. border tribes to free passage across the Canada-U.S. border. Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate, Art. III, 8 Stat. 116 (1794); Act of Apr. 2, ch. 308, 45 Stat. 401 (1928); Caitlin C.M. Smith, *The Jay Treaty Free Passage Right in Theory and Practice*, 1 AM. INDIAN L.J. 161, 162 (2012). Similarly, the Tohono O’odham Nation has resisted federal efforts to build a border wall through its territory. *Resolution 0117*, INTER TRIBAL ASS’N OF ARIZ. (Feb. 10, 2017), <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/ITAA-Resolution-0117-Opposition-to-Border-Wall.pdf> [<https://perma.cc/6J6V-DD9B>].

78. For example, the Shoshone-Paiute Tribes of the Duck Valley Reservation occupy a territory that straddles the Idaho-Nevada border and the tribes’ ancestral territory includes present day Idaho, Nevada, and Oregon. See *Duck Valley Indian Reservation*, NEV. STATE HIST. PRESERVATION OFF., <https://shpo.nv.gov/nevadas-historical-markers/historical-markers/duck-valley-indian-reservation> [<https://perma.cc/68FS-YNRS>]. The Standing Rock Reservation is situated in North and South Dakota. *About*, STANDING ROCK SIOUX TRIBE, <https://www.standingrock.org/about> [<https://perma.cc/48WW-BMT7>].

79. For example, the Cherokee Nation is in Oklahoma, even though the aboriginal homeland of the Cherokee people was in present-day Georgia and North Carolina, because the U.S. government relocated tribes from the East Coast under duress. See generally CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2020) (historicizing the forced migration of Indigenous people across the Mississippi River in the 1830s and state-sponsored theft of their land, now known as “Indian Removal”); WILLIAM L. ANDERSON, CHEROKEE REMOVAL: BEFORE AND AFTER (1991) (surveying Cherokee removal).

against the dispossessing and demeaning fact of colonization by foreign peoples, that fundamentally distinguishes Indigenous peoples from other peoples of the world.⁸⁰

“[H]istorical continuity with pre-invasion and pre-colonial societies”⁸¹ is thus arguably the defining feature of indigeneity as compared to “minority” status.⁸²

Importantly, descent and land occupation are linked.

[Indigenous peoples are] descendants of the peoples who inhabited the present territory of a country, wholly or partially, at the time when persons of different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonized status.⁸³

Indigeneity is thus a group status, and the status of an individual as Indigenous depends on both self-identification and group acceptance.⁸⁴ Accordingly, ancestry is used to trace the link back through time between a living person and the group who inhabited the territory precolonization.

As groups, Indigenous peoples have a right to self-determination,⁸⁵ but that right has been interpreted in light of nations’ right to territorial integrity.⁸⁶ For Indigenous peoples located “within” settler states, this has meant that self-determination is not always understood to include the right to complete political independence because some argue that could amount to secession.⁸⁷

80. Taiaiake Alfred & Jeff Corntassel, *Being Indigenous: Resurgences Against Contemporary Colonialism*, 40 *GOV'T & OPPOSITION* 597, 597 (2005) (emphasis omitted).

81. Julian Aguon, *On Loving the Maps our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 *UCLA ASIAN PAC. AM. L.J.* 47, 56 (2011).

82. Will Kymlicka, *Beyond the Indigenous/Minority Dichotomy?*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 184 (Stephen Allen & Alexandra Xanthaki eds., 2011) (acknowledging that despite other similarities, other minority groups do not share “the same territorial claims”).

83. Daes, *supra* note 75, at 9.

84. Addie C. Rolnick, *Indigenous Children*, in *THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW* 571, 572 (Jonathan Todres & Shani M. King eds., 2020).

85. See G.A. Res. 61/295, at 3-4 (Sept. 13, 2007).

86. See Samuel K.N. Blay, *Territorial Integrity and Political Independence*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 9-11 (2010).

87. See MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION*, at xii-xxvi (Richard Falk ed., 2000); Maivân Clech Lâm, *Remembering the Country of Their Birth: Indigenous Peoples and Territoriality*, 57 *J. INT’L AFFS.* 141-42 (2004) [hereinafter Lâm, *Remembering*] (describing the tension between territorial integrity and self-determination, explaining why political-independence claims by nonconsenting indigenous peoples are

B. Indianness

American law recognizes Indigenous rights through the categories of “tribe” and “Indian.”⁸⁸ These categories are associated with Federal Indian law, the body of law that deals specifically with the unique relationship between the federal government and the Indian tribes.

Indian “tribes” have “an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government.”⁸⁹ In the Constitution, they are “contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union.”⁹⁰ Indian tribes are acknowledged in federal law as separate sovereigns with whom the United States signed treaties.⁹¹

Based in part on these provisions,⁹² Congress claims plenary power to recognize and “terminate” its government-to-government relationship with tribes, and federal courts have agreed that Congress has the power to say which groups will be recognized as tribes.⁹³ Today, that power has been delegated to the Department of the Interior’s Office of Federal Acknowledgement, but the decision to acknowledge or stop acknowledging an Indigenous nation as an Indian tribe has been exercised by all three branches of government.⁹⁴ Not all Indigenous groups are recognized as tribes,⁹⁵ and the current system allows few opportunities to challenge a decision not to acknowledge.⁹⁶

Indians are those people who are properly the subjects of federal law relating to Indian tribes because of their relationship to a group that is or was acknowledged as a tribe. The definition of “Indian” varies across different laws, but it always includes some political component. That is, a person does not qualify as

not secession, and noting that “virtually all indigenous peoples seek a freely negotiated partnership with states rather than independence”).

88. Ablavsky, *supra* note 57, at 1032-33.

89. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

90. *Id.* at 18; see U.S. CONST. art. 1, § 8, cl. 3.

91. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 2, cl. 2.

92. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014 (2015).

93. See Newton, *supra* note 71, at 233-34, 249.

94. See Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 957 (2016) (finding that Congress acknowledged more tribes than the Bureau of Indian Affairs (BIA) did during the period studied); William W. Quinn, Jr., *Federal Acknowledgement of American Indians Tribes: Authority, Judicial Interposition, and* 25 C.F.R. § 83, 17 AM. INDIAN L. REV. 37, 41 (1992) (describing acknowledgement via the judicial branch).

95. 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, 452 (2016).

96. See *id.* at 474.

an Indian just because they describe themselves that way. In most cases, they must demonstrate a connection to a specific Indian tribal government and, importantly, the Indian tribal government must recognize them as members.⁹⁷ The easiest and most common form of this relationship is formal citizenship in a tribe.⁹⁸ However, federal⁹⁹ (and tribal¹⁰⁰) definitions of “Indian” often sweep more broadly than tribal citizenship. This makes sense considering the many federal policies that intentionally severed the formal relationship between individuals and their nations, and made citizenship a site of financial and political contestation. Many of the definitions of “Indian” incorporate some reference to ancestry.¹⁰¹ Even so, they are treated as nonracial classifications for the purposes of equal-protection analysis. This means that they are exempted from the strict scrutiny that applies to racial classifications and are constitutional as long as they are “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”¹⁰²

While “Indian” is a racial category, and the federal legal “Indian” category is shaped by the historical racial duality of Indian versus White,¹⁰³ there are several reasons to treat “Indian” classifications differently from other racial classifications. For instance, the category itself denotes a political relationship between individual and nation, and between an Indian nation and the U.S. nation. Indian tribes are described separately in the Constitution,¹⁰⁴ and instead of undoing

97. See Ablavsky, *supra* note 57, at 1056 (describing historical and constitutional usage of “Indian” as based on “belonging to a Native polity”); Rolnick, *Tribal Criminal Jurisdiction*, *supra* note 17, at 468 (describing how Indian legal classifications emphasize tribal affiliation). *But see* Rolnick, *Tribal Criminal Jurisdiction*, *supra* note 17, at 381-83 (noting that federal-government recognition of a person as Indian can suffice for some purposes in the absence of tribal-government recognition of that person).

98. See Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 324 (2011).

99. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 974.

100. See Rolnick, *Tribal Criminal Jurisdiction*, *supra* note 17, at 376-77.

101. Even definitions that turn on citizenship may incorporate descent if the tribe’s citizenship laws require documentation of ancestry. See, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5304(d) (2018) (defining “Indian” as a member of a federally acknowledged tribe); see KIRSTY GOVER, TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP 10 (2010) (collecting tribal-citizenship laws and identifying descent and/or percentage of ancestry as common criteria).

102. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

103. See Ablavsky, *supra* note 57, at 1050-54; *United States v. Sandoval*, 167 U.S. 278 (1897); *United States v. Rogers*, 45 U.S. 567, 573 (1846); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978).

104. See U.S. CONST. art. I, § 2, cl. 3; *id.* § 8, cl. 3.

that distinction,¹⁰⁵ the Fourteenth Amendment reinforced it.¹⁰⁶ In the case setting forth the rule of rational basis scrutiny, however, the Court simply described legal “Indian” classifications as “political rather than racial in nature.”¹⁰⁷ Although the statutory classification at issue in that case did in fact reference ancestry and included people who were not tribal citizens,¹⁰⁸ the Court described it as a classification based only on citizenship in a recognized tribal government.¹⁰⁹

Beyond protection from strict scrutiny, the framework of Federal Indian law has at least two other significant themes. First, it includes an awareness that U.S. citizenship was imposed on Indian people without their consent and as a tool of colonization via forced assimilation.¹¹⁰ Second, it explicitly protects group rights and preserves the connection between individual and group.¹¹¹ These themes are important because American law otherwise centers on individual rights and views group power as hostile to individualism. It also elevates U.S. citizenship

105. Compare *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that free individuals of African descent were not citizens), with U.S. CONST. amend. XIV, § 1 (granting citizenship to all persons born in the United States, including individuals of African descent).

106. Compare U.S. CONST. art. I, § 2, cl. 3 (excluding “Indians not taxed” when determining apportionment of Congressional representatives for each state), with *id.* amend. XIV, § 2 (retaining the “Indians not taxed” exclusion).

107. *Mancari*, 417 U.S. at 553 n.24.

108. See Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 949-50 (2002).

109. *Mancari*, 417 U.S. at 553-54; Goldberg, *supra* note 108 (explaining that the statute required one quarter Indian blood, but not tribal citizenship, and the Court relied on a subsequent BIA rule adding the citizenship requirement); Carole Goldberg, *What’s Race Got to Do With It?: The Story of Morton v. Mancari*, in RACE LAW STORIES 237, 237-38 (Rachel F. Moran & Devon Wayne Carbedo eds., 2008) (further analyzing differences in coverage between the statute and the rule).

110. See Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1241-42 (2016).

111. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989) (describing the ICWA protecting “not only the interests of individual Indian children and families, but also of the tribes themselves”); Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727, 744 n. 65 (2017) (describing the *Holyfield* Court’s identification of the link between group rights and children’s best interests).

as the carrier of many individual rights and therefore as a highly sought after¹¹² (and sometimes jealously guarded¹¹³) status.

C. Colonized

Colonized status is an aspect of the definition of “indigeneity,” but it has independent meaning under international law. Colonized peoples are inhabitants of “territories whose peoples have not yet attained a full measure of self-government.”¹¹⁴ The United Nations maintains a list of non-self-governing territories.¹¹⁵ Inclusion on the list operates as a prima facie case that the peoples in question have an inchoate right to political self-determination, which may be exercised via independence, free association, or statehood. However, peoples excluded from that list may also have self-determination rights under international law principles. Some colonized peoples are not included on the list of non-self-governing territories on the theory (sometimes contested) that they have already exercised their rights to political self-determination through free association (e.g., the Commonwealth of the Northern Mariana Islands), independence (e.g., Philippines), or statehood (e.g., Hawaii). Of the U.S. territories, only Guam, American Samoa, and the U.S. Virgin Islands remain on the list.

As recognized by the U.N. General Assembly’s Declaration on the Granting of Independence to Colonial Peoples and Countries, “all peoples have the right to self-determination,” which includes the right to freely determine their political status.¹¹⁶ Colonized peoples are thus entitled to the remedy of decolonization.¹¹⁷ If colonized peoples are citizens of the colonizing nation, such citizenship may be a double-edged sword, signifying domination while containing rights.

112. *But see* Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 639, 644 (2005) (offering an interpretation of Black American inclusion as violence, noting that “slavery both denaturalized Blacks from Africa and Americanized them” and observing that formal citizenship for Blacks has entailed “inclusive exclusion”).

113. *See* Eric Cohen & Melissa Rodgers, *Trump’s Wealth Test for Citizenship Targets People of Color*, HILL (Aug. 4, 2020, 7:00 PM EDT), <https://thehill.com/opinion/immigration/510481-trumps-wealth-test-for-citizenship-targets-people-of-color> [<https://perma.cc/KP2Z-NFSF>] (describing recent proposals to restrict naturalization).

114. U.N. Charter art. 73.

115. *Non-Self-Governing Territories*, UNITED NATIONS (Aug. 17, 2021), <https://www.un.org/dppa/decolonization/en/nsgt> [<https://perma.cc/8URJ-QC7R>].

116. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, ¶ 2 (Dec. 14, 1960) [hereinafter Declaration on the Granting of Independence].

117. *See* Aguon, *supra* note 81, at 52.

While colonized peoples may also be Indigenous,¹¹⁸ the categories are not coextensive. For example, all the people living in Guam when it was annexed to the United States were colonized under the international-law definition. But not all were Indigenous.¹¹⁹ It is therefore possible to be colonized, but not Indigenous.¹²⁰ On the other hand, Indigenous peoples living within the boundaries of settler-colonial nations are not considered to be non-self-governing territories under international law.¹²¹ While those peoples also experienced colonization, international law recognizes only their right to limited self-determination, which does not include political independence.¹²²

It is important to note that both “indigeneity” and “colonized” status are formal legal categories under international law. They are also group-based statuses, not individual labels. A group is Indigenous, or a group is colonized. An individual is a colonized person or an Indigenous person only vis-à-vis their connection to the group.

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118. Indeed, the application of international law to colonized peoples has sometimes involved drawing a distinction between Indigenous and non-Indigenous colonized people, and further between “savage” and “civilized” Indigenous peoples. See, e.g., Burnett [Ponsa-Kraus], *supra* note 36, at 668 (describing how the Treaty of Paris allowed Spanish inhabitants of new U.S. territories to elect between Spanish and U.S. citizenship but denied “native inhabitants” the right to determine their own status); *id.* at 699-700 (discussing Federico Degetau’s amicus brief in *Gonzalez v. United States*, which argued that “native inhabitants” referred only to “uncivilized native tribes,” which in his view existed in the Philippines but not in Puerto Rico).
119. Most, however, were. See *Davis v. Guam*, No. 11-00035, 2017 WL 930825, at *6 (D. Guam Mar. 8, 2017) (using data from the 1950 federal census of Guam to explain that most of Guam’s inhabitants were Chamorro, but some were not).
120. See Aguon, *supra* note 81, at 57 n. 62 (differentiating between the meaning of self-determination for colonized and indigenous peoples); see also ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 87 (1995) (explaining outlier colonies like Gibraltar and the Falklands/Malvinas, where the colonial inhabitants are essentially of colonial (i.e. British) stock).
121. Aguon, *supra* note 81, at 52; accord Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for Under Article 73c of the Charter, G.A. Res. 1541 (XV), U.N. Doc. A/4684 (Dec. 15, 1960); Declaration on the Granting of Independence, *supra* note 116; U.N. Doc. A/4684 (Dec. 14, 1960); see also Julian Aguon, *Native Hawaiians and International Law*, in NATIVE HAWAIIAN LAW: A TREATISE 353-424 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua‘ala Sproat eds., 2015) (explaining and critiquing the United Nations’ removal of Hawaii from its list of non-self-governing territories based on U.S. arguments that Hawaiians had exercised their rights to self-determination by voting for statehood and the U.S. had consequently fulfilled its international obligations).
122. Daes, *supra* note 75, at 11-12.

American law's treatment of colonized peoples is roughly bifurcated between states and unincorporated territories.¹²³ Inside states,¹²⁴ consistent with the international principle of territorial integrity, a history of colonization does not necessarily give rise to present-day rights of independence or decolonization.¹²⁵ To the extent that colonization is recognized or addressed in fully incorporated areas, it is done via the domestic doctrine of Federal Indian law.¹²⁶ Outside the states, the status of colonized peoples is governed by the extraterritoriality doctrine set forth in the *Insular Cases*.¹²⁷ This approach has been criticized for creating a second-class form of Americanness, where residents of the territories are subjected to U.S. rule but do not enjoy full citizenship or constitutional rights, existing instead in a not-quite-in, not-quite-out relationship to the United States. For some, this looks like formal citizenship without full constitutional or voting rights. For others, it looks like the status of "non-citizen national."¹²⁸ In other words, colonized peoples are subjects of the United States, but not fully a part of its political community.¹²⁹

Most scholars object to this subject status, and indeed many have persuasively argued for full citizenship and full constitutional protections to be applied

123. See Christina Duffy Burnett [Ponsa-Kraus], *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982-83 (2009).

124. In earlier periods, U.S. territories that would eventually become states were treated as sometimes outside the reach of some constitutional rules, a contest that greatly affected the lives of colonized peoples in Alaska and the American Southwest. See *infra* notes 470-475.

125. See LÂM, AT THE EDGE OF THE STATE, *supra* note 87, at 136-38 (describing state-centric resistance to Indigenous claims to external self-determination rights); Lâm, *Remembering the Country of Their Birth*, *supra* note 87, at 140-43; Aguon, *supra* note 81, at 50-51 (describing the tension between external self-determination and territorial integrity in debates about the definition of "peoples" and noting that the United Nations Declaration on the Rights of Indigenous Peoples recognizes a right of self-determination); MAURO BARELLI, SEEKING JUSTICE IN INTERNATIONAL LAW: THE SIGNIFICANCE AND IMPLICATIONS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 25 (2016) (analyzing the final version of the Declaration and noting that, by "invoking an unqualified principle of territorial integrity, Article 46(1) requires that indigenous peoples exercise their right to self-determination within the framework of existing States").

126. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 589-90 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 23-24 (1831).

127. E.g., *Downes v. Bidwell*, 182 U.S. 244, 250 (1901); *Gonzalez v. Williams*, 192 U.S. 1, 10 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 304-05 (1922); see also *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (applying the *Insular Cases*'s extraterritoriality doctrine to an equal-protection claim arising in Puerto Rico).

128. *Tuaua v. United States*, 788 F.3d 300, 304 (D.C. Cir. 2015) (holding that American Samoans are not entitled to birthright citizenship), *cert. denied*, 579 U.S. 902. (2016). *But see* *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196 (D. Utah 2019) (holding that American Samoans are U.S. citizens, a holding that was reversed on appeal), *rev'd*, 1 F.4th 862 (10th Cir. 2021).

129. See ERMAN, *supra* note 36.

in the territories.¹³⁰ For Indigenous peoples, however, citizenship and full constitutional protections have been a decidedly mixed bag. It is arguably their subject status that has enabled Indigenous Pacific Islanders to maintain land and self-governance rights¹³¹ against the backdrop of an American legal system that generally refuses to recognize group identity and is veined with the belief that “[t]he soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union.”¹³²

Accordingly, although legal scholars aligned in support of the argument that American Samoans were entitled to birthright citizenship when federal courts considered the issue,¹³³ some Samoans expressed concern that citizenship would mean the loss of land rights protected in part by federal courts’ limited application of Fourteenth Amendment jurisprudence to the territories.¹³⁴

D. Race

Race is a legally and socially constructed category that was, at one time, formally defined in law.¹³⁵ While not scientifically real and rarely legally defined

130. See, e.g., Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, HARV. L. REV. BLOG (Mar. 23, 2018), <https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy> [<https://perma.cc/PL6N-ZPAA>]; Villazor, *supra* note 3; Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017).

131. See Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should be Taught in Law School*, 21 J. GENDER, RACE & JUST. 395, 445-48 (2018); LINE-NOUE MEMEA KRUSE, *THE PACIFIC INSULAR CASE OF AMERICAN SĀMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES* 76-89 (2018); *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1680-1703 (2017); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 809 (2008).

132. *United States v. Kagama*, 118 U.S. 375, 379 (1886).

133. See Brief for Scholars of Constitutional Law & Legal History as Amici Curiae Supporting Appellees with Respect to the *Insular Cases*, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019); Brief of Citizenship Scholars as Amici Curiae in Supporting Plaintiffs-Appellees and Affirmance, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017, 20-4019); Brief of Amici Curiae Scholars of Constitutional Law & Legal History in Support of Neither Party, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272); Corrected Brief of Citizenship Scholars as Amici Curiae Supporting Appellants and Urging Reversal, *Tuaua*, 788 F.3d 300 (No. 13-5272).

134. Michelle Broder Van Dyke, *Why Some American Samoans Don’t Want U.S. Citizenship*, NBC NEWS (Dec. 17, 2019, 1:04 PM EST), <https://www.nbcnews.com/news/asian-america/why-some-american-samoans-don-t-want-u-s-citizenship-n1103256> [<https://perma.cc/AQ6H-JHWK>]; see also MEMEA KRUSE, *supra* note 131, at 79-84 (explaining how American Samoa’s unincorporated status shields customary practices regarding nobility and land alienation).

135. While race is often discussed as a social construction, it was also a legal construction in the sense that the racial categories we know today were shaped by legal rules. See K-Sue Park, *The*

today, race is “a *real* and *central* social vessel of group affiliation and life in the modern world.”¹³⁶ Because it has no natural meaning, race is best described as a category that results from the process of racialization. This is a “discursive process by which particular groups have been classified as non-White; specific meanings have been attached to those groups; and those meanings have been used to support the hierarchical distribution of power, land, and resources.”¹³⁷ Racial categories have often worked by attaching legal or social significance to otherwise insignificant characteristics.¹³⁸ A variety of factors have been used to define groups as non-White and to map people into those groups.¹³⁹ Distinctions of phenotype and ancestry are probably the most common factors, but religion, culture, and even nonmutable or performative characteristics have mattered too.¹⁴⁰

For much of American history, race was also a formal legal category.¹⁴¹ The definitions and boundaries of racial categories shifted across time, place, and

History Wars and Property Law: Conquest and Slavery as Foundational to the Field, 131 YALE L.J. 1062, 1111-12 (2021) (describing how colonial property laws created and defined racial categories); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 36-47 (cataloguing laws that solidified the category of Blackness in relation to property rights).

136. Eduardo Bonilla-Silva, *The Essential Social Fact of Race*, 64 AMER. SOCIO. REV. 899, 899 (1999).
137. Rolnick, *The Promise of Mancari*, *supra* note 17, at 965 n.31 (citing MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994)).
138. *Id.* at 1001; Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3-5 (1994); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 3, 13 (3d ed. 2015).
139. Rolnick, *The Promise of Mancari*, *supra* note 17, at 962-63 n.23 (citing Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005)).
140. Devon W Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. Contemp. Legal Issues 701, 722-25 (2001) (discussing the theory of “identity performance” which recognizes that racial discrimination is based not just on phenotypic characteristics but on how one presents difference, such as hairstyle or dress). See Khaled Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 50-58 (2013) (arguing that religion demarcated the boundary between White and non-White in Arab naturalization cases); Ariela Schachter, René D. Flores & Neda Maghbouleh, *Ancestry, Color, or Culture? How Whites Racially Classify Others in the U.S.*, 126 AM. J. SOCIO. 1220, 1241 (2021) (“[The] unexpected absence of the strictest versions of ancestry-based logics, combined with a heavy reliance on skin color for some categories but not others, as well as the importance of less formalized [cultural] cues [especially for non-Black people of color], reveal the growing complexity of the U.S. racial system and the inadequacy of referring to it as solely based on institutionalized ancestry logics.”).
141. Laura Gómez, *Understanding Law and Race as Mutually Constitutive*, 8 J. SCHOLARLY PERSPS. 47, 53-57 (2012) (collecting examples of laws that defined the menu of and boundaries between racial categories).

purpose.¹⁴² Whatever the definition, though, race as a legal category secured or removed specific rights and freedoms.¹⁴³ The key similarity between different legal definitions of race was the lack of relationship between the factors used to classify racial groups and the rights and freedoms affected. Hair texture has nothing to do with enslavement.¹⁴⁴ Sedentary farming culture (as opposed to nomadic hunting and gathering culture) has nothing to do with whether a person is legally competent to manage his or her own property rights.¹⁴⁵ Rather, racial categories were created along whatever lines were convenient as a filter through which to sort power and ownership rights over land, production, and national identity.

By creating these categories and tying rights to them, early American settlers could more efficiently exercise control over non-White peoples.¹⁴⁶ Recognizing this history, modern courts strictly scrutinize any use of racial categories.¹⁴⁷ While the Supreme Court has acknowledged that recognition of, and classification by, race might be required to undo racial harms,¹⁴⁸ it has moved steadily toward a rejection of all uses of race.¹⁴⁹ The justification for heightened scrutiny has also evolved from a concern about historical subordination based on race to a belief that race, as an invented category, has no logical connection to rights like

142. See Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 370-74 (2007); Gotanda, *supra* note 19, at 6, 23-36 (1991); *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134, 135 (1806).

143. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (explaining how naturalization rights were restricted to White people and naturalization case law in turn helped construct the legal category of Whiteness); Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 615 (2009) (describing laws that prohibited Indians from testifying, holding office, and voting); Ariela Gross & Alejandro de la Fuente, *Slaves, Free Blacks, and Race in the Legal Regimes of Cuba, Louisiana, and Virginia: A Comparison*, 91 N.C. L. REV. 1699, 1723-24 (2012-2013) (describing Louisiana's Code Noir, which prohibited free Black people from, among other activities, gathering in public and appearing on the streets without a pass); *id.* at 1730-31 (describing laws that restricted free Blacks' right to give testimony and vote).

144. See *Hudgins*, 11 Va. (1 Hen. & M.) at 139-40.

145. See KATHERINE ELLINGHAUS, *BLOOD WILL TELL: NATIVE AMERICANS AND ASSIMILATION POLICY* 49 (2017) ("[C]ompetent Native American people were often imagined by the U.S. government as self-sufficient farmers.").

146. See Gómez, *supra* note 141.

147. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The Court first set forth this rule of constitutional strict scrutiny in *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

148. E.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971); *Wygant v. Jackson Bd. of Ed.*, 467 U.S. 267, 280 (1986).

149. E.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007); *Shaw v. Reno*, 509 U.S. 630, 654-55 (1993).

citizenship, voting, property, or autonomy.¹⁵⁰ More recently, some decisions have suggested that even “racial attentiveness,” or race-conscious action, will be scrutinized.¹⁵¹

The law no longer functions as the final arbiter of racial categories, but racial categories are still important to law. Most obviously, antidiscrimination law requires that courts pay attention to racial categories in order to determine whether old legal hierarchies persist and where remedies are required.¹⁵² In both law and public conversation, however, an effort has emerged to separate race as a social idea (one that might be important to organizing and identity, but which is otherwise not real) from race as a scientific idea (one that is biologically real, but is not related to identity or rights).¹⁵³ Old scientific theories of race (such as eugenics) have been discredited, but the widespread belief in race as a biological fact persists. Some modern science continues to advance the idea that there are important genetic and physical differences among human populations that correspond with geographic ancestry.¹⁵⁴ Popular discourse often embraces these biological divisions as facts, but legal scrutiny is triggered when these assumed biological facts are linked to the social idea of race. Thus, although the general public might understand socially constructed race to be important to identity, social organization, and political rights, the law rejects the possibility that race, biologically defined, could be relevant to any of these concepts.

Unlike indigeneity, Indianness, or colonization, which all speak to group status, this modern understanding of race renders it a matter of individual identity. This conception is reflected in the legal protections associated with race. Though the Reconstruction Amendments originally attempted to remedy group-based

150. See, e.g., *Shaw*, 509 U.S. at 657; *Rice v. Cayetano*, 528 U.S. 495, 514 (2000).

151. See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 103 (2010) (coining the term “racial attentiveness” and describing *Ricci v. DeStefano*, 557 U.S. 557 (2009)).

152. E.g., *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987); *Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 712 (7th Cir. 2008).

153. The equation of ancestry and race speaks to the common desire to disavow race as an invented category while clinging to the idea that there is some biological truth to racial categories, a move accomplished by accepting that race is real on a scientific level while asserting that it has no significance outside of scientific and medical data.

154. DOROTHY E. ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE 21ST CENTURY* 57-68 (2011); Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1503-07 (2014); Kimberly TallBear, *DNA, Blood, and Racializing the Tribe*, 18 WICAZO SA REV. 81, 81-82 (2003).

harms with collective remedies,¹⁵⁵ they are understood today as extending only individual protection, regardless of group affiliation.¹⁵⁶

E. Ancestry

Ancestry refers to the genetic or historical connection between a living person and those progenitors who preceded the person, sometimes through generations. It connects a living person to their parents, grandparents, or other relatives who came before. It is most often used as a proxy for some other kind of connection between a living person, a relative, or a group with rights, property, or specific historical status. Ancestry is not coextensive with race, though there is significant overlap.¹⁵⁷

Ancestry has been used to sort people into racial categories, which were in turn the basis for the denial of important rights.¹⁵⁸ Japanese Americans subject to curfew, relocation, and imprisonment during World War II were denied freedom based on an invocation of their ancestry, which served as a way to connect

155. See Fiss, *supra* note 31, at 123-27.

156. See Barnes & Chemerinsky, *supra* note 29, at 1076-80, 1084-85 (tracing the Court's interpretation of the Reconstruction Amendments); see generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019) (describing how the purposes of the Reconstruction Amendments were defeated by narrow judicial construction and congressional inaction).

157. The *Rice v. Cayetano* opinion itself acknowledges this, holding that "[a]ncestry can be a proxy for race." 528 U.S. 495, 496 (2000) (emphasis added). Circuit courts have continued to recognize the distinction. See, e.g., *Davis v. Guam*, 932 F.3d 822, 834 (9th Cir. 2019) ("Our first inquiry is whether . . . *Rice* held all classifications based on ancestry to be impermissible proxies for race. It did not."). However, litigants and courts inaccurately cite *Rice* for the proposition that ancestry is always equivalent to race. See, e.g., *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 533-34 (N.D. Tex. 2018) ("characterizing *Rice* as a case concerned with ancestry-based classifications generally and holding that [b]y deferring to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race").

158. Maillard, *supra* note 142, at 354-55 (describing the treatment of Native American ancestry in antimiscegenation statutes and linking it to legal erasure); Gotanda, *supra* note 19, at 6, 24-26 (describing the "one drop of blood" racial classification system for Black people and linking it to slavery); Tanya Katerí Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 115-17 (1998) (describing a variety of ways in which Whiteness is valued as a property right in a hierarchical society because it is a prerequisite for legal and social benefits, from cemetery admission to citizenship).

them to Japan and the stereotypes of disloyalty associated with Japanese people.¹⁵⁹ Although ancestry was not the only factor important to Japanese racialization,¹⁶⁰ it provided an easy way to connect individuals to a racial group. Similarly, grandfather clauses used by Southern states in the wake of Reconstruction provided an easy way to link present-day voters to past groups (White and Black) in order to continue the work of denying rights to free Blacks.¹⁶¹ When ancestry functions as a stand-in for race, it is treated by courts as a racial category and analyzed under the same constitutional framework as a racial category would be.

However, ancestry has other meanings.¹⁶² For example, some colleges rely on “legacy” status in admissions and financial aid decisions.¹⁶³ “Legacies” are people whose parents, grandparents, or other relatives attended the same college.¹⁶⁴ And probate and inheritance rules classify people by ancestry in order to determine how property should be distributed upon a person's death.¹⁶⁵ Although these uses of ancestry undoubtedly facilitate the transfer of property and

159. See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 *UCLA L. REV.* 933, 953-54 (2004).

160. Devon W. Carbado, *Yellow by Law: The Story of Ozawa v. United States*, in *RACE LAW STORIES* 175, 208-14, 235 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

161. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 34 (2006).

162. Ancestry is used in law for nonracial purposes, but most of those laws operate in contexts where no one would think to link them to race discrimination. For example, most people would not think twice about considering ancestry in probate decisions about how to allocate a deceased person's estate. Few would think to call that a racial classification in disguise; it also is not singled out as an ancestry-based classification. It is just one of many areas of law where ancestry is used to mark something else of legal significance: family relationships.

163. See *Rosenstock v. Bd. of Governors of the Univ. of N.C.*, 423 F. Supp. 1321, 1327 (M.D.N.C. 1976) (college's interest in alumni monetary support provides a sufficiently “reasonable basis” to justify admissions preference for descendants of out-of-state alumni because “no suspect criteria or fundamental interests are involved”); see also Richard D. Kahlenberg, *Introduction*, in *AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS* 1 (Richard D. Kahlenberg ed., 2010) (raising concerns about legacy preferences but describing them as “widespread”).

164. Jasmine Harris, *A New Bill in Congress Would End “Legacy” College Preferences. Here's Why that Matters*, *WASH. POST* (Feb. 15, 2022), <https://www.washingtonpost.com/politics/2022/02/15/legacy-colleges-universities-black-brown> [<https://perma.cc/H2A8-DGD9>].

165. See, e.g., *ALA. CODE* § 43-8-42 (2021); *ARIZ. REV. STAT. ANN* § 14-2103 (2021); *FLA. STAT.* § 732.103 (2021); *KAN. STAT. ANN.* § 59-506 (2021); *WIS. STAT.* § 852.01 (2021). Other laws also consider ancestry. Children born outside the United States have special rights to acquire United States citizenship if they can demonstrate that their parents are United States citizens. See 8 U.S.C. §§ 1431, 1433 (2018). In Georgia, out-of-state residents can only apply for lifetime hunting licenses in Georgia if they can demonstrate they are descended from a lifetime license

wealth from White people to their descendants, they are not racialized and therefore do not trigger the constitutional framework of strict scrutiny.

Because the “ancestry” category has been used to facilitate racial subordination, it is understandable why some seek to proceed as if “ancestry” should always be treated as a code word for “race.” Indeed, even critical race scholars sometimes assume the two are the same – or that ancestry is at least subsumed within race.¹⁶⁶ Unpacking the relationship between ancestry and indigeneity thus provides a rare opportunity to critique the judicial and popular understandings of race as ancestry – that is, race as a legally insignificant biological truth. This inquiry is urgent for Indigenous peoples, but it is important for other groups as well. For example, disentangling ancestry from race might help illuminate the conversation about reparations for enslavement, a point I return to in Section IV.D.

For Indigenous peoples, ancestry traces the connection between a historical group and those alive today who remain connected to that group. Present-day inhabitants who have a sufficient connection to pre-settlement inhabitants can thus use ancestry to demonstrate that they should be part of a group that exercises the political rights of former inhabitants. Ancestry is an imperfect proxy to determine membership in a present-day Indigenous group, or even to identify those with a sufficient connection to a pre-settlement group to count as Indigenous. Nonetheless, asking who one is descended from is an obvious way to assess this temporal and historical connection, and sometimes it is the best available method. After all, group rights may not die when individual people do, but if there is no way to connect present-day peoples to past peoples, settlement would achieve erasure within a generation.

One might expect classifications that use ancestry to identify Indigenous peoples to be analyzed under Federal Indian law. But within the U.S. law framework that applies to Indigenous peoples, as explained further in the next Part, courts have generally associated ancestry with race even when it is being used to demarcate indigeneity.

* * *

holder. GA. CODE ANN. § 27-2-3.1(c)(1)(3) (2021) (“An applicant for a lifetime sportsman’s license who is a nonresident shall not be eligible for issuance of such license unless: (A) He or she is from two through 15 years of age and is the grandchild of a resident who holds a valid paid lifetime sportsman’s license . . .”).

166. In distinguishing between color discrimination and race discrimination, Vinay Harpalani suggests that the Reconstruction framers’ understanding of race was *more* about ancestry than skin color, arguing that they used skin color “as a proxy for race when evidence of ancestry was not available.” Vinay Harpalani, *Civil Rights Law in Living Color*, 79 MD. L. REV. 881, 907 (2020); see also *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (describing group-based subordination of Japanese Americans as ancestry-based and condemning laws that classify on the basis of ancestry).

The five categories described in this Part may overlap, but they have different legal meanings, serve different purposes, and are associated with different doctrinal frameworks and treated differently under the Constitution. Only race is strictly scrutinized. Some uses of ancestry escape scrutiny entirely, while others are reflexively equated with race. Indigeneity, colonized status, and Indianness evoke entirely different inquiries, but only Indianness is a significant source of protection in U.S. law. Part II describes how litigants have used these different doctrinal strands against each other to restrict the protections offered by each one, with Indigenous Pacific Islanders as the first casualty, and outlines the key juridical moves that made this possible. Part III investigates the social and political consequences of this confusion, which include legal erasure of non-Indian Indigenous peoples and a narrow understanding of race as unrelated to historical subordination or political power. In the case of both Indigenous and non-Indigenous people, this translates into a denial of collective rights.

The categories also have different popular meanings, which structure social movements and shape public responses to legal controversies. While some may view the categories as common sense or natural concepts, each has been shaped by history and law. The doctrinal evolution described in Part II has thus contributed to popular confusion about whether ancestry equals race, whether attention to race is always dangerous, and whether recognizing indigeneity and the harm of colonization threatens a national commitment to colorblindness. This confusion is not abstract or accidental; it reinforces the denial of rights described in Part III.

II. BLURRED CATEGORIES

Doctrinally, these five categories (indigeneity, Indianness, colonized status, race, and ancestry) have become increasingly difficult to disentangle. While the discussion above sets forth the different purposes, uses, and boundaries of each one in law, courts sometimes have difficulty recognizing their differences. While some of the confusion seems genuine, it is also the consequence of deliberate legal strategies to redefine or constrain the categories, or to erase a particular category by subsuming it within another. Moreover, because the categories have popular usages that both reflect and diverge from the legal definitions, juridical blurring creates confusion in popular understandings, which in turn reinforces restrictive legal definitions.

The stakes of this entanglement are high when the constitutionality of recognition and remedies is at issue, as they were in the Supreme Court's 2000 decision in *Rice v. Cayetano*.¹⁶⁷ *Rice* was a constitutional challenge to a Hawaii law that limited the right to vote in certain elections to Indigenous Hawaiians and defined that category with reference to ancestry. The case was a rare moment of collision between all five categories: Indigenous Hawaiians, or Kānaka Maoli, are Indigenous peoples who were colonized by the United States, but they are not always included in the "Indian" legal category and their status under international law has been a matter of debate; they have been racialized; and the class was defined by ancestry, which for some on the Court recalled the use of ancestry in some nineteenth-century anti-Black voting laws. Instead of taking the opportunity to carefully interrogate the overlap and distinctions between the various demarcations of identity at play in *Rice*, the Court collapsed race into ancestry and indigeneity into Indianness.¹⁶⁸ *Rice* itself was a limited decision, and it might have had limited impact.¹⁶⁹ But, in the decades since, it has become the centerpiece of a campaign to dismantle Indigenous rights,¹⁷⁰ beginning in Hawaii and the Pacific Islands, and bleeding back into laws affecting tribes in the continental United States. Litigants have taken its holding that ancestry can be a proxy for race and used it to argue that ancestry is equivalent to race, so any classification that uses ancestry to identify a group is illegal. This strategy eliminates indigeneity and colonized status as categories of legal analysis and redefines ancestry and race in a way that chokes off any legal acknowledgement of collective harm or identity.

This process unfolded in five stages. First, the Court in *Rice* collapsed ancestry into race, walling the two off from Indianness and eliminating indigeneity and colonized status as separate frames of legal inquiry. By collapsing these categories, the Court was able to skip the intent inquiry that is normally required in situations where a statute does not employ a facial racial classification. Second,

167. 528 U.S. 495, 495-96 (2000).

168. Rolnick, *The Promise of Mancari*, *supra* note 17, at 996-1000.

169. See, e.g., Am. Fed'n of Gov't Emps. (AFL-CIO) v. United States, 195 F. Supp. 2d 4, 19 (D.D.C. 2002) (distinguishing *Rice* in an equal-protection challenge to an "Indian" classification in federal contracting because "*Rice* only dealt with the right to vote, which is a fundamental right evoking strict scrutiny"); Goldberg, *supra* note 108, at 951-52 (noting that the Court in *Rice* emphasized the particular facts of the case and the state voting context rather than delving into broader questions about Native Hawaiian legal status); see also Berger, *supra* note 57, at 1193 (noting that, while some feared the Court might use *Rice* to limit *Mancari*, the Court relied instead on the Fifteenth Amendment and the context of state voting laws, limiting its applicability to Indian rights).

170. Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501, 513-14 (2018); Serrano, *supra* note 131, at, 447-48.

the *Rice* Court borrowed rules developed in the context of the Fourteenth Amendment and applied them through the Fifteenth, with the Fifteenth Amendment's blunt prohibition on race-based voting classifications allowing the Court to avoid the careful weighing of potential government interests required by a full equal-protection analysis.¹⁷¹ Third, lower courts expanded the reach of the *Rice* rule beyond state elections and Kānaka Maoli affairs to bar ancestry-based voting classifications in federal territories. Although the context differed from Hawaii in important ways, these cases still involved Fifteenth Amendment challenges. They were therefore governed by *Rice* and by the Court's longstanding approach of carefully scrutinizing every burden on voting and treating race-based voter qualifications as categorically unconstitutional.

Fourth, armed with several cases holding that that ancestry-based voting classifications were illegal in the territories, the U.S. Department of Justice imported those holdings into the context of property rights and statutory law. It did so by invoking the Fair Housing Act to challenge a lease program intended to prevent Indigenous land loss. Fifth, the *Rice* rule came full circle when a federal district court relied on *Rice* to strike down the ICWA.¹⁷² The law applies to children who are citizens of (or eligible for citizenship in) the federally acknowledged Indian tribes that the Court in *Rice* first used as a foil to explain why Kānaka Maoli, as an unrecognized group whose members were not identifiable by citizenship rules, would not be protected by *Mancari*. While the Fifth Circuit Court of Appeals reversed the most far-reaching of the district court's equal-protection holdings, the Supreme Court granted certiorari and will consider the Act's constitutionality.¹⁷³ In the Sections below, I outline all five stages in greater detail.

171. See *Jones v. Florida*, 975 F.3d 1016, 1043 (11th Cir. 2020) (citing *Rice* for the rule that the Fifteenth Amendment “does not subject race-based voter qualifications to strict scrutiny—they are per se unconstitutional”).

172. See cases cited *supra* note 2.

173. *Brackeen v. Haaland*, No. 21-380, 2022 WL 585885 (2022); *Cherokee Nation v. Brackeen*, No. 21-377, 2022 WL 585883 (2022); *Haaland v. Brackeen*, No. 21-376, 2022 WL 585881; *Texas v. Haaland*, No. 21-378, 2022 WL 585884. The Court seems mostly likely to focus on anticommandeering arguments, standing, and equal-protection arguments about the Act's placement preferences, but at least one petitioner has asked the Court to consider the constitutionality of the “Indian child” classification. See cases cited *supra* notes 9-10.

A. *Collapse*: Rice v. Cayetano

Harold Rice was born and raised in Hawaii.¹⁷⁴ Rice was a White man, a rancher, and a descendant of missionaries and ranchers who migrated to the Hawaiian Islands in the 1800s.¹⁷⁵ This was the period when American settlement in Hawaii began in earnest and when the plantations and agricultural businesses that later dominated the islands first took hold.¹⁷⁶ In the mid-1800s, settlers were still a numerical minority and were generally not Hawaiian citizens, but their influence over the Hawaiian Kingdom's governance and land policies grew. By 1890, fewer than 5,000 out of a population of 90,000 people owned land.¹⁷⁷ Three out of four parcels of private land were owned by European and American settlers, who collectively owned over a million acres.¹⁷⁸ The major exception to this trend toward settler land ownership was the Bernice Pauahi Bishop Estate, a trust established in 1884 to benefit the Kamehameha Schools for Indigenous Hawaiian children.¹⁷⁹

174. Rice v. Cayetano, 528 U.S. 495, 510 (2000).

175. *Id.* at 501. See also Mililani B. Trask, Rice v. Cayetano: *Reaffirming the Racism of Hawaii's Colonial Past*, 3 ASIAN-PAC. L. & POL'Y J. 352, 352 (2002) (describing Rice as a "white man [who] was not allowed to vote in the OHA election" and who "was a descendant of the missionaries who had conspired with the United States to overthrow the Hawaiian Kingdom in 1898."). According to Rice, his great-great-grandfather helped write the Bayonet constitution, the document which would eventually lead to Hawaii's annexation. Judy Rohrer, "Got Race?" *The Production of Haole and the Distortion of Indigeneity in the Rice Decision*, 18 CONTEMP. PAC. 1, 6 (2006) (citing an interview with Harold Rice).

176. See Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 850 (1975).

177. LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 251 (1961); ROBERT H. HOROWITZ & JUDITH B. FINN, LEGIS. REFERENCE BUREAU, REP. NO. 3, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS 3-4 (1967); MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN LAW: A TREATISE 18 (Melody Kapilialoha MacKenzie, Susan Serrano & D. Kapua'ala Sprout eds., 2015). The seeds of this transition of property ownership began years earlier. Stuart Banner has described how Kamehameha III sought to make royal lands resemble private lands as a buffer against colonization, but—due in part to court interpretations—by annexation these lands were treated as public lands and thus became U.S. federal lands. Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 L. & SOC'Y REV. 273, 305-07 (2005).

178. HOROWITZ & FINN, *supra* note 177, at 4; MACKENZIE, *supra* note 177, at 18; see also H.R. REP. NO. 66-839, at 6 (1920) (finding that in 1919, only 6.23 percent of property in the Hawaiian Islands was owned by Kānaka Maoli).

179. In 1955, the Bishop Estate held nearly 16% of all privately held land in the territory. Clinton T. Tanimura and Robert M. Kamins, *A Study of Large Landowners in Hawaii*, LEGISL. REF. BUREAU 17 (1957), https://lrb.hawaii.gov/wp-content/uploads/1957_AStudyOfLargeLand-OwnersInHawaii.pdf [<https://perma.cc/LXY8-DSG2>]. With the Land Reform Act of 1967, HAW. REV. STAT. §§ 516 et seq. (1967), Hawaii used its eminent domain power to break up

Political pressure from new residents led to the “Bayonet constitution,” which extended voting rights to settler men (even if they were citizens of other countries) and set a property ownership qualification that disenfranchised many Indigenous Hawaiians.¹⁸⁰ Queen Lili‘okulani proposed limiting voting rights to Hawaiian citizens, but her government was illegally overthrown by settlers collaborating with the U.S. military and replaced by an interim government that “consented” to being annexed to the United States.¹⁸¹ Hawaiians have long contended that the overthrow violated international law,¹⁸² and in 1993 Congress formally acknowledged its illegality and apologized for the “deprivation of the rights of Native Hawaiians to self-determination.”¹⁸³ Notably, Congress directed the apology at Native Hawaiians, defined as “any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in . . . Hawaii.”¹⁸⁴

In 2000, Hawaii was a U.S. state and Harold Rice wanted to vote in the election for trustees to the state Office of Hawaiian Affairs (OHA). OHA is an agency created to manage land and money reserved to Indigenous Hawaiians.¹⁸⁵ Under state law, only “Native Hawaiians” could be trustees (“any descendant not less than one half part of the races inhabiting Hawaii in 1778”) and only “Hawaiians” could vote for trustees (“any descendant of the aboriginal peoples inhabiting the Hawaiian islands” who exercised sovereignty in 1778 and have continued to live

tracts held by the Bishop Estate and other large private landowners and redistribute land title to lessee homeowners. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231-32 (1984) (upholding the Act and citing the Legislature’s findings that by the mid-1960s, 49% of land in Hawaii was owned by the state or federal government and 47% was owned by only 72 private landowners); Stacy Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 56 (2005) (describing the *Midkiff* decision). Although styled as a benefit for the residential lessees, Gideon Kanner has pointed out that the Bishop Estate leased at below-market rents and criticized the legislation as “a political gesture” that failed to create new housing or stabilize rents and led to many residents selling their homes to investors. Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 212-14 (2006).

180. RALPH S. KUYKENDALL, *1874-1893: The Kalakaua Dynasty*, in *THE HAWAIIAN KINGDOM* 368-72 (1967).

181. *Id.* at 344-72; see also Joint Resolution of July 7, 1898, 30 Stat. 750 (authorizing the annexation of Hawaii).

182. See Julian Aguon, *The Commerce of Recognition (Buy One Ethos, Get One Free): Towards Curing the Harm of the United States’ International Wrongful Acts in the Hawaiian Islands*, ‘OHIA 5-10 (2012), <https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/Programs%2CClinics%2CInstitutes/108622%20L1%20Aguon%20r5.pdf> [<https://perma.cc/BA77-3ZKT>].

183. Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, § 1(3), 107 Stat. 1510, 1513.

184. *Id.* at § 2, 107 Stat. at 1513.

185. HAW. CONST. art. XII, § 5.

there).¹⁸⁶ Rice was neither. He challenged the law, specifically the “Hawaiian” classification, under the Fourteenth and Fifteenth Amendments.

The Hawaii law used ancestry to designate a class of people who are Indigenous to the Hawaiian Islands, and by virtue of this status have certain rights to land and benefits that other citizens of Hawaii do not have. The classification furthered Hawaii’s professed and demonstrated intent to provide a modicum of self-determination and control over land and other resources to Indigenous peoples in keeping with domestic and international legal regimes that recognize those rights.¹⁸⁷ In other words, ancestry was a proxy for indigeneity in a context where the state must define the boundaries of the Indigenous group for the purposes of allowing the group to assert rights they inherently possess under international and domestic law.¹⁸⁸

Unlike Indian tribes in the continental United States, most of which have written citizenship rules and have organized into governments recognized by the United States as competent to promulgate these citizenship rules,¹⁸⁹ Hawaiians were not officially recognized as a single government at the time the law was passed¹⁹⁰ and did not have a unified, written membership rule. In the absence of such a rule, ancestry provided a relatively clean and easy-to-document proxy.¹⁹¹

186. *Id.* (determining who can vote and serve as a trustee for OHA); HAW. REV. STAT. § 10-2 (2021) (defining the terms “Native Hawaiian” and “Hawaiian”).

187. The self-determination framing was controversial among Kānaka Maoli. OHA’s structure and voting restrictions did give Indigenous Hawaiians a greater voice in the administration of their own trust assets, but OHA was still a state agency, not an Indigenous government. This is similar to the way *Mancari* permitted greater Indian control over BIA, but did not solve the problem of a federal agency running Indian affairs. *See Morton v. Mancari*, 417 U.S. 535, 552-55 (1974).

188. Rice argued that the 1778 date has “has no special relevance to” Hawaiian sovereignty because it was well before the island was unified under a monarchy, a style of government that was familiar to American and European powers and therefore easy to recognize as sovereign. Brief for Petitioner at 24, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818). Because no monarchy existed in 1778, he argued, “the only possible relevance of 1778 is that it marks the last days of what might be characterized as the era of relative ‘racial purity’ in the Hawaiian Islands.” *Id.* at 25. But sovereignty does not turn on whether a people exercise a European-style form of government, and although it may have changed form, Hawaiian sovereignty did not begin with Kamehameha I. Rice’s argument boils down to the claim that, if a people did not use a style of self-government familiar to European powers, they are no more than a loose affiliation of racially and culturally similar people whose political and land rights need not be respected.

189. *See generally* GOVER, *supra* note 101 (collecting and analyzing tribal citizenship laws).

190. Of course, the Hawaiian Kingdom was recognized as a sovereign government under international law prior to U.S. annexation, a fact that is important to deoccupation arguments under international law. *See Aguon*, *supra* note 121, at 356, 369.

191. Many American Indian tribal citizenship rules also refer to ancestry as a central criterion for citizenship. Ancestry there serves as a proxy for kinship ties and historical connection. Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1390 (2002).

It is also consistent with Indigenous Hawaiian understandings of relatedness and belonging. Kānaka Maoli understand themselves to be the “descendants of Papa, the earth mother, and Wakea, the sky father,” whose relationship with the islands has, since time immemorial, been familial, ancestral, and sacred.¹⁹² “Like many other native people, [Kānaka Maoli] believed that the cosmos was a unity of familial relations. [Their] culture depended on a careful relationship with the land, [their] ancestor, who nurtured [them] in body and spirit.”¹⁹³

The parties advanced two different frameworks for analyzing the legality of the “Hawaiian” classification. The first framework, adopted by the dissent, was that of Federal Indian law. The state argued that it was trying to identify Hawaiians as an Indigenous group, for purposes of self-determination.¹⁹⁴ By likening Kānaka Maoli to American Indian tribes, the dissent could easily hold that the classification was political, avoiding entirely the trap of constitutional race law – which at this point was solidly governed by a colorblind, anticlassification approach.¹⁹⁵

Rejecting the first framework, the majority opinion emphasized two separate issues. First, while the Court conceded that in some contexts Kānaka Maoli classifications might be political classifications, it took the view that the prerequisite step would be for Congress to recognize Kānaka Maoli as an Indian tribe.¹⁹⁶ Then, they would come within the legal box of “Indian.” Under the Court’s 1974 decision in *Morton v. Mancari*, when Indians are singled out, even relying in part on their ancestry, it is for a political, not a racial purpose, so it is not illegal.¹⁹⁷ Second, the state, rather than the federal government, made the voting rule. Even if Kānaka Maoli were considered to be akin to an Indian tribe, it would typically be the federal government, not the state, that would pass rules singling them out.¹⁹⁸

The second framework, which the majority adopted, was that of race law, governed by the Reconstruction Amendments. By likening Harold Rice to free Black people denied voting rights,¹⁹⁹ the majority cast a cloud of suspicion over

192. MARY KAWENA PUKUI, ‘ŌLELO NO’EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 56 (1983).

193. HAUNANI-KAY TRASK, LIGHT IN THE CREVICE NEVER SEEN, at xv (1994).

194. *Rice v. Cayetano*, 528 U.S. 495, 520 (2000).

195. *Id.* at 529-538 (Stevens, J., dissenting); see Rolnick, *The Promise of Mancari*, *supra* note 17, at 1003-04.

196. *Rice*, 528 U.S. at 518. However, the majority also raised questions it declined to address about Congress’ power to do this. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 997.

197. 417 U.S. 535 (1974). See Rolnick, *The Promise of Mancari*, *supra* note 17, at 993-96 (explaining how this rule was solidified in cases that followed *Mancari* but preceded *Rice*).

198. *Rice*, 528 U.S. at 537 (Stevens, J., dissenting).

199. *Id.* at 512-14, 517.

the statute's use of ancestry and foreclosed any consideration of its purpose or context. The *Rice* Court did not hold that ancestry is equivalent to race, and it certainly did not address such an equivalency argument in the Fourteenth Amendment context. However, it ultimately concluded that ancestry was operating as "a proxy for race" in the Hawaiian context and that the classification was therefore barred by the Fifteenth Amendment's rule that voting cannot be denied or abridged based on race.²⁰⁰ In so doing, the Court collapsed ancestry into race and chose to associate ancestry with the framework of race law. This move has made it difficult to defend any use of ancestry for the purpose of identifying Indigenous people.²⁰¹

By tightening the link between ancestry and race, the majority created a new test that made it easier to prove racist intent in laws intended to promote self-determination: find a reference to ancestry and reason that ancestry is being used as a "proxy" for race. Accordingly, the *Rice* majority stated that it "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities" and that an "inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses."²⁰² Certainly, ancestry-based categories have in many cases been demeaning and disrespectful because they were imposed in a context where ancestry had no significance except as a way to oppress²⁰³ or as a crude stereotype.²⁰⁴ In contrast, in *Rice*, ancestry *did* have independent significance, and its use in voting was linked to its use in defining the beneficiary class affected by the positions being voted upon. The Court's approach ignored that significance.

One architect of the Court's holding was now-Justice Kavanaugh, whose amicus brief provided the groundwork for the majority's reasoning by treating

200. *Id.* at 514, 517.

201. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 1016-1019.

202. *Rice*, 528 U.S. at 517.

203. *Guinn*, 238 U.S. at 365.

204. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 91, 96-101 (1943) (upholding wartime curfew directed at people of Japanese ancestry after deferring to the government's rationale that people of Japanese ancestry were more likely to be disloyal); *Korematsu v. United States*, 323 U.S. 214, 218-19 (1945) (relying on *Hirabayashi* to uphold exclusion order directed at people of Japanese ancestry), abrogated by *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018); *Hirabayashi v. U.S.*, 627 F. Supp. 1445, 1456 (W.D. Wash. 1986) (granting *Hirabayashi's* petition for writ of error coram nobis after finding that the government concealed the real reason for the curfew: a military commander's belief that it was impossible to separate disloyal people of Japanese ancestry from those who were loyal); Karen Korematsu, *Carrying on Korematsu: Reflections on My Father's Legacy*, in *WOMEN & L.* 95, 101 (2020) ("The real reason for the government's deplorable treatment of Japanese Americans wasn't acts of espionage. Rather, the government acted on a baseless perception of disloyalty grounded in racial stereotypes.").

the terms “ancestry” and “race” as interchangeable.²⁰⁵ Kavanaugh filed the brief on behalf of an organization called Center for Equal Opportunity,²⁰⁶ which bills itself as “the nation’s only conservative think tank devoted to issues of race and ethnicity.”²⁰⁷ Its work focuses mainly on opposing racial classifications and remedial legislation in areas where the focus on race is used to benefit minorities, such as affirmative action and voting rights.²⁰⁸ Indeed, the brief advanced Justice Scalia’s stringent articulation of colorblindness from *Richmond v. J.A. Croson Co.* that “only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embedded in the Fourteenth Amendment that our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”²⁰⁹

B. Borrow: Equal Protection, Race, Voting, and Intent

The Court’s choice to focus on the Fifteenth Amendment was important. The Fifteenth and Fourteenth Amendments cover similar ground and belong to the same general legal framework, but their prohibitions, and the way courts have interpreted them, are different. By analyzing the case under the Fifteenth

205. Brief for Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen & Abigail Thernstrom as Amici Curiae Supporting Petitioner at *4 n.2, *Rice*, 528 U.S. 495 (No. 98-818), 1999 WL 345639 (“We will use the terms ‘race’ and ‘racial’ throughout this brief to encompass the overlapping concepts of race, ethnicity, ancestry, and national origin, as government distinctions based on such characteristics are subject to the same stringent constitutional scrutiny.”).

206. *Id.* Kavanaugh coauthored the brief with Roger Clegg, Robert Bork, and Theodore Ulyot. *Rice* was represented by Ted Olson. *Rice*, 528 U.S. 495. Justice Kavanaugh, of course, formerly clerked for Justice Kennedy, who authored the majority opinion, and he would go on to replace Kennedy on the bench. Justice Roberts, the current Chief Justice, argued the case for Hawaii. *Id.*

207. CEO Staff, *Mission Statement*, CTR. FOR EQUAL OPPORTUNITY (Dec. 22, 2011), <https://www.ceousa.org/2011/12/22/mission-statement> [<https://perma.cc/Y5CL-3GK4>].

208. After *Rice*, the Center for Equal Opportunity remained involved in subsequent challenges to Kānaka Maoli rights. See Trisha Kehaulani Watson, *Civil Rights and Wrongs: Understanding Doe v. Kamehameha Schs.*, 3 HUILILI 69, 80-81, 89 (2006) (describing the Center’s role in litigation challenging Kamehameha Schools’ admissions policy, which grants preference to Indigenous Hawaiian applicants, and stating that “the Center for Equal Opportunity’s work in the *Doe* case is actually part of a larger campaign that systematically attacks programs throughout the United States that work to remedy hundreds of years of education discrimination”).

209. Brief for Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen & Abigail Thernstrom as Amici Curiae Supporting Petitioner, *supra* note 205, at *11-12 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring)) (omission in original). The brief acknowledges that the Court had not adopted such an extreme rule but suggested that it should.

Amendment, the Court could borrow its Fourteenth Amendment case law without having to seriously engage with the compelling interests that might have saved the classification in a Fourteenth Amendment analysis.

Fifteenth Amendment case law borrows heavily from the Fourteenth Amendment, incorporating a similar theory of colorblindness and an understanding of racism as intentional action.²¹⁰ The text, however, suggests a more absolute rule: it seems to forbid any race-based denial of voting rights, with no room for balancing of interests. By employing a Fifteenth Amendment analysis, but borrowing the colorblindness approach from the Fourteenth Amendment, the Court could simply point to an invocation of race and the law would fall, sidestepping any need for inquiry into the purpose, effect, or importance of the law.²¹¹

The majority opinion also circumvented a discussion of legislative purpose by treating the case as a facial racial classification, thus obviating the need to inquire about intent. By the end of the twentieth century, the Court had solidified two doctrinal approaches in its equal-protection cases.²¹² If a law includes a facial (that is, express) racial classification, the Court will apply strict scrutiny

210. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976) (holding that a law violates the Fourteenth Amendment only if it can be “traced to a racially discriminatory purpose”); *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964) (affirming the dismissal of a voting-rights case because “appellants failed to prove that the New York Legislature was either motivated by racial consideration or in fact drew the districts on racial lines”); see also *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 66–67 (1980) (Stewart, J., plurality) (“[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment. . . . [T]his principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination.”); *Rogers v. Lodge*, 458 U.S. 613, 617–19 (1982) (reviewing the intent requirement applied in voting cases). Congress amended Section 2 of the VRA shortly after *Bolden* was decided, Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982) (codified as amended at 53 U.S.C. § 10301), so *Bolden* no longer controls disparate impact analysis under the statute, but it still controls analysis under the Fourteenth and Fifteenth Amendments. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997) (“Because now the Constitution requires a showing of intent that § 2 does not, a violation of § 2 is no longer *a fortiori* a violation of the Constitution.”); accord *Lodge*, 458 U.S. at 617–19 (upholding requirement of proof of discriminatory intent in cases concerning voting despite Congress’s amendment, just days earlier, of the Voting Rights Act).

211. See Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. UNIV. L. REV. 1549, 1623 (2020) (criticizing the Court’s importation of Fourteenth Amendment colorblindness jurisprudence into voting cases and proposing that “instead of a well-worn argument over whether equality is best achieved through race-neutral or race-conscious means, the Fifteenth Amendment may embody a distinctively different framework, such as the empowerment of racial minorities through the ballot and their fair representation at various levels of government”).

212. Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1782–84 (2012).

based on *Adarand Constructors, Inc. v. Peña*.²¹³ If it does not, the Court must conduct a careful inquiry into its intent. In situations where race is not expressly mentioned, the Court has made it clear that it will not lightly imply a racially discriminatory intent, regardless of its impact or historical context.²¹⁴ Because the definition of “Hawaiian” referred only to ancestry, it should have been treated as an intent case, requiring an inquiry into the law’s purpose and, importantly, whether it was intended to deny the vote to White people on account of race. Instead, the Court treated it as a colorblindness case by seizing on the use of ancestry and sewing it directly to race.

In this sense, *Rice* belongs in a special category of cases that are neither facial racial classifications nor intent cases. In these cases, the Court has identified statutory text that it associates with race and then determined that the purpose of the statute can be explained in no way other than a desire to account for race.²¹⁵ For example, in *Guinn v. United States*, the Court noted the use of a grandfather clause referring to 1866 and understandably asked why the Oklahoma legislature would condition voting rights on the status of one’s ancestor in 1866 unless it was for the purpose of excluding Black voters.²¹⁶ In *Gomillion v. Lightfoot*, the Court asked why the Alabama legislature would draw a “strangely irregular twenty-eight-sided” district around previously-square Tuskegee unless it meant to exclude all Black voters.²¹⁷ In *Shaw v. Reno*, the Court asked a similar question triggered by the odd shape of the district.²¹⁸ And, in *Rice*, the Court asked why Hawaii would make voting turn on the status of one’s ancestor in 1778.

In a typical intent analysis, this is the point at which the Court would consider the legislature’s motives to determine whether there existed any legitimate explanation for the classification, or whether it was instead motivated by a desire to exclude or harm a particular racial group. Thus, in *Guinn* and *Gomillion*, it

213. 515 U.S. 200, 227 (1995); *id.* at 239 (Scalia, J., concurring).

214. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977) (reversing a holding for respondents despite evidence of a disproportionate burden on racial minorities because there was no evidence of discriminatory purpose); *Washington v. Davis*, 426 U.S. 229, 240-41 (1976). The Court held that this same intent rule applied to Fifteenth Amendment cases in *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980).

215. See N. Jay Shepherd, “Abridge” Too Far: *Racial Gerrymandering, the Fifteenth Amendment, and Shaw v. Reno*, 14 B.C. THIRD WORLD L. J. 337, 365-66 (1994) (asserting that a plaintiff could meet its burden of proof in a Fifteenth Amendment challenge by showing that a law “could not be explained on grounds other than race”).

216. 238 U.S. 347, 364-65 (1915).

217. 364 U.S. 339, 341, 347-48 (1960).

218. 509 U.S. 630, 633-34 (1993); see also *Miller v. Johnson*, 515 U.S. 900, 910-11 (1995) (finding that the irregular shape of a voting district may constitute evidence of racial gerrymandering).

was critical that the Oklahoma and Alabama legislatures could not offer *any* explanation for their actions or any factor that connected the excluded voters, leaving the Court to conclude that those rules stemmed from a desire to exclude Black voters on account of race.²¹⁹

In *Shaw* and *Rice*, on the other hand, the legislatures did offer an explanation. The North Carolina law was a response to a preclearance denial, in which the U.S. Attorney General indicated a need for a second majority-Black district. The new district was drawn in an attempt to condense the political power of Black voters, increase Black voting power, and comply with the Voting Rights Act (VRA).²²⁰ And in *Rice*, the 1778 date and the use of ancestry as a tracing device was an attempt to designate the present-day members of a class of people who were Indigenous to the Hawaiian Islands – as evidenced by their presence before the arrival of European explorers who would eventually colonize the islands.²²¹ Although other groups certainly have a rich history in the Hawaiian Islands, no other group was Indigenous to that land.

In neither case did the Court grapple with intent, however. The Court in *Shaw* recounted historical uses of racial gerrymandering to disenfranchise Black voters, including *Gomillion*.²²² But instead of characterizing *Gomillion* as an intent case, which it arguably was, it transformed that case into evidence that the Constitution prohibited segregating voters by race, regardless of purpose.²²³ Even though race was not expressly used, the *Shaw* Court described the new district as “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles”²²⁴ The Court divided the race precedents into three groups: (1) cases about laws that “contain[] explicit racial distinctions”²²⁵

219. *Guinn*, 238 U.S. at 365 (“[W]e are unable to discover how, unless the prohibitions of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the 15th Amendment.”); *Gomillion*, 364 U.S. at 346-48 (“While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.”). See Shepherd, *supra* note 215, at 350 (describing the *Guinn* Court’s concern with the purpose of the law).

220. *Shaw*, 509 U.S. at 638-39; see A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1618-20 (1994).

221. *Rice v. Cayetano*, 528 U.S. 495, 500-01, 510-11 (2000).

222. *Shaw*, 509 U.S. at 640-41.

223. *Id.* at 644-45. But see Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 *CORNELL L. REV.* 1211, 1240, 1251-57 (2018) (providing a taxonomy of definitions of discriminatory intent, including one in which classification equals intent).

224. *Shaw*, 509 U.S. at 642.

225. *Id.* at 643.

(racial classification cases), (2) cases where the classification in question “is ostensibly neutral but is an obvious pretext for racial discrimination”²²⁶ (neutral classification/intent cases), and (3) “those ‘rare’ statutes that, although race neutral, are, on their face, ‘unexplainable on grounds other than race.’”²²⁷ The district in question was an example of the third category, the Court held, so it “demands the same close scrutiny that we give other state laws that classify citizens by race.”²²⁸

To the Court, the *Rice* classification was another example of this third category. Although the statute did not purport to make a racial classification, it did mention ancestry, and the Court concluded that ancestry was a proxy for race.²²⁹ Unlike *Shaw*, in which the plaintiffs’ Fourteenth Amendment claim would presumably have been weighed against any compelling state interests, the *Rice* Court declared the law illegal without any discussion of its purpose, because the Fifteenth Amendment does not require a balancing test.²³⁰ Because it was applying the Fifteenth Amendment’s categorical prohibition, the Court could avoid any examination of what ancestry actually meant or what the purpose of the classification at issue was. As precedent, *Rice* thus adds an important analytical dimension to *Guinn*, which involved an ancestry-based classification but where the Court engaged in minimal discussion about the relationship between ancestry

226. *Id.* at 644 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

227. *Id.* at 643 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

228. *Id.* at 644.

229. *Rice v. Cayetano*, 528 U.S. 495, 513-16 (2000). The statute used and defined the terms Hawaiian and Native Hawaiian, HAW. REV. STAT. § 10-2 (2021), which the state did not view as racial terms or racial classes. Brief for Respondent, *Rice v. Cayetano*, No. 98-818, 1999 WL 557073, at *1, *39. The definition of Hawaiian referred to Indigenous Hawaiians as “peoples,” a term signaling political identity. The definition of Native Hawaiian set a blood quantum floor and referred to “the races inhabiting the Hawaiian Islands previous to 1778” but also refers to “such aboriginal peoples which exercised sovereignty.” *Rice*, 528 U.S. at 509-10 (citing HAW. REV. STAT. § 10-2 (2021)). The definition of Native Hawaiian was not at issue in the case. *Id.* at 521 (“[T]he validity of the voting restriction is the only issue before us.”). To support its holding that ancestry was being used as a proxy for race, the Court pointed to the legislative history of the Hawaiian statute at issue, where the term “peoples” was used interchangeably with the term “races.” To the Court, the legislature’s invocation of peoplehood was also itself a code for race. *Id.* at 516; see Rolnick, *The Promise of Mancari*, *supra* note 17, at 1005 n. 201.

230. Case law interpreting the Fifteenth Amendment is sparse, see *Crum*, *supra* note 211, at 1554-55, so I do not wish to suggest here that courts have carefully examined whether the Amendment might be understood to incorporate exceptions or require interest balancing. However, courts have interpreted categorical language in other amendments to require interest balancing. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381-413 (2009) (describing judicial interest-balancing approaches, and contrasting them with categorical or absolutist approaches, in cases interpreting the First and Second Amendments).

and race and instead inquired about the purpose of the classification. With ancestry and race linked as they were in *Rice*, future courts can simply engage in a word hunt to find a term like “descent” or “ancestor” in a statute or its legislative history.

Intent doctrine has been widely criticized for the way it prevents an inquiry into outcomes and makes it impossible to recognize systemic discrimination as a legal problem.²³¹ As commentators have noted, the Supreme Court’s intent inquiry sets a high bar, requiring clear evidence of discriminatory intent before it will invalidate a facially neutral statute.²³² Thus, the Court has upheld zoning rules intended to keep poor people out of wealthy suburban neighborhoods despite evidence that residents and decisionmakers were also trying to keep out Black people,²³³ a decision to seek the death penalty in the face of clear evidence that it was used almost entirely to vindicate White death at the hands of Black killers,²³⁴ and federal prosecution of Black defendants for crack cocaine offenses in the face of evidence that Black people were much more likely to be prosecuted and receive longer sentences.²³⁵ In all these cases, the Court refused to strike down laws that clearly harm non-White people without ironclad evidence of intent to harm. In contrast, the *Rice* Court struck down a law benefitting a group of primarily non-White people without requiring *any* evidence of intent to harm

231. See, e.g., Haney López, *supra* note 212, at 1783 (describing modern intent cases as requiring a state of mind “akin to malice” and noting in 2012 that the standard had never been satisfied); Barnes & Chemerinsky, *supra* note 29, at 1082.

232. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 258 (1979) (“[D]iscriminatory purpose’ implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”); see Huq, *supra* note 223, at 1231 n.86 (describing *Feeney* as “excluding cases in which racial effects were anticipated but not intended”). Compare *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) (applying *Arlington Heights* to hold that North Carolina voting restrictions were motivated by discriminatory intent), and Christopher Ingraham, *The ‘Smoking Gun’ Proving North Carolina Republicans Tried to Disenfranchise Black Voters*, WASH. POST (July 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/29/the-smoking-gun-proving-north-carolina-republicans-tried-to-disenfranchise-black-voters> [https://perma.cc/Q72J-TWKW] (discussing evidence of intent in the case), with *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (upholding death sentence against an equal-protection challenge based on evidence that Black defendants who killed White victims were much more likely to receive the death penalty than White defendants who killed Black victims because “[f]or this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of an anticipated racially discriminatory effect*”).

233. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 (1977); *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199–200 (2003).

234. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

235. *United States v. Armstrong*, 517 U.S. 456, 469–70 (1996).

White or other non-Indigenous people (and despite evidence of non-racist intent).

Another characteristic of intent doctrine, which arises from its interrelationship with colorblindness,²³⁶ is that intent has come to mean intent to *recognize* race rather than intent to *harm* on the basis of race.²³⁷ *Shaw* and *Rice* facilitated this transition by turning what would otherwise be intent cases into racial classification cases, employing the equivalency rule of the racial classification cases to strike down the laws without any discussion of whether they actually intended to discriminate on the basis of race. They led to a new rule that the Constitution prohibits the intent to segregate or classify, and that much less is required to show intent to classify than would be required to show intent to discriminate in a non-classification case. While *Shaw* employed this rule in the Fourteenth Amendment context, where the Court's balancing test could potentially permit some uses of race, *Rice* imported it to the Fifteenth Amendment context, enabling the Court to impose an absolute bar.

C. *Expand: The Pacific Island Cases*

The specific circumstances that gave rise to the *Rice* decision—the right to vote for officers of a state agency on a matter concerning the rights of nonfederally recognized Indigenous peoples—are unlikely to recur. These twin circumstances—a group that is not federally acknowledged as an Indian tribe and a state government action—obscured the eventual threat that *Rice* would pose to the rights of Indigenous and colonized peoples. Moreover, the Court decided the case on Fifteenth Amendment grounds and declined to address Harold Rice's Fourteenth Amendment challenge. As a result, it only directly impacted voting cases, softening its potential effect on land rights, self-government rights, or self-determination more generally.

However, as an advocacy tool, the case has transformed into a shorthand rule that ancestry-based classifications are illegal in general. While Federal Indian law doctrine protects most ancestry-based classifications that are also based on tribal citizenship, the *Rice* rule has been used to chip away at the rights of Indigenous peoples in two main categories of cases.

In the first category, litigants have invoked *Rice* in several cases with the goal of declaring a variety of programs benefitting Kānaka Maoli unconstitutional.²³⁸

236. See Haney López, *supra* note 212, at 1779.

237. See Harris & West-Faulcon, *supra* note 151, at 110-11.

238. See Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007); Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006); Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 596 F.3d 1036 (9th Cir. 2010).

These cases attempt to expand the holding prohibiting ancestry-based Hawaiian classifications beyond the context of voting rules to bar any state law classifying Hawaiians or Native Hawaiians. Federal courts have largely declined to strike down programs benefitting Kānaka Maoli, making this attempted expansion of *Rice* largely unsuccessful.²³⁹

Partly as a response to these continuing challenges, the federal government issued new regulations in 2016 that would allow Kānaka Maoli to petition for recognition as an Indian tribe.²⁴⁰ Yet *Rice* still haunts the process. A recognized government will require elections for leaders, and the state cannot hold those elections after *Rice*. A non-profit, Na'i Aupuni, was created for the purpose of managing the election process.²⁴¹ Non-Indigenous residents of Hawaii sued, citing *Rice*, but a federal district court rejected the challenge in the initial stages, holding that the election was not a state function.²⁴² The challengers petitioned Justice Kennedy for an emergency stay, which was granted.²⁴³ Na'i Aupuni stopped its voting process, but it continued to oversee self-governance activities, including a constitutional convention.²⁴⁴

The second set of cases are lawsuits challenging Indigenous rights in the Pacific territories – one lawsuit in the CNMI and one in Guam.²⁴⁵ Because these suits challenged voting-related classifications, plaintiffs succeeded by invoking *Rice*'s Fifteenth Amendment analysis.

239. See *Carroll v. Nakatani*, 342 F.3d 934, 943, 948 (9th Cir. 2003) (dismissing challenges to the Hawaiian Homes Commission Act for lack of standing); *Corboy v. Louie*, 283 P.3d 695, 697 (Haw. 2011) (same); see also cases cited *supra* note 20; *Doe*, 470 F.3d at 830 (upholding Native Hawaiian-only admission policy at private school).

240. *Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community*, 43 C.F.R. § 50 (2022). Although federal acknowledgement would result in stronger protections for Kānaka Maoli rights and self-governance in some contexts, it is a highly contested strategy. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 997 n.178 (summarizing criticisms of the federal acknowledgement strategy); see also J. Kehaulani Kauanui, *The Politics of Blood and Sovereignty in Rice v. Cayetano*, 25 POL. & LEGAL ANTHROPOLOGY REV. 110, 121 (2002) [hereinafter Kauanui, *The Politics of Blood*]; J. Kehaulani Kauanui, *Precarious Positions: Native Hawaiians and U.S. Federal Recognition*, 17 CONTEMP. PAC. 1, 15 (2005) [hereinafter Kauanui, *Precarious Positions*].

241. *Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1117-18 (D. Haw. 2015).

242. *Id.* at 1136.

243. *Akina v. Hawaii*, 577 U.S. 1024 (2015) (mem.).

244. *Makekau v. Hawaii*, 943 F.3d 1200, 1202-03 (9th Cir. 2019).

245. *Davis v. Commonwealth Election Comm'n*, 2014 WL 2111065 (D.N.M.I. 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 127; *Davis v. Guam*, 2017 WL 930825 (D. Guam 2017), *aff'd*, 932 F.3d 822 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2739 (2020).

In 2016, a Ninth Circuit panel struck down a law in the CNMI that limited the right to vote on a constitutional amendment affecting the land rights of Indigenous peoples to eligible voters “who are also persons of Northern Marianas descent as described in Article XII, Section 4” of the NMI Constitution.²⁴⁶ In 2019, another Ninth Circuit panel struck down a law limiting the right to vote to “native Inhabitants of Guam,” a category defined in part by ancestry.²⁴⁷ The lawsuits were part of a concerted, well-funded conservative campaign to enforce “civil liberties” and dismantle important protections for minority rights in voting, education, and government contracting.²⁴⁸ Unlike the post-*Rice* Hawaii challenges, these were voting lawsuits governed by the Fifteenth Amendment. Lower courts viewed them as close enough to *Rice* that they were bound to strike down the rules, but each also contained an incremental expansion of the *Rice* rule.²⁴⁹ By applying *Rice*, the Court expanded its application of race jurisprudence beyond state-law classification of Hawaiians to include laws singling out Indigenous peoples in the territories. In so doing, the Court made it more difficult for those peoples to advance claims under a Federal Indian law framework or even under a territorial or international framework.

In the CNMI case, non-Indigenous residents filed a lawsuit seeking the right to vote on a proposed amendment to the CNMI Constitution.²⁵⁰ The provision in question, Article XII, restricts “the acquisition of permanent and long-term interests in real property within the Commonwealth” to “persons of Northern Marianas descent.”²⁵¹ “Permanent” is defined to include leases longer than fifty-five years.²⁵² “A person of Northern Marianas descent” is defined as a person who is a U.S. citizen and “at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof,” while a “full blooded” person is defined as any person who “was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the

246. *Davis v. Commonwealth Election Comm’n*, 2014 WL 2111065 (D.N.M.I. 2014), *aff’d*, 844 F.3d 1087 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 127 (quoting CNMI CONST. art. XVIII, § 5(c)). The panel was composed of Chief Judge Thomas, Judge Callahan, and Judge Murguia.

247. *Davis v. Guam*, 932 F.3d 822, 843 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2739 (2020). The panel was composed of Judge Berzon, Judge Wardlaw, and Judge Rawlinson.

248. See Serrano, *supra* note 170, at 501, 502 n.4 (describing the role of conservative think tanks and legal organizations in the Guam case).

249. See *infra* notes 257–259 (CNMI holding and expansions), 281–284 (Guam holding and expansions), 300 and accompanying text (further explaining the doctrinal expansions).

250. *Davis v. Commonwealth Election Comm’n*, 2014 WL 2111065, at *1 (D.N.M.I. 2014).

251. N. MAR. I. CONST. art. XII, § 1.

252. *Id.* art. XII, § 3.

Pacific Islands before the termination of the Trusteeship.”²⁵³ Article XII implements a provision in the Covenant between the United States and the Commonwealth that limits land ownership to Indigenous peoples.²⁵⁴ The Covenant’s land ownership restriction was aimed at protecting the cultural significance of land and the economic self-sufficiency of the people.²⁵⁵ The restriction expired in 2011 (twenty-five years after the termination of the trusteeship agreement) and the NMI legislature provided that Indigenous Northern Marianas residents would vote on whether to retain it.²⁵⁶ The court ultimately used *Rice* to find that CNMI’s Indigenous-only voting rule violated the Fifteenth Amendment.²⁵⁷

By applying *Rice* to bar a voting rule in the territories, the CNMI case eroded two of the main perceived limitations on *Rice*’s impact. First, it applied *Rice* beyond the limited context of state elections. This expansion was not obvious: the federal government has a much more direct role in territorial governance than in state governance, and the Court in the *Insular Cases* held that the Constitution must therefore apply differently in that context.²⁵⁸ Second, the Court’s rejection of the Indigenous-rights framework in *Rice* hinged partly on the fact that Congress claims plenary power over the acknowledgement of Indian tribes and had not clearly indicated an intent to bring Kānaka Maoli within the scope of those

253. *Id.* art. XII, § 4.

254. *Id.* (permitting the government of the Northern Mariana Islands to “regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent”). See Nicole Manglona Torres, *Self-Determination Challenges to Voter Classifications in the Marianas After Rice v. Cayetano: A Call for a Congressional Declaration of Territorial Principles*, 14 ASIAN-PAC. L. & POL’Y J. 152, 154 (2012) (discussing the relationship between section 805 of The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America and the Northern Mariana Islands Constitution).

255. See *Wabol v. Villacrusis*, 958 F.2d 1450, 1452 (9th Cir. 1990).

256. 2011 N. Mar. I. Pub. L. 17-40, § 1; Torres, *supra* note 254, at 157. The twenty-five-year restriction is reminiscent of the twenty-five-year trust that prevented individual Indians from selling land they received during Allotment. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 10 (1995) (discussing the 25-year trust period and opposition to “continued federal guardianship” that led Congress to authorize early issuance of patents to Indians who were determined to be competent to manage their own property). Once the trust period expired, the individual would receive a fee patent and the land could be sold to settlers. Much of it was, until the federal government realized the mistake of allotment policy and reimposed the trust restrictions. Royster, *supra*, at 10-12, 16-17. Here, the ability of Indigenous CNMI residents to decide whether to extend the restriction puts power in Indigenous hands. By striking down the voting restriction, the Court placed the decision about whether to open lands for settlement in the hands of the non-Indigenous majority.

257. *Davis v. Commonwealth Election Comm’n*, 2014 WL 2111065, at *14, (D.N.M.I. 2014), *aff’d*, 844 F.3d 1087, 1091-93 (9th Cir. 2016).

258. The claim to plenary power over the territories then provided an additional basis for distinguishing the CNMI case from *Rice*. I discuss this idea further in Section IV.B.

protections. Article XII implements the provision of a covenant between Congress and the CNMI. Arguably, the covenant indicates that Congress intended to treat Chamorros and Carolinians in a manner analogous to Indian tribes, although within a completely different political structure.²⁵⁹ Yet, the Ninth Circuit accorded no significance to this expression of congressional purpose.

Moreover, the CNMI land laws had already been upheld against a challenge that they classified on the basis of race.²⁶⁰ A decade earlier, the Ninth Circuit in *Wabol v. Villacrusis* had considered an equal-protection challenge to Article XII.²⁶¹ The constitutional provision survived, with the court holding that Indigenous property protections were “not subject to equal protection attack” even if they required classifying on the basis of ancestry.²⁶² In so holding, the court relied on the *Insular Cases* to hold that Congress could selectively incorporate constitutional guarantees to the territories, and that it had done so with the Fourteenth Amendment’s equal-protection guarantee.²⁶³ Because this new lawsuit was about voting rights, however, it was challenged under the Fifteenth Amendment, and the court applied *Rice* to strike down the classification.²⁶⁴ The Fifteenth Amendment framing obscured the way the case was situated in a longstanding contestation between settlers and Indigenous peoples over land. It also helped the Court of Appeals avoid the question raised by *Wabol* about the application of constitutional provisions in the territories because, unlike the

259. Every time Congress employs a different framework for its relationships with Indigenous peoples, which it has sometimes done in recognition of the shortcomings of Federal Indian law, the difference in status has raised questions about whether Indigenous people count as Indians and whether they are entitled to the same protections. See *infra* notes 470-475.

260. See *Wabol v. Villacrusis*, 958 F.2d 1450, 1451 (9th Cir. 1990). In that case, the Ninth Circuit upheld the land ownership restriction against an equal-protection challenge, relying on the *Insular Cases* to hold that applying the constitutional guarantee of equal protection in access to long term property interests would be impractical and anomalous in the CNMI because “[a]bsent the alienation restriction, political union would not be possible.” *Id.* at 1460-62.

261. *Id.* at 1451-52. The plaintiff in that case sought to void a lease by arguing that it violated Article XII, and the defendant argued that Article XII violated the Equal Protection Clause. *Id.* at 1451.

262. *Id.* at 1462; see *Davis v. Commonwealth Election Comm’n*, 2014 WL 2111065, at *12 (noting that the *Wabol* court assumed without analysis that the restriction was race-based).

263. *Id.* at 1451 (“This case requires us to determine whether the constitutional guarantee of equal protection of the laws limits the ability of the United States and the Commonwealth to impose race-based restrictions on the acquisition of permanent and long-term interests in Commonwealth land.”).

264. *Davis v. Commonwealth Election Comm’n*, 2014 WL 2111065, at *12 - *14 (D.N.M.I. 2014). The district court also held that it violated the Fourteenth Amendment as a voting restriction, *id.* at *18, but the Ninth Circuit addressed only the Fifteenth Amendment challenge, *Davis v. Commonwealth Election Comm’n*, 844 F.3d at 109.

Fourteenth Amendment, the Fifteenth Amendment is made fully applicable to CNMI through the Covenant.²⁶⁵

The CNMI litigation was largely local. The Northern Marianas Descent Corporation, a group formed in 2013 to advocate for the land rights of people of Northern Marianas descent, filed the only amicus brief.²⁶⁶ Academic interest in the decision was limited to scholars who study the territories.²⁶⁷ As the case wound through the courts, however, it attracted the attention of leading conservative figures and organizations working against minority voting rights. Hans A. von Spakovsky highlighted the CNMI case in the *National Review*, criticizing the Obama Justice Department for having “no interest in filing a lawsuit under the Voting Rights Act against a blatantly discriminatory and repugnant law that prevented John Davis from voting because he doesn’t have the right ‘blood’ quantum.”²⁶⁸ J. Christian Adams of the Election Law Center described the decision as “a huge victory for the right to vote.”²⁶⁹ Adams and von Spakovsky were later primary architects of the fabricated voter-fraud claims used by the

265. *Davis v. Commonwealth Election Comm’n*, 844 F.3d at 1095.

266. See Brief Amicus Curiae of Northern Marianas Descent Corporation in Support of Defendants-Appellants and Reversal, *Davis v. Commonwealth Election Comm’n*, No. 14-16090, 2014 WL 5510536, at *1; Marc Venus, *NMD Group Forms Nine Committees*, SAIPAN TRIB. (July 25, 2019), <https://www.saipantribune.com/index.php/nmdgroupformsninecommittees> [<https://perma.cc/B3PF-7P75>] (describing the formation and goal of the corporation).

267. Eleven law-review publications reference the case. Five specifically address Indigenous rights in the territories, most written by scholars with personal ties to the territories. See Ian Falefufafua Tapu, *Who Is Really a Noble?: The Constitutionality of American Samoa’s Matai System*, 24 ASIAN PAC. AM. L.J. 61 (2020); Villazor, *supra* note 3; Serrano, *supra* note 131, at 395; Serrano, *supra* note 170, at 501. Gregory Ablavsky was the only scholar to explicitly examine the case in relation to Federal Indian law. See Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 36-39 (2019). Three publications consider Kānaka Maoli rights post-*Rice*. See Melody Kapilialoha MacKenzie & D. Kapua’ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai’i’s Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481 (2017); Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawai’i’s Past*, 39 U. HAW. L. REV. 631 (2017); Lisset M. Pino, Comment, *Colonizing History: Rice v. Cayetano and the Fight for Native Hawaiian Self-Determination*, 129 YALE L.J. 2574 (2020). One considers territorial law more broadly. See Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J. F. 284 (2020). The remainder are law updates. *Constitutional Law – Territories – Ninth Circuit Holds that Guam’s Plebiscite Law Violates Fifteenth Amendment*, 133 HARV. L. REV. 683, 686 n. 44 (2019); *Developments in the Law: Introduction*, 130 HARV. L. REV. 1617, 1626 (2017).

268. Hans A. von Spakovsky, *Voting Discrimination Struck Down in Northern Mariana Islands-DOJ Nowhere to Be Seen*, NAT’L REV. (May 23, 2014, 7:22 PM), <https://www.nationalreview.com/corner/voting-discrimination-struck-down-northern-mariana-islands-doj-nowhere-be-seen-hans> [<https://perma.cc/27DD-RB4F>].

269. Mindy Aguon, *9th Circuit Upholds Voting Rights in CNMI*, GUAM DAILY POST (Dec. 31, 2016), <https://www.postguam.com/news/local/th-circuit-upholds-voting-rights-in-cnmi/article>

Trump Administration to legitimate restrictive election laws.²⁷⁰ Adams's Public Interest Legal Foundation was even sued for defamation because its report suggested that nonfelon citizens were noncitizen felons committing voter fraud.²⁷¹

Meanwhile, in Guam, a non-Indigenous resident challenged a law limiting the right to vote on self-determination to "native inhabitants of Guam."²⁷² Unlike the CNMI, which negotiated a Commonwealth relationship with the United States that the people of the CNMI believed would confer greater autonomy than a purely territorial one, Guam has not yet negotiated its political status.²⁷³ As a non-self-governing territory under U.S. rule, it retains the right to political self-determination, which could take many forms, including independence (similar to the Philippines), free association (similar to the COFA nations of Palau, the Marshall Islands, and the Federated States of Micronesia), or statehood (similar to Hawaii). The election at issue was a nonbinding plebiscite intended to document the views of the colonized residents of Guam and transmit them to the United States as a starting point for negotiations.

The "native inhabitants" category includes "those persons who became U.S. citizens by virtue of the authority and enactment of the 1950 Organic Act of

_4666aa68-ce7f-11e6-8732-8bbece2faec6.html [https://perma.cc/PX76-KERD]; see Steve Limtiaco, *No "Native Inhabitant" Vote After U.S. Supreme Court Denies Guam's Plebiscite Appeal*, PAC. DAILY NEWS (May 5, 2020), https://www.guampdn.com/news/local/no-native-inhabitant-vote-after-u-s-supreme-court-denies-guams-plebiscite-appeal/article_a2c51570-2707-5995-b169-fc187f55f25b.html [https://perma.cc/8AKR-7JQT].

270. See Simon Lewis & Joseph Tanfani, *Special Report: How a Small Group of U.S. Lawyers Pushed Voter Fraud Fears into the Mainstream*, REUTERS (Sept. 9, 2020, 3:43 AM), https://www.reuters.com/article/us-usa-election-voter-fraud-special-repo/special-report-how-a-small-group-of-u-s-lawyers-pushed-voter-fraud-fears-into-the-mainstream-idUSKBN2601GZ [https://perma.cc/HA2M-X7KU] (naming Adams and von Spakovsky as part of "a small network of lawyers who have promoted [voter-fraud claims] for two decades, funded by right-wing foundations" and listing the Public Interest Legal Foundation, the Heritage Foundation, the American Constitutional Rights Union, Judicial Watch and True the Vote); Jim Rutenberg, *The Attack on Voting*, N.Y. TIMES (Sep. 30, 2020), https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html [https://perma.cc/856V-2DNG] (naming Adams and von Spakovsky as "the two leading proponents of the voter fraud narrative").

271. See Alex Kasprak, *How to "Weaponize" Misleading Narratives About Voting: Lessons from Trump-Linked PILF Playbook*, SNOPE (Oct. 15, 2020), https://www.snopes.com/news/2020/10/15/the-fog-of-war/ [https://perma.cc/K5HM-VC7N].

272. 3 GUAM CODE ANN. § 21000 (2021). Eligible voters include "[e]very person who is a Native Inhabitant of Guam . . . [as defined in the statute] or who is descended from a Native Inhabitant of Guam . . ." 3 GUAM CODE ANN. § 21003 (2021). This is redundant, as anyone who is descended from a "Native Inhabitant" would themselves be included in the definition of "Native Inhabitant." See 3 GUAM CODE ANN. § 21001 (2021).

273. Aguon, *supra* note 81, at 52-53; *Non-Self-Governing Territories*, *supra* note 115.

Guam and descendants of those persons.”²⁷⁴ The Guam Organic Act, which changed Guam’s political relationship with the United States from an unorganized to an organized unincorporated territory,²⁷⁵ extended U.S. citizenship to the following categories of people “and their children born after April 11, 1899”²⁷⁶: (1) all inhabitants of Guam on April 11, 1899 who were Spanish subjects; and (2) all persons born on Guam and inhabiting the island on April 11,

274. 3 GUAM CODE ANN. § 21001(e) (2021).

275. Pub. L. No. 81-630, § 3, 64 Stat. 384, 384 (1950) (codified at 48 U.S.C. § 1421a (2018)); see also *Gumataotao v. Dir. of Dep’t of Revenue & Tax’n*, 236 F.3d 1077, 1079 (9th Cir. 2001) (“Congress organized Guam as an unincorporated possession of the United States through the 1950 Organic Act of Guam . . .”); Anthony Ciolli, *The Power of United States Territories to Tax Interstate and Foreign Commerce: Why the Commerce and Import-Export Clauses Do Not Apply*, 63 TAX LAW. 1223, 1226 (2010) (“In addition to being deemed incorporated or unincorporated, United States territorial possessions may also be classified as organized or unorganized. ‘An “organized” territory is one that has established a civil government under an organic act passed by Congress.’ An ‘organic act’ is defined as ‘[t]he body of laws that the United [States] Congress has enacted for the government of a United States insular area . . .’. A territory’s organic act will ‘usually include [] a bill of rights and the establishment and conditions of the insular area’s tripartite government.’ Although ‘some organized insular areas now have constitutions of their own, the organic act was meant to substitute for such a document while retaining ultimate authority over the insular area.” (quoting Off. Insular Affs., *Definitions of Insular Area Political Organizations*, DEP’T INTERIOR, <https://www.doi.gov/oia/islands/politicatypes#:~:text=A%20jurisdiction%20that%20is%20neither,Territory%20of%20the%20Pacific%20Islands> [<https://perma.cc/GM3E-Z63Q>])).

276. Pub. L. No. 81-630, § 4(a), 64 Stat. 384, 384 (1950) (current version at 8 U.S.C. § 1407 (2018)). April 11, 1899 is the effective date of the Treaty of Peace Between the United States and Spain, pursuant to which Spain ceded its political authority over Guam to the United States. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris]. Guam had previously been under Spanish control for three centuries, and it was subsequently a possession of the United States for approximately half a century (except for a brief period of Japanese occupation during the Second World War), before its inhabitants were granted U.S. citizenship. Francis X. Hezel & Marjorie C. Driver, *From Conquest to Colonization: Spain in the Marian Islands*, 23:2 J. PAC. HIST. 137 (1988); ANNE PEREZ HATTORI, *COLONIAL DIS-EASE: US NAVY HEALTH POLICIES AND THE CHAMORROS OF GUAM, 1898-1941*, at 14 (2004); Anthony (T.J.) F. Quan, “*Respeto I Taotao Tano*”: *The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam under International, Federal, and Local Law*, 3 ASIAN-PAC. L. & POL’Y J. 56, 63 (2002); see *Guam v. Guerrero*, 290 F. 3d 1210, 1214 (9th Cir. 2002); see also *Gov’t of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 632 (9th Cir. 1999). Of course, this chronology obscures the reality that people lived on Guam long before it became the object of European colonization. See ROBERT F. ROGERS, *DESTINY’S LANDFALL: A HISTORY OF GUAM* 6-7, 22 (1995). While their citizenship status has varied under each foreign occupation, the inhabitants of Guam have continued to live on the island and exercise varying degrees of limited self-government.

1899.²⁷⁷ The Act also extended citizenship to “[a]ll persons born on the island of Guam on or after April 11, 1899”²⁷⁸ Most of the people encompassed by this definition were Chamorros, but any non-Chamorros who were born on Guam and lived there in 1899 (and did not elect to take Spanish or U.S. citizenship) would also be included.

While all people living on Guam certainly have a stake in its future status, they are not all similarly situated with regard to international rights. The remedy of decolonization arises from the injury of colonization, and only those groups who were colonized suffered that injury. Under the Treaty of Paris, non-Native inhabitants were permitted to choose their citizenship status; only Native inhabitants were left in colonial limbo.²⁷⁹ Certainly, those people who moved to Guam once it was under U.S. control are better understood as members of the colonizing nation (or even another nation), and not as colonized peoples. The “native inhabitants” category traces its origins to federal laws and reflects the U.S. position that Guam’s colonized population continues to have a group political identity. That group political identity is significant, at least, for purposes of international law on decolonization. If the settler population could outvote the colonized population on the question of whether and how to decolonize, the remedy would be meaningless.²⁸⁰

A federal district court struck down the plebiscite law;²⁸¹ the Ninth Circuit, citing *Rice*, agreed, although it recognized the importance of self-determination and rejected the argument advanced by the plaintiff that ancestry always equals race.²⁸² Both courts glossed over potentially important distinctions between

277. Pub. L. No. 81-630, § 4(a), 64 Stat. 384, 384 (current version at 8 U.S.C. § 1407 (2018)). The Act excluded from the first two categories anyone who took certain steps to retain citizenship or nationality from another country, and it included anyone who otherwise fit the statutory definitions but was temporarily absent from Guam when the law was enacted, as well as anyone who otherwise fit the statutory definition and continued living in a U.S. territory, even if that territory was not Guam. *Id.*

278. *Id.*

279. Treaty of Paris, *supra* note 276.

280. See *Gillot et al. v. France*, U.N. Human Rights Comm’n, Commc’n No. 932/2000, U.N. Doc. CCPR/C/75/D932/2000, at p. 14.3 (July 26, 2002) (noting that a state may restrict voting in a self-determination referendum to ensure that “results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it”); *Aguon*, *supra* note 121, at 388 (arguing that “to have allowed the American settler population in Hawai’i to vote alongside the colonized population diluted ad absurdum the latter’s right to a decolonization remedy guaranteed by international law”); *Kauanui*, *The Politics of Blood*, *supra* note 240, at 112 (noting that, in the election that resulted in Hawaii statehood, “Hawaiians were outnumbered by settlers as well as military personnel”).

281. *Davis v. Guam*, No. 11-00035, 2017 WL 930825, at *1 (D. Guam Mar. 8, 2017).

282. *Davis v. Guam*, 932 F.3d 822, 837, 839, 843 (9th Cir. 2019). Guam sought review by the Supreme Court, which denied the petition in 2020. See *Limtiaco*, *supra* note 269.

Guam and Hawaii (and even CNMI). First, Native inhabitants of Guam, as residents of a non-self-governing territory, have clear rights to self-determination and access to the remedy of decolonization. While most of the colonized population is Indigenous, these rights stem from international law on colonized peoples, not Indigenous peoples. Accordingly, the right of the Native inhabitants of Guam to self-determination clearly encompasses independence, should that be the will of the Native inhabitants of Guam.²⁸³ Second, because Guam is a non-self-governing territory, it is more directly controlled by the federal government than is either Hawaii or CNMI. The legislature responsible for the challenged law is more an arm of Congress than either the CNMI or Hawaii in the sense that its relationship to the United States is not mediated through a covenant or state constitution. Moreover, the Guam legislature was simply employing a classification clearly understood by Congress²⁸⁴ to designate Native inhabitants as a separate class.

The conservative figures and organizations that expressed interest in the CNMI case were more directly involved in the Guam case. J. Christian Adams of the Election Law Center represented the plaintiff in the Guam challenge.²⁸⁵ He was assisted by lawyers from the Center for Individual Rights,²⁸⁶ a conservative nonprofit that represented the plaintiffs in *Reno v. Bossier Parish School District*, which made it easier for covered jurisdictions to obtain preclearance under Section 5 of the VRA despite evidence of discriminatory purpose.²⁸⁷ The Pacific Legal Foundation, one of dozens of “so-called ‘public interest’ litigation boutiques” funded by “dark money” that “scour the country for sympathetic and willing ‘plaintiffs of convenience’ to bring litigation that advances their constitutional theories and ideological and political goals, even in the absence of a genuine ‘case

283. Hawaiians argue that they are entitled to the same remedies, but the law is less clear and the U.S. position is different. Aguon, *supra* note 121, at 385-91.

284. See S. REP. NO. 81-2109 (1950), reprinted in 1950 U.S.C.C.A.N. 2840, 2841 (acknowledging Congress’s responsibility under the Treaty of Paris to provide for “[t]he civil rights and political status of the native inhabitants”).

285. See Application for *Pro Hac Vice* Admission—J. Christian Adams, Davis v. Guam, No. 11-00035 (D. Guam Nov. 22, 2011).

286. See Application for *Pro Hac Vice* Admission—Michael E. Rosman, Davis v. Guam, No. 11-00035 (D. Guam Nov. 22, 2011).

287. See Peyton McCrary, Christopher Seaman & Richard Vallely, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275 (2006). Part of the Center for Individual Rights’ mission is “to get the government out of the business of granting preferential treatment to individuals based on their race.” *Issue Areas: Civil Rights*, CTR. FOR INDIVIDUAL Rts., <https://www.cir-usa.org/category/civil-rights> [https://perma.cc/JFP7-3TEQ].

or controversy,”²⁸⁸ filed an amicus brief.²⁸⁹ Whereas von Spakovsky complained about the Obama Justice Department’s lack of interest in the CNMI case, these organizations were able to secure an amicus brief from the Trump Justice Department in support of their position in the Guam case.²⁹⁰

Both the CNMI and Guam cases involved an attempt to expand the holding of *Rice* beyond its facts and transform it into a rule that all ancestry-based classifications are racial ones – a rule that, if accepted, could be used to undermine all Indigenous classifications, including Indian laws. Although the Court in *Rice* only held that ancestry could be a proxy for race, litigants in the lower courts advocated for the view set forth in the CEO amicus brief that ancestry *always* equals race.²⁹¹ This was the core argument used in both the CNMI and Guam challenges: if a law identifies a group by reference to ancestry or descent, it is unconstitutional because ancestry equals race and racial classifications are generally unconstitutional. Because of the two cases’ factual similarity to *Rice* (all three involved ancestry-based classifications in voting and non-Indian Indigenous peoples), the lower courts hearing these cases employed *Rice*’s Fifteenth Amendment analysis and therefore did not consider as consequential the reasons ancestry was being used: in CNMI to identify people who were Indigenous and thus had claims to land that predated settlement by others, and in Guam to identify people affected by colonization on a specific date in order to operationalize international rights to self-determination for colonized peoples.

Litigants in the Guam case doubled down on this argument, urging the court to hold that all ancestry-based classifications are racial classifications.²⁹² The court of appeals addressed this argument at length in an important passage of its

288. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J.F. 141, 155 (2021).

289. Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant and Reversal, *Davis v. Guam*, 932 F.3d 8²² (9th Cir. 2019) (No. 17-15719), 2013 WL 3171316.

290. Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee and Urging Affirmance, *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019) (No. 17-15719), 2017 WL 5957470.

291. Brief of *Amici Curiae* Center for Equal Opportunity et al. Supporting Petitioner, *supra* note 205, at *2-4.

292. See *Davis v. Guam*, 932 F.3d 822, 834 (9th Cir. 2019) (“Our first inquiry is whether, as Davis maintains, *Rice* held *all* classifications based on ancestry to be impermissible proxies for race.”) The district court in *Davis v. Guam* rejected the argument that ancestry and race are always equivalent. 2017 WL 930825, at *4 (stating that the *Rice* Court found that “ancestry can be a proxy for race,” implying that it is not always a proxy for race). Yet, it determined that in the context of Guam’s election, in which the government used ancestry to identify voters, ancestry was operating as a racial proxy. *Id.* at *8. The court of appeals agreed. *Davis v. Guam*, 932 F.3d at 839.

opinion that rejected such a broad reading of *Rice*.²⁹³ Turning to the substance of the argument, the court acknowledged that “[j]ust as race is a difficult concept to define, so is ancestry’s precise relationship to race.”²⁹⁴ Although racial classifications often incorporate ancestry, the court reasoned that “ancestry and race are not identical legal concepts” and that “[s]tate and federal laws are replete with provisions that target individuals based on biological descent without reflecting racial classifications.”²⁹⁵ Further undermining the expansive characterization of the *Rice* rule, the court also noted that the Supreme Court has “rejected any categorical equivalence between ancestry and racial categorization.”²⁹⁶ Here, the court specifically cited the Supreme Court’s approval of American Indian classifications that rely in whole or in part on ancestry.²⁹⁷ Ultimately, the court held that “biological descent or ancestry is often a feature of a race classification, but an ancestral classification is not always a racial one.”²⁹⁸

It is important that this conceptual expansion of *Rice* failed to gain traction in the courts.²⁹⁹ However, the Pacific Island cases still represent doctrinal expansions of the *Rice* rule and their holdings diminished the legal protections available to Indigenous Pacific Islanders. The challengers succeeded in expanding *Rice* by using it to challenge classifications made by the U.S. government (in CNMI) or directly traceable to U.S. law (in Guam), as opposed to state voting rules, and rules that apply in territories outside the states. Because both cases involved voting, the courts treated *Rice*’s Fifteenth Amendment analysis as controlling. But the broader context of the cases implicates underlying issues beyond voting. While *Rice* was arguably related to Kānaka Maoli self-governance, it involved an

293. *Davis*, 932 F.3d at 834–35 (rejecting *Davis*’s argument that *Rice* stands for the rule that all ancestry-based classifications are racial and noting that “[n]owhere did the Court suggest that classification by ancestry alone was sufficient to render the challenged classification a racial one”).

294. *Id.* at 836.

295. *Id.*

296. *Id.* at 837.

297. *Id.* As Sarah Krakoff has explained, the “Indian” classification “assumes ancestral ties to peoples who preceded European (and then American) arrival.” Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 *STAN. L. REV.* 491, 501 (2017).

298. *Davis*, 932 F.3d at 837.

299. Had the U.S. Supreme Court granted certiorari in either case, the arguments may have had more traction. See, e.g., *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) (limiting application of the Indian Child Welfare Act to a child whom the majority opinion described as “1.2% (3/256) Cherokee”). But see *id.* at 690 (Sotomayor, J., dissenting) (criticizing the majority’s “analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry” and its “intimation that the statute may violate the Equal Protection Clause as applied here”).

election for state officers, and academics and activists have questioned whether the activities of the OHA can fairly be characterized as an exercise of self-governance.³⁰⁰ The Pacific Island cases directly implicated land rights, self-governance, and decolonization. The expansion of *Rice* to cover those cases without regard to the underlying issues was thus an important step toward invalidating a host of laws that somehow recognize the land or self-determination rights of Indigenous and colonized peoples.

D. Import: Civil-Rights Statutes

A subsequent housing case from Guam took the attacks on Indigenous Pacific Islander rights one step further. This suit challenged a law that protected Chamorro homelands through a system of reduced rate leases available only to Chamorro applicants.³⁰¹ The suit invoked statutory civil-rights law, not constitutional race law,³⁰² to challenge Indigenous rights, adding more legal tools for challenging Indigenous classifications using a race framework. The United States also took the lead in challenging Guam's housing law, a shift from the federal government's role in previous cases.³⁰³

Arnold Davis, the same plaintiff from the Guam plebiscite lawsuit described in the previous Section, applied for a lease from the Chamorro Land Trust, but he was rejected because he did not qualify under the law's definition of "Native Chamorro."³⁰⁴ After the district court ruled in favor of Davis in his separate challenge to the "native inhabitants" classification,³⁰⁵ the Justice Department sued the Chamorro Land Trust Commission (CLTC) alleging that, in limiting leases to those who qualified as Native Chamorros, the CLTC violated the Fair Housing Act's ban on racial discrimination in housing.³⁰⁶

Prior to this ruling, the Chamorro Land Trust Act had created the CLTC to manage land held in trust for the benefit of "Native Chamorros," which the 1975 Act defined to include "any person who the Commission determines to be of at

300. Kauanui, *The Politics of Blood*, *supra* note 240, at 121.

301. Complaint at 6-8, *United States v. Guam*, No. 17-00113 (D. Guam Sept. 29, 2017).

302. Complaint, *supra* note 301, at 10-11.

303. Press Release, U.S. Dep't Just., Justice Department Sues Guam's Government for Racial and National Origin Discrimination in Violation of the Fair Housing Act (Sep. 28, 2017), <https://www.justice.gov/opa/pr/justice-department-sues-guam-s-government-racial-and-national-origin-discrimination-violation> [<https://perma.cc/XFP9-JJ9Q>].

304. Steve Limtiaco, *Land Trust Concerns Brought to Feds Long Ago*, PAC. DAILY NEWS (Oct. 1, 2017), <https://www.guampdn.com/story/news/2017/10/01/land-trust-concerns-brought-feds-long-ago/720422001> [<https://perma.cc/U3CG-J6RL>].

305. *Davis v. Guam*, 2017 WL 930825, at *15 (D. Guam Mar. 8, 2017) (No. 11-00035).

306. Complaint, *supra* note 301, at 1.

least one-fourth part of the blood of any person who inhabited the island prior to 1898.”³⁰⁷ Such references to “blood quantum” have long been used by Indian tribes³⁰⁸ and the federal government to signify the strength of an individual’s connection to an Indigenous community.³⁰⁹ The Guam legislature later amended the definition to include “any person who became a U.S. citizen by virtue of the authority and enactment of the Organic Act of Guam or descendants of such person.”³¹⁰

The amendment is notable for at least three reasons. First, it reflects the trend in Federal Indian law away from the language of blood quantum in favor of the language of citizenship.³¹¹ Second, the amendment expands the class of qualifying people by eliminating the blood quantum floor and emphasizing historical connection without requiring a certain degree of Indigenous ancestry.³¹² And third, the statute now distinguishes between people living on the islands before U.S. acquisition and those who came after. Some of those people were Spanish citizens and were permitted to choose their citizenship status (U.S. or Spanish), while the political rights of “native inhabitants” remained subject to the future will of Congress.³¹³ Those Native inhabitants were granted U.S. citizenship in the 1950 Organic Act, so reliance on the 1950 citizenship date more accurately describes the class of colonized people in Guam.

In order to make its case that the CLTC violated the Fair Housing Act, the United States took a page from the *Rice* playbook. It argued that Chamorros in Guam are not recognized by Congress as an Indian tribe. It emphasized the Guam legislature’s use of the term “Chamorro” which, the United States contended, “is generally understood as a racial and ethnic term.”³¹⁴

307. Guam Pub. L. 12-226 (1975).

308. See, e.g., GOVER, *supra* note 101, at 83; Paul Spruhan, *The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 TRIBAL L.J. 1, 7-8 (2007); TallBear, *supra* note 154, at 88-89; Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. ANTHROPOLOGY 1, 4-6; Melissa L. Meyer, *American Indian Blood Quantum Requirements: Blood Is Thicker than Family*, in OVER THE EDGE: REMAPPING THE AMERICAN WEST 231, 241-44 (Valerie J. Matsumoto & Blake Allmendinger eds., 1999).

309. See, e.g., Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 1-2 (2006).

310. Guam Pub. L. 15-118 (1980) (codified at 21 GUAM CODE ANN. § 75101 (2021)).

311. Matthew L. M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 1, 295-96 (2011); Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, *supra* note 17, at 427-47 (describing and critiquing the trend toward exclusive reliance on tribal citizenship).

312. See generally GOVER, *supra* note 101, at 76-94 (contrasting tribal citizenship rules that rely on descent of any degree with rules that rely on blood quantum).

313. Treaty of Paris, *supra* note 276, at 1759.

314. Complaint, *supra* note 301, at 3.

By invoking the Fair Housing Act, the United States attempted to expand the *Rice* rule in three important ways. First, it lifted an argument developed in the context of the Fifteenth Amendment's absolute approach to race and voting, in which interests are not balanced, and deployed it in the context of property and housing, where the Fifteenth Amendment does not apply. As described in Section II.B, voting is a unique context and only challenges to voting classifications implicate the Fifteenth Amendment. The voting context thus permitted a conclusion in *Rice* that might have been more difficult in another context, and it was also the reason the courts in both *Davis* cases felt bound to apply the same rule. Lower courts had previously upheld Indigenous property protections in CNMI, so the choice to revive challenges to local property protections in Guam was significant.

Second, it borrowed the classification-and-intent gloss applied by the Court to Fourteenth and Fifteenth Amendment cases and used it to interpret civilrights statutes. This is important because the Fair Housing Act permits attention to the subordinating effects of a classification, not just its intent. As a result, it sometimes offers greater protections for subordinated racial groups than the Reconstruction Amendments do. Importing constitutional race jurisprudence into the statutory context thus threatens to narrow civil-rights law in a way that courts have declined to do.³¹⁵

And third, the United States took the lead in arguing that Indigenous rights in the territories were illegal. Whether and how the United States intervenes in litigation between Indian tribes and other parties has been an important factor in determining whether tribal interests win³¹⁶ – and the U.S. position in the territorial cases has shifted over the course of the lawsuits described in this Part. In *Rice*, the federal government argued that the law should be upheld.³¹⁷ In the

315. See Harris & West-Faulcon, *supra* note 151, 116-17 (arguing that the Court has extended constitutional affirmative action precedent into other areas of law and that the *Ricci* opinion “in effect, . . . imports the substance of strict scrutiny review into the doctrinal regime” of Title VII).

316. For discussions of amicus briefs in Indian law cases that emphasize the unique role of the federal government, see generally Matthew L.M. Fletcher, *The Utility of Amicus Briefs in the Supreme Court's Indian Cases*, 2 AM. INDIAN L.J. 38 (2013); and Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of Plains Commerce Bank v. Long Family Land and Cattle Co.*, 56 S.D. L. REV. 86 (2011). Fletcher has also described the United States' view as an important factor in the Court's decision whether to grant certiorari in Indian cases, Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 970 (2011), and found that the United States fares better before the Court when it takes a position against tribal interests than when it sides with tribal interests, see Matthew L.M. Fletcher, *The Tenth Justice Lost in Indian Country*, THE FEDERAL LAWYER, Mar.-Apr. 2011, at 36.

317. Brief for the United States as Amicus Curiae Supporting Respondent, *Rice v. Cayetano*, 1999 WL 569475 (No. 98-818).

CNMI case, the Justice Department was silent.³¹⁸ In the Guam plebiscite case, the United States intervened against Guam.³¹⁹ And in the Guam housing case, the Justice Department initiated its own civil-rights lawsuit challenging the Chamorro Land Trust Act. The Guam housing suit settled, but the decision to invest federal litigation resources in challenging a territorial housing law transformed the Justice Department from a defender of Indigenous rights laws into an active dismantler. This shifting federal role appears to be the result of a long-term strategy to harness Justice Department resources: the United States filed its lawsuit after the plaintiff involved in the Guam plebiscite case applied for a lease. That plaintiff was backed by multiple organizations hostile to minority rights, and those organizations had pressured the United States to intervene in previous cases.³²⁰

E. *Full Circle: Indian Law*

Though Indigenous Hawaiians and Pacific Islanders have been vulnerable at least since *Rice* to arguments that their rights and recognition are race-based and therefore unconstitutional, Indian tribes within the continental United States are protected by *Morton v. Mancari*, a 1978 case holding that Indian classifications serve the political purpose of furthering the federal government's treaty-based obligations to tribes and are thus not considered racial, even if they rely in part on ancestry.³²¹ *Mancari* has not stopped challenges to Indian ancestry classifications, though, and litigants have used *Rice* as an independent rule that ancestry-

318. See *supra* note 268.

319. Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellee and Urging Affirmance, *Davis v. Guam*, 2017 WL 5957470 (Nov. 28, 2017).

320. See *supra* note 268 (describing efforts to involve the Justice Department in the CNMI case). The Trump Justice Department was also criticized for being inconsistent in its willingness to strongly defend Indigenous interests in other areas. See *Trump Administration Abandons the Indian Health Care Improvement Act in Court Case*, INDIANZ.COM (Mar. 26, 2019) (criticizing the U.S. Department of Justice's decision not to defend the Affordable Care Act as leaving "Indian country without an advocate" and noting that the district court judge who struck down the ACA, which included reauthorization of the Indian Health Care Improvement Act, also struck down the ICWA); *Hard Work "in the Trash": Standing Rock Sioux Tribe Slams Trump on Dakota Access*, INDIANZ.COM (Sep. 4, 2018) (citing tribal criticism of the Trump Administration's "hasty" decision to expedite construction of the Dakota Access pipeline despite the previous Administration's identification of important treaty and cultural resource concerns).

321. 417 U.S. 535, 554 (1974).

based classifications are unconstitutional, and therefore only non-ancestry-based “Indian” classifications should be analyzed under *Mancari*.³²²

In 2017, a federal judge in Texas relied on *Rice* to strike down the ICWA.³²³ The ICWA is a landmark law that protects the relationship between Indian tribes and their children by affirming tribal jurisdiction over child welfare matters and ensuring that state courts notify tribes and follow specific procedures before adopting Indian children out to non-Indian families.³²⁴ It was enacted in response to a century of policies that removed Indian children from their families, first through federally sponsored boarding schools and later through state child-welfare systems, which routinely terminated the rights of Indian parents based on cultural misunderstandings and vague allegations about poverty and neglect.³²⁵ The case in Texas is one of several filed in federal courts in recent years with the aim of overturning the entire law.³²⁶

At the heart of the court’s holding that the statute violated the Fourteenth Amendment was its determination that “by deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA’s jurisdictional definition of ‘Indian children’ uses ancestry as a proxy for race.”³²⁷ This finding reflected a dramatic misunderstanding of the statute’s definition of Indian child, which requires that a child be a citizen of a tribe or be *both* the child of a tribal citizen and eligible for citizenship under the tribe’s rules.³²⁸ In other words, the statute articulates a narrow version of tribal affiliation based almost exclusively on political citizenship, not on ancestry.

The possibility that an Indian child could be the child of a tribal citizen but not a formal tribal citizen herself is real for two reasons. First, tribal citizenship

322. See *supra* note 34 (citing cases in which litigants relied on *Rice* to challenge “Indian” classifications).

323. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev’d sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *aff’d in relevant part sub nom. en banc* *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022).

324. Kathryn E. Fort, *Beyond Minimum Standards: Federal Requirements and State Interpretations of the Indian Child Welfare Act*, 45 COURT REV. 26, 27-29 (2009).

325. Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, MICH. STATE UNIV. (Apr. 10, 2009), <https://www.law.msu.edu/indigenous/papers/2009-04.pdf> [<https://perma.cc/F6RL-K77A>]; see generally MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD (2014) (documenting history of child welfare removal); *infra* note 365 (citing histories of boarding schools).

326. See Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. STATE L. REV. 727, 751-53 (describing and citing lawsuits challenging the ICWA between 2014 and 2017).

327. *Brackeen*, 338 F. Supp. at 533-34.

328. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(4) (2018).

generally requires affirmative filing of paperwork, so a child who has been placed outside the home could easily lack formal citizenship simply because no one has yet filed the correct paperwork.³²⁹ Second, the ICWA was intended to counteract government policies that severed the relationship between children and their tribes, and one effect of those policies was that some eligible children might not be enrolled because the connection has already been severed; the law aims to reconnect those children.³³⁰ The district court, however, simply looked at the reference to parentage, cited *Rice*, and held that the definition was unconstitutional.³³¹

A panel of the Fifth Circuit Court of Appeals reversed.³³² The case was reheard before the en banc court in January 2020, and the en banc court also upheld the law.³³³ Regarding the equal-protection challenge, the court held that the “ICWA’s Indian child designation classifies on the basis of a child’s connection to a political entity based on whatever criteria that political entity may prescribe.”³³⁴ Congress was not expanding the law beyond tribal citizenship or affiliation, it reasoned, but was instead acknowledging the realities of tribal enrollment, which typically requires an affirmative act of registration that a child would be incapable of undertaking alone.³³⁵ The Court of Appeals rejected the district court’s use of *Rice* to strike down the law, reasoning that the ICWA’s “Indian child” classification is easily distinguishable from the classification at issue in *Rice*.

The Court in *Rice* specifically noted that native Hawaiians did not enjoy the same status as members of federally recognized tribes, who are constituents of quasi-sovereign political communities. Instead, ancestry was the sole, directly controlling criteria for whether or not an individual could vote in the OHA election. But unlike the ancestral requirement in *Rice*, the ICWA’s eligibility standard simply recognizes that some Indian children have an imperfect or inchoate tribal membership. That

329. *Brackeen v. Haaland*, 994 F.3d 249, 340 (5th Cir. 2021) (en banc).

330. Indian Child Welfare Act, Pub. L. 95-608, §2(3)-(4), §3, 92 Stat. 3069 (1978), (codified at 25 U.S.C. § 1901-02).

331. *Brackeen v. Zinke*, 338 F. Supp. 3d at 514.

332. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *aff’d in relevant part sub nom. en banc Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022).

333. *Brackeen v. Haaland*, 994 F.3d at 249.

334. *Id.* at 338.

335. *Id.* at 340.

is, the standard embraces Indian children who possess a potential but not-yet-formalized affiliation with a current political entity – a federally recognized tribe.³³⁶

To the Court Appeals, *Rice* was “wholly inapplicable except insofar as it reaffirmed the holdings of *Mancari* and its progeny that laws that classify on the basis of Indian tribal membership are political classifications.”³³⁷

The district court’s conclusion that the ICWA’s “Indian child” classification was illegal did not survive appellate review, but its summary invocation of *Rice* as outlawing ancestry-based “Indian” classifications reveals the way the *Rice* rule has evolved. What began as a holding striking down a “Kānaka Maoli” classification because it did not involve citizenship in a federally recognized Indian tribe had grown into a rule that could be used to invalidate a classification that specifically turns on citizenship in a federally recognized Indian tribe. The district court repeated *Rice*’s language about ancestry operating as a proxy for race, but it engaged in no analysis of how ancestry was operating as a proxy for race in the ICWA, revealing the way the *Rice* rule has simply flattened ancestry into race.

It also opened a door to challenge federal “Indian” classifications using *Rice*. The Court of Appeals upheld the “Indian child” definition, but it was split on the constitutionality of the “Indian” classifications used elsewhere in the statute for foster care and adoption placement preferences, which do not turn on tribal citizenship. The Supreme Court will now consider those provisions and may also reconsider the “Indian child” classification. Until the district court’s reasoning is fully and squarely rejected by a reviewing court, *Rice* remains a threat to Indian rights.

The people whose rights were at stake in the cases described above are Indigenous, colonized, racialized, and ancestrally defined – four of the five categories set forth in Part I. With the exception of the people involved in *Brackeen*, however, they are not generally classified as “Indians.” Beginning with *Rice*, the courts have characterized these ancestry-based “Indigenous” classifications as proxies for race. A rule that was refined in Pacific Islander voting cases has now been invoked to challenge Indigenous property rights in the Pacific Islands and Indian tribal rights expressly protected by federal law. Over the course of the cases described in this Part, the courts have blurred or eradicated any distinction

336. *Id.* at 339 (citations omitted).

337. *Id.* at 340. The Fifth Circuit decision included a complicated collection of issues, with two judges receiving en banc majority support for individual sections of their respective opinions. While the “Indian child” classification was clearly upheld, *id.* at 267–68 (per curiam), the fate of the adoption preference provision is less clear, see Kate Fort, *Brackeen Decision Summary*, TURTLE TALK (Apr. 7, 2021), <https://turtletalk.blog/2021/04/07/brackeen-decision-summary> [<https://perma.cc/V7WS-8AAV>]. See *supra* note 9.

between ancestry and race. Strategic litigants have then used that blurring to urge courts to ignore all other legal frameworks that may apply, even in Indian cases. Race jurisprudence has undermined Indigenous rights in Hawaii and the Pacific Islands and has also become a significant threat to Indian tribal rights.

III. RECONSTRUCTION AMENDMENTS AS COLONIZING AGENTS

Whereas the foregoing Part offered details about the juridical moves used to link ancestry with race and delink it from indigeneity and colonization, this Part considers the implications of this strategy. For Indigenous peoples, the process described above has threatened their existence and rights. For Indians, it has tightened the “Indian” category so as to exclude more people and groups. For non-Indigenous minorities, all of whom have only the race-law framework available, the cases described above have reinscribed an apolitical, individualized understanding of rights that could work against them in many contexts.

Rice crystallized the divide between Indians and racial groups by holding that ancestry can be a proxy for race. Although *Mancari* permits some recognition of indigeneity based on ancestry, *Rice* also suggested that ancestry should be treated as race when invoked outside the context of Indianness.³³⁸ In the cases described in Sections II.C and II.D, litigants have asked lower federal courts to strike down non-Indian ancestry-based classifications in contexts that much more closely parallel the collective self-determination and property rights protected by Federal Indian law. While bound by the Supreme Court’s holding in *Mancari*, and sometimes rejecting the most far-reaching iterations of the arguments, such as the argument that ancestry is always equivalent to race, or the argument that Congress lacks power to recognize Indigenous Hawaiians,³³⁹ these lower courts have declined to meaningfully limit or distinguish *Rice*, at least in the Pacific Island context. The rule that ancestry may be a proxy for race has been incrementally expanded into a rule that ancestry is nearly always a proxy for race when used to designate non-Indian Indigenous or colonized peoples.

338. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 997-98. *Contra* Kymlicka, *supra* note 82, at 187 (noting that “the dramatic enhancement of the rights of indigenous peoples over the past 15 years has coincided with a period of stagnation, even retrenchment, in the international status of minorities, and with growing international hostility to many minority rights claims” and arguing that “[t]he success of the international indigenous movement to date has depended precisely on the assumption that progress for indigenous peoples need not, and will not, open the door to greater recognition or protection of other minorities”).

339. See *supra* notes 20, 239, 292-298 (describing cases in which courts have avoided or rejected these arguments).

When courts employ a colorblind understanding of the Reconstruction Amendments to undermine Indigenous rights, the most direct response is to clarify the misunderstanding by distinguishing Indian law from race law: under federal-Indian-law principles, Indigenous rights are political rights, and Indigenous status is a political status.³⁴⁰ This approach makes sense because until the Court is willing to fully grapple with its cramped interpretation of racial equality, distance from the doctrine will best protect Indigenous rights.³⁴¹ The doctrinal space available to uphold classifications based on indigeneity or colonization is shrinking, though. When it comes to voting classifications, that space has arguably disappeared. In place of an expansive understanding of colonization and racialization, American law now has two boxes: Indianness and race. Neither of these categories is defined in a way that reflects the historical reality of land transfer, enslavement, and disenfranchisement. Instead, the resulting doctrine allows these injuries to continue, turning law into a tool of colonization.

A. *Erasure and Colonization*

One of the core injuries wrought by *Rice* and its progeny is the suggestion that, for purposes of U.S. law, being “Indigenous” has no legal significance. If taken to its logical extension, the rule that ancestry-based classifications amount to illegal race discrimination threatens to juridically erase Indigenous peoples who do not fit into the narrow legal category of Indian.

U.S. law has one available framework for recognizing Indigenous self-determination and property rights: Federal Indian law. The protection offered by this box is already thin in many ways. Indian tribes are not recognized by the Court as having full “external” self-determination rights (e.g., treaty-making, full property rights, full jurisdiction over outsiders).³⁴² According to the Court, their

340. The district court opinion in *Brackeen*, for example, obviously misunderstands existing law by substituting a brief citation to *Rice* for an entire body of law on political “Indian” classifications. See *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 531-32 (N.D. Tex. 2018).

341. Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1132 (2012) (“If courts move in the direction of scrutinizing tribes’ distinctive status in today’s color-blind climate, they are more likely to entrench historical discrimination against indigenous peoples than to reverse it.”).

342. Steele, *supra* note 71, at 309.

sovereignty³⁴³ and land rights³⁴⁴ are “subject to complete defeasance” by Congress.³⁴⁵ Federal Indian law is a settler-colonial creation in the sense that it recognizes Indigenous rights only to the extent that they do not unsettle American nationhood or property rights.³⁴⁶

Despite its shortcomings, though, Federal Indian law recognizes Indigenous peoples’ continued existence via a model of contemporary nationhood. It protects important collective powers, such as the power to govern and adjudicate according to non-Western cultural norms;³⁴⁷ the power to control, protect, discipline, and educate children;³⁴⁸ the power to tax;³⁴⁹ the power to punish;³⁵⁰ and the power to exclude people from and regulate the use of land.³⁵¹ The category of “Indianness,” which includes many people who are also racial minorities, allows Congress to pass laws to recognize these rights, or otherwise to benefit Indigenous peoples, despite constitutional limitations on the power of Congress to legislate with regard to racial groups.

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343. Courts have also claimed the power to divest tribes of aspects of sovereignty via the theory of implicit divestiture. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-08 (1978) (limiting tribal jurisdiction over non-Indians in criminal proceedings); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (limiting tribal jurisdiction over highway accidents involving nonmembers); *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 328-29 (2008) (limiting tribal sovereignty over land owned by nonmembers); see also Steele, *supra* note 71, at 673 (discussing the untenability of the Court’s “theory that tribes may have lost powers by implication”).
344. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 603 (1823); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 289 (1955); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).
345. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).
346. See, e.g., *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (holding that laches may bar “disruptive” Indian land claims); see also Kauanui, *Precarious Positions*, *supra* note 240, at 14 (“Hawaiians can look to cases from Indian Country and Native Alaska to shed light on the problems and pitfalls of federal recognition.”).
347. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 800 (2007).
348. Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 67 (2016).
349. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).
350. See *Wheeler*, 435 U.S. at 322; *Talton v. Mayes*, 163 U.S. 376, 380 (1896); see also Rolnick, *Tribal Criminal Jurisdiction*, *supra* note 17, at 338-39 (arguing that while Indian tribes retain some ability to punish, their criminal jurisdiction is more limited than that of other sovereigns).
351. See *Merrion*, 455 U.S. at 139-40; cf. *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 444, 447 (1989) (Stevens, J., concurring) (holding that the Yakima Nation could regulate land use by non-Indians in the closed portion of the reservation, but not in the area open to settlement).

In *Rice*, the Court confronted the question of legal protections for Indigenous peoples whose status was somehow outside this box. The Court could have recognized parallel rights to self-determination, powers of self-governance, and protections against land loss, effectively recognizing a legal category of “indigeneity” outside Indianness.³⁵² Even if the Court did not recognize “indigeneity” as a legal category, it could have acknowledged that Hawaii was using ancestry as a proxy for indigeneity, not race, and therefore not subjected the classification to the scrutiny reserved for classifications based expressly on race or unexplainable on any grounds other than race. Instead, the Court treated ancestry as race, leaving race as the only legal category available to Indigenous Hawaiians.

This categorical choice has far-reaching consequences. Racial groups are treated differently than Indians under U.S. law. They have no self-determination rights. The government can only very rarely pass laws to benefit them. And they cannot be singled out as a group.³⁵³ By refusing to engage with the law’s purpose of protecting the political power of Indigenous Hawaiians over the administration of trusts to benefit them (in light of the Fifteenth Amendment analysis), the *Rice* Court also suggested that protection of Indigenous rights was not a legally meaningful purpose outside the context of Indian law. Without the protection of Indianness, the Court determined that any attempt to identify Indigenous Hawaiians “as a distinct people, commanding their own recognition and respect” was “a racial purpose.”³⁵⁴

For people whose experience does not require them to think about decolonization rights, indigeneity, or tribal affiliation, Justice Kennedy’s maxim that ancestry is a proxy for race seems to prove itself because ancestry is likely to be significant only when used as a proxy for race. But the *Rice* decision disregarded a clearly outlined reason that ancestry was significant in the Hawaiian context: ancestry was used as a proxy for historical continuity. Because indigeneity and colonized status take their meaning from a historical moment of colonization,³⁵⁵ it is necessary to connect present-day peoples to their historical predecessors by tracing back through time. For groups defined by kinship structures, as most

352. The rights and power attached to this category would not necessarily have been the same as those attached to the Indian category. For example, if American law recognized the international legal category of indigeneity, it would not be required to recognize the territorial sovereignty of the groups in that category.

353. See *supra* note 156 and accompanying text (discussing how modern race jurisprudence rejects group rights); *infra* note 373, 377-380 and accompanying text (discussing the rejection of group rights and the vulnerability of laws protecting minority rights).

354. *Rice v. Cayetano*, 528 U.S. 495, 496 (2000).

355. See *supra* note 81 and accompanying text (indigeneity); *supra* note 51 and accompanying text (colonized status).

Indigenous peoples are,³⁵⁶ tracing backward through ancestry makes sense.³⁵⁷ The rule of *Rice* makes it difficult to carve out a class of Indigenous or colonized peoples because it eliminates the easiest tool for tracing a class of people who suffered a past harm through time to a present class of people who can exercise the remedy for that harm. If taken to their logical conclusion, the line of cases described in Part II would make such tracing illegal.

On their face, these decisions strip Indigenous peoples in the territories, including Chamorros, Carolinians, and Samoans, of their group political rights in the sense that important questions cannot be decided by Indigenous peoples as a group at the ballot box. Of course, group political power may still be possible via the election of representatives from Indigenous communities. It may also be possible through numerical power in voting. But the Guam example shows how the United States can easily overcome the will of colonized peoples by simply locating and enfranchising new territorial residents.³⁵⁸

In the Guam plebiscite case,³⁵⁹ the Court's disallowance of ancestry-based classifications has already had a direct effect on a colonized peoples' ability to pursue the remedy of decolonization. Peoples have a right to political self-determination, and as a non-self-governing territory, Guam residents are on the U.N. list of peoples who have been unable to access this basic right.³⁶⁰ With the plebiscite, Guam sought to conduct a nonbinding poll of colonized residents to determine their desires with regard to pursuing decolonization remedies. By invalidating that election, the federal courts have done more than assure noncolonized residents a voice in the process; they have made it nearly impossible for Guam to distinguish between the votes of colonized and noncolonized residents, effectively depriving colonized peoples of any collective voice.

The CNMI and Guam lawsuits have also indirectly facilitated the potential loss of Indigenous peoples' land rights. In CNMI, the *Davis* decision permitted all residents of the islands to vote on whether to repeal Article XII of the NMI Constitution, which protected Indigenous property rights. Indeed, the lease restriction was adopted for the express purpose of "protect[ing] [the people] against exploitation and . . . promot[ing] their economic advancement and self-sufficiency' and . . . preserv[ing] the islanders' culture and traditions, which are

356. Goldberg, *supra* note 191.

357. Rolnick, *Tribal Criminal Jurisdiction*, *supra* note 17, at 389-427 (describing how citizenship obligations are inherited via families, clans, and moieties).

358. See *supra* note 280 (describing the problem of settler majorities outvoting colonized minorities); see also Aguon, *supra* note 81, at 54 n.40 (describing New Caledonia).

359. *Davis v. Guam*, 2017 WL 930825 (D. Guam 2017), *aff'd*, 932 F.3d 822 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2739 (2020).

360. Aguon, *supra* note 81, at 52-53; *Non-Self-Governing Territories*, *supra* note 115.

uniquely tied to the land.”³⁶¹ Chamorros and Carolinians, who make up the legal category of people protected by Article XII, are less than forty percent of the CNMI population. Thus, assuming that all settler residents vote in favor of preserving their interests in acquiring property, it will be easy to remove the land restriction. Removing the voting restriction will “allow anyone, even non-NMDs who have gained residency after a short period of time, to vote on the fate of NMD land ownership – potentially leaving NMDs without a homeland.”³⁶² Similarly, the federal government’s civil-rights challenge to Guam’s lease program threatened to eliminate Guam’s limited remedy for Chamorro land loss and the only real bulwark against further loss.

Land transfer is the intended outcome in settler societies, and the physical and metaphorical disappearance of the colonized is the primary tool of colonization.³⁶³ Early American law facilitated Indigenous peoples’ anthropological disappearance by defining Indianness in a way that depended on blood quantum, ensuring that Indians would no longer exist after a few generations of intermarriage.³⁶⁴ Later, federal law facilitated cultural disappearance by educating Indian children in schools designed to make them White.³⁶⁵ If Indian children could be remade as White adults, Indians would no longer exist after their parents’ generation died off. If colonized and Indigenous status could not be traced back though time, the only people entitled to remedies for colonization would be the generation that lived through a defining event (e.g., the people in Guam who

361. *Wabol v. Villacrusis*, 958 F.2d 1450, 1452 (9th Cir. 1990) (quoting 48 U.S.C. § 1801 (2018)).

362. Torres, *supra* note 254, at 185. In previously upholding the land restriction against an equal-protection challenge, the Ninth Circuit disavowed this use of law as colonizing agent: “The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.” *Wabol*, 958 F.2d at 1462.

363. See Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 387–90 (2006); PHILIP JOSEPH DELORIA, *PLAYING INDIAN* 1–9 (1998); VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 9–14 (1969).

364. Maillard, *supra* note 142, at 357; Wolfe, *supra* note 363, at 401 (describing similar laws in Australia).

365. See generally ANDREW WOOLFORD, *THIS BENEVOLENT EXPERIMENT: INDIGENOUS BOARDING SCHOOLS, GENOCIDE, AND REDRESS IN CANADA AND THE UNITED STATES* (2016) (comparative examination of U.S. and Canadian boarding schools that situates them as the primary means by which governments carried out assimilation policies); MARGARET CONNELL SZASZ, *EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928* (1999) (discussing educational programs as a vehicle for assimilation of Indians); K. TSINANINA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* (1994) (relating Indian experience of assimilation through boarding school program); CHRISTINE BOLT, *AMERICAN INDIAN POLICY AND AMERICAN REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS* 95–97 (1987) (discussing government policies and programs to assimilate Indians).

were made citizens in 1950). Within one generation, there would be no one left in the “Indigenous” or “colonized” legal categories. Outside the “Indian” category, Indigenous and colonized peoples would legally disappear, and the colonial project would be complete.

B. Individuality, Immutability, and Racial Domination

Indigenous Pacific Islanders stand to lose the most from the rule that ancestry equals race, but the post-*Rice* territorial cases show that Indigenous Pacific Islanders have been a pawn in a long game to exorcise all recognition of collective identity and history from American constitutional jurisprudence on race. This game has many more losers, most of whom would not be saved by a rule carving out ancestry-based classifications tied to indigeneity. This is because, while first-in-time land-rights claims are unique to Indigenous peoples, collective identity and harms stretching from history to the present day are not.³⁶⁶ For example, Black people continue to be harmed by the law’s refusal to consider collective identity and account for the present-day impacts of historical harms. Just as *Rice* narrowed legal recognition of indigeneity to exclude Indigenous peoples in the territories, it also narrowed the legal concept of racial harm and remedy to more fully exclude historical continuity and group identity.

The United States exacted a range of harms on various groups of people, all in the name of expanding a physical and financial empire. Modern American law, however, has successfully bifurcated its acknowledgement of these harms: Black people lost control over their labor and capital and were excluded from the American polity, while Indians lost land and were forcibly assimilated. Civil-rights law thus prioritizes inclusion and citizenship and protects private property and employment rights, while Federal Indian law protects collective land rights, self-government, and a right to difference.

The Fourteenth and Fifteenth Amendments were unquestionably enacted to protect Black people from subordination via exclusion. In recognition of the various ways subordination has operated and the various groups affected, they have been interpreted to include other subordinated groups. But racial subordination in this country has always worked in one direction (White over non-White), so the Court’s suggestion that it is impossible to know who the next subordinated group will be is detached from historical reality. Meanwhile, Indigenous peoples have experienced subordination in this country through forced inclusion, and

366. Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 1-4 (2007); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 436-38 (1998); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 697-701 (2004).

the only way to prevent this subordination is to keep the non-Indigenous majority from completely silencing and erasing the Indigenous minority by preserving space for Indigenous territorial and governmental self-determination.³⁶⁷

Efforts to resist both forms of subordination, however, have been stymied by the legal compartmentalization of Indianness and race. The law effectively divides identities and realities into mutually exclusive categories and protects only a narrowly defined set of rights for each category. With regard to both the boundaries of the categories and the scope of rights protected for each, *Rice* has been an important tool, standing for the idea that group political identity among racialized peoples is a threat to democracy. By bifurcating the legal protections for subordinated groups, and narrowing the protection offered by each category, courts have also created doctrinal tools that can be used against each other to further narrow the protections available to everyone. The territorial cases demonstrate that the political right understands that the continued exclusion of minority voters is connected to the continued denial of collective self-determination to Chamorros: the same organizations pushing to allow everyone to vote on self-determination in Guam are responsible for restrictive voting laws in general elections.³⁶⁸

Race law's failure to recognize group-based claims was not a foregone conclusion. When Owen M. Fiss wrote *Groups and the Equal Protection Clause*, there was room to understand the Reconstruction Amendments as requiring group-based remedies for collective harms.³⁶⁹ At that time, four Supreme Court Justices understood the Fourteenth Amendment to authorize college admissions programs that benefit underrepresented minority students because of their connection to a group that had suffered the historical harm of educational exclusion.³⁷⁰ The Court agreed that the Fifteenth Amendment authorized Congress to protect

367. See Brief Amicus Curiae of Anne Perez Hattori in Support of Defendants-Appellees and Affirmance, *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2017) (No. 13-15199), at *2 (“[I]f the flood of recent migrants to Guam is allowed to vote in the plebiscite, this colonized polity will yet again be denied even this symbolic expression of self-determination by dint of simple vote dilution. Attempting to disguise such an injustice beneath the cloak of civil rights is as shameful as it is transparent.”).

368. See *supra* note 270 (discussing J. Christian Adams and Hans von Spakovsky); see also Serrano, *supra* note 170, at 501-02 (noting that anti-affirmative-action and conservative election attorneys represented a White U.S. citizen and Guam resident in his “attempt to vote in a political-status plebiscite reserved for ‘native inhabitants of Guam’”).

369. Fiss, *supra* note 31, at 107; see also Owen Fiss, *Another Equality*, 2004 ISSUES LEGAL SCHOLARSHIP 1, 19-20 (linking individual and group interests); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9-14 (2003) (arguing that antisubordination was not rejected but survived as a value that guides courts in applying an anticlassification approach).

370. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring).

minority political power as well as access to the polls.³⁷¹ And in the context of college admissions, it agreed to draw a direct line between the specific racial harms enacted by states in the past to specific remedies today.³⁷²

The Court's anticlassification theory, cemented in the decades since Fiss advanced his theory, does not conceive of group harm. It locates the harm of racism in the individual dignitary injury of classification, rather than the resulting material inequality that has resulted from classifications.³⁷³ Laws that invoke race are subjected to strict scrutiny not because of the material damage they have visited upon actual groups of people, but because of the dignitary and value-based injury they could pose to hypothetical individuals. This kind of injury hurts everyone equally, no matter how they are situated with regard to power.

Such an approach only makes sense if race is defined as a static biological fact disconnected from history and hierarchy. The *Rice* Court's equation of race with ancestry has helped shape an ongoing definition of race as an individual descriptor based on immutable physical or biological characteristics. Under such a definition, it injures both individual dignity and national values to make any election decision based on a biological descriptor.³⁷⁴ It follows that collective identity could not be based on such an irrelevant fact.³⁷⁵

The assertion that ancestry is equivalent to race also reflects a common desire among members of the public to operate in a perceived colorblind fashion by rejecting all racial classifications in social settings. At the same time, many people still cling to an understanding of race as scientific truth at the level of DNA or ancestry. In court, it is possible to reconcile these positions by defining race in terms of ancestry but asserting that it cannot have significance outside of scientific and medical data. This framing echoes beyond Indigenous rights and even beyond constitutional jurisprudence on benign racial classifications. From it flows some courts' colorblind insistence that official uses of certain immutable, irrelevant characteristics (skin color, ancestry, hair texture) amount to discrimination when used in law, but classifying by mutable, performative, or cultural

371. *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986).

372. *Bakke*, 438 U.S. at 307-08.

373. Siegel, *Equality Talk*, *supra* note 29, at 1531; Barnes & Chemerinsky, *supra* note 29, at 1086-87.

374. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("[I]t demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

375. See *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)). In the canon of cases that establish the rules of colorblind constitutionalism, *Rice's* notoriety is dwarfed by its more famous Fourteenth Amendment cousins *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Bakke*, 438 U.S. 265; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and *Shaw v. Reno*, 509 U.S. 630 (1993). Its logic, however, is just as central to the colorblind project.

characteristics (hairstyle) does not.³⁷⁶ Although all these factors were important to disavowed legal definitions of race, only a subset is associated with race today.

The colorblind approach, which treats race as a biological, but politically insignificant, descriptor, places White people's dignitary interest in not being classified above minority groups' interest in exercising political power within a system that has long subordinated them. Indeed, the Court cited *Rice* in *Parents Involved in Community Schools v. Seattle School District No. 1* for the rule that ancestry-based classifications are generally forbidden because they "demean[] the dignity and worth of a person,"³⁷⁷ and Justice Alito cited it in his dissent in *Fisher v. University of Texas* for the same proposition.³⁷⁸ In the context of redistricting, the colorblind approach ignores the issue being voted on, the backdrop of relative political power in that jurisdiction, and the history of similar power imbalances.³⁷⁹ Consistent with the individual focus on facial classification over subordinating effects, constitutional race law has evolved to protect individual political rights at the expense of group rights.³⁸⁰

That the Reconstruction Amendments, which were designed to remedy the exclusion of Black Americans, have become a tool to allow the silencing of Indigenous rights via majority participation defies logic. But it is completely consistent with the way the Amendments have been deployed as tools to silence Black people and other minority groups in the context of voting. It is not simply that the Amendments, after the Court's adoption of its intent doctrine, provide anemic protection against vote dilution. In cases like *Shaw* and *Miller*, they have also been used proactively to dilute or muffle minority political power by insisting on an individualized definition of race that is divorced from politics and history.³⁸¹

376. See D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1370-76 (2008); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 376-81; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1202-12 (2004).

377. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (quoting *Rice*, 528 U.S. at 517).

378. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2221 (2016) (Alito, J., dissenting).

379. See *Shaw*, 509 U.S. at 657 (insisting that even racial classifications intended to remediate past racism "may balkanize us into competing racial factions"); *Miller v. Johnson*, 515 U.S. 900, 927 (1995) ("[E]radicating invidious discrimination from the electoral process . . . is neither assured nor well served . . . by carving electorates into racial blocs.").

380. See, e.g., *Shaw*, 509 U.S. at 657; *Miller*, 515 U.S. at 927.

381. *Miller*, 515 U.S. at 911-12; *Shaw*, 509 U.S. at 647 ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another

IV. DOCTRINAL INTERVENTIONS

If U.S. courts' interpretation of the Reconstruction Amendments and Federal Indian law leaves Indigenous Pacific Islanders vulnerable to loss of rights and recognition, what is the solution? Their vulnerability is a symptom of two problems. First, legal doctrines meant to address various forms of subordination are detached from material reality. Second, interest groups have successfully used the detached doctrinal strands to narrow protections in each area and further a long-term project of subordination. Yet, each of the categories described in Part I has come to be defined so restrictively that this subordinating project looks like justice. Well-meaning judges can easily misunderstand an attack on Indigenous peoplehood as an effort to protect the dignity of all citizens. Without an understanding of how the legal rules have evolved, the context for that evolution, and other possible interpretations, a casual observer would almost certainly be confused about what justice means and how to pursue it.

An initial question, then, is whether the doctrine can be changed and how radical a change is possible. This Part considers several options for reinterpreting current doctrine to protect Indigenous Pacific Islanders, who have been pushed outside the margins of protection in all areas of law. Centering them requires revisiting the categories described in Part I and the rules that courts apply to each one. This Part sets forth five strategies for doing so, addressed in order of how radical a shift they require compared to the Court's current approaches. It considers the benefits and disadvantages of each approach, including which groups will be helped or harmed and how, the feasibility of using each strategy in court, and a consideration of each strategy's significance beyond individual cases.

First, litigants could opt not to challenge the Court's doctrinal frameworks at all, but to accept them and work to highlight in individual cases why Indigenous rights merit protection. Second, litigants could rely on the domestic law of the territories to carve out a new doctrinal approach for protecting Indigenous peoples in the territories. Third, litigants could seek to achieve the same goal by importing international-law protections into domestic law. By relying on areas of law beyond Indian law and race law, the second and third approaches may offer specific and tailored ways to protect non-Indian Indigenous rights without

but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.”).

challenging the Court's approach to Federal Indian law or race law. Fourth, litigants could attempt to expand and reshape Federal Indian law by arguing that some or all of its protections apply based on Indigenous status, a political identity, either instead of or in addition to Indian status. This approach would also entail disentangling ancestry from race, at least when it is used as a proxy for indigeneity. And fifth, rather than insisting that "Indigenous" classifications are nonracial, litigants could challenge the Court's restrictive understanding of race and remedies, trying in the process to reshape civil-rights law.

Each of these approaches has potential benefits and harms, further explored below. In many instances, adopting a particular approach might benefit the primary litigant group in the short term, but harm that group or a broader group in the long term. Ultimately, this Article recommends a combination of strategies in which individual litigants remain free to adopt whatever approach seems most likely to benefit them in the short term while trying to minimize the harm they visit on other groups or on the long-term development of law. Because non-Indian Indigenous peoples are often overlooked, academics and policy makers should take special care to consider how various doctrinal frameworks may impact them. The experience of Indigenous Pacific Islanders demonstrates why it is essential to strategize collectively in this manner.

Advocates should work across doctrinal divisions to identify common harms and interests among groups. In the same way that opponents of affirmative action and Black voting rights have calculated that weakened protections for Indigenous peoples will lead to weaker protections for others, those invested in resisting subordination must recognize that protecting Indigenous Pacific Islander rights will change legal doctrine in a way that may benefit other groups as well. This method for achieving justice is an important feature of critical race

theory,³⁸² Black feminist theory,³⁸³ and deconstructionist philosophy.³⁸⁴ Applied here, the task of protecting Indigenous Pacific Islander rights invites a reimagination of categories and rules so that law might become more just. The long-term goal, then, is to reshape Federal Indian law, the law of the territories, and race law in a way that minimizes the harm to all Indigenous peoples and to other people of color.

A. *Accept and Distinguish*

In individual cases, the easiest approach – and, in the lower courts, often the only one available – is to accept the legal framework given and distinguish. This strategy can be powerful. Indeed, advocates have successfully used this strategy to defend against equal-protection-based attacks on Indian tribal rights. *Brackeen* is the most recent example. ICWA’s defenders successfully argued that the district court’s invocation of *Rice* was sloppy and failed to recognize that ICWA’s “Indian child” designation looks more like *Mancari*’s citizenship rule and less like *Rice*’s ancestry rule.³⁸⁵ As the court of appeals recognized, this provision is relatively easy to defend as a citizenship rule.³⁸⁶ To the extent that it invokes ancestry, it only looks back a single generation, and it arguably does so only because

382. *E.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.–C.L. L. REV. 323, 325 (1987) (“When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge.”); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 167 (“[P]lacing those who currently are marginalized in the center is the most effective way to resist efforts to compartmentalize experiences and undermine potential collective action.”).

383. *E.g.*, BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 16 (2d ed. 2000) (“It is essential for continued feminist struggle that black women recognize the special vantage point our marginality gives us and make use of this perspective to criticize the dominant racist, classist, sexist hegemony as well as to envision and create a counter-hegemony.”); *see also* Crenshaw, *supra* note 382, at 153–54 (describing how Black feminists used their own experiences to reveal the limitations of identity categories in political movements and applying those insights to law).

384. *See generally* JACQUES DERRIDA, *WRITING AND DIFFERENCE* 278–93 (Alan Bass trans., 1978) (1967) (critiquing the notion of a center); Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 789 (1984) (emphasizing the importance of the “the other” in analyses of power).

385. Federal Appellants’ En Banc Brief at 24–32, *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (18–11479), 2019 WL 6699234.

386. *Brackeen*, 994 F.3d 249.

tribal citizenship is typically not automatic.³⁸⁷ Congress recognized that requiring children to be enrolled before the law applied to them would likely defeat the law's purpose with regard to very young children living away from their tribal communities.³⁸⁸

Even if there is room to defend protections for non-Indian Indigenous peoples with this approach, distinguishing has been less effective in the Pacific Islander cases. In the CNMI case, the NMI government distinguished the "Northern Marianas descent" classification from the "Hawaiian" classification by pointing out that it was created by the agreement that solidified CNMI's status as a Commonwealth.³⁸⁹ As a federally created classification related to a quasi-sovereign entity, the government argued, it is distinguishable from the state-created category at issue in *Rice*, making the *Mancari* framework more appropriate. In the Guam plebiscite case, international recognition of decolonization rights provides a basis for identifying a group of people based on the date of colonization that was not present at all in *Guinn* and did not carry the same significance in *Rice*.³⁹⁰ Guam's unique status under international law also helped distinguish the case from *CNMI*. As a non-self-governing territory, Guam's right to political self-determination is recognized by international law.³⁹¹ The vote in Guam directly implicated this right, which was not at issue in the *CNMI* case.³⁹² In each case, however, the court interpreted the rule of *Rice* to cover these potentially distinguishable scenarios.

This outcome may be partially attributable to the lack of broad-based support for the defendants in the territorial cases. When faced with a campaign to

387. *See id.* at 340.

388. *Id.*

389. *See* Petition for Writ of Certiorari at 16-17, *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087 (2016) (No. 16-1437) (distinguishing the situation of Hawaiians from that of CNMI residents); *id.* at 14-15 (explaining why *Mancari* should be extended to cover the case of CNMI).

390. Opening Brief of Defendants-Appellants at 23, *Davis v. Guam Election Comm'n*, 932 F.3d 822 (2019) (No. 17-15719), 2017 WL 4157072 (arguing that the historical date used to establish ancestry in *Davis* has political significance because it refers to the "inalienable right to self-determination" enshrined in Guam's Organic Act).

391. *Id.* at 22.

392. CNMI had arguably already exercised its right to self-determination when it negotiated with the United States for commonwealth status. *See* Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 *ASIAN PAC. L. & POL'Y J.* 181, 187-90 (2003).

expand the *Rice* rule to encompass the Court's broadest and most damaging suggestions,³⁹³ successfully distinguishing new cases in court requires a coordinated effort. For example, when the en banc Fifth Circuit considered *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,³⁹⁴ and every brief that addressed the constitutional dimension argued that *Mancari*, not *Rice*, was the applicable precedent.³⁹⁵ In contrast, the territorial cases went almost unnoticed. A total of four amicus briefs were filed in either case, and certainly none by Indian law advocates.³⁹⁶ Neither Guam nor CNMI had the coalition of allies necessary to convince the court that the voting classifications should be saved.

Distinguishing the constitutional status of Indian tribes from that of other groups is historically and doctrinally accurate.³⁹⁷ It has allowed courts to incorporate a fuller understanding of the unique harms suffered by Indigenous peoples and recognize both tribes' continuing sovereignty and the United States's commitment to upholding it as expressed in treaties, promises, and negotiations. For those who fit easily into the "Indian" category, this is arguably the best strategy for preserving rights. However, *Rice* and subsequent tribal-jurisdiction cases have narrowed the "Indian" category to the extent that anything short of con-

393. See *supra* notes 268-271, 285-291, 303-304, 320 and accompanying text (describing the briefs, strategy, and individuals and organizations involved in the Guam and CNMI lawsuits); see also Serrano, *supra* note 170, at 502 & n.4 (describing "anti-affirmative action and conservative election attorneys" involved in the Guam plebiscite case).

394. *Brackeen v. Haaland (5th Circuit and Lower Courts)*, NATIVE AM. RTS. FUND (2021), https://sct.narf.org/caseindexes/brackeen_v_bernhardt_lower_courts.html [https://perma.cc/37HG-7C6X].

395. See, e.g., Brief of Amicus Curiae 486 Federally Recognized Tribes, Association on American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association, and Other Indian Organizations in Support of Appellants and Reversal at 18-22, *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479), 2019 WL 7376824; En Banc Brief of Members of Congress as Amici Curiae in Support of Defendants-Appellants and Reversal at 13, *Brackeen*, 994 F.3d 249 (No. 18-11479), 2019 WL 7046960; Brief of Indian Law Scholars as Amici Curiae in Support of Defendants-Appellants at 22, *Brackeen*, 994 F.3d 249 (No. 18-11479), 2019 WL 7046961.

396. See *supra* Sections II.C-II.D (describing the briefs filed in each case).

397. See Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1039-49 (2015) (identifying various sources of federal power over Indian affairs that predate the Reconstruction Amendments); Carole Goldberg, *supra* note 108, at 955-73 (articulating three approaches for upholding "Indian" classifications).

sent-based citizenship in a federally acknowledged tribe may be outside its protections.³⁹⁸ More to the point, it is unclear whether a strategy that focuses on distinguishing Indian tribes and Federal Indian law could possibly encompass Indigenous Pacific Islanders after the cases discussed in Part II. This strategy does not help anyone (Indigenous or otherwise) left outside the “Indian” category. It could also harm them because positioning Indianness against race reinforces the Court’s colorblind race jurisprudence, described in Section III.B, helping to excise any protection of collective identity and rights from race law.

B. Repurpose the Insular Cases

The Ninth Circuit has, in the past, upheld a law that treated Indigenous residents of the territories differently from non-Indigenous residents. In *Wabol v. Villacrusis*,³⁹⁹ the Court considered a challenge to Article XII of the NMI Constitution. Article XII implements Section 805 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, which requires CNMI to limit “long-term interests” in land to persons of Northern Marianas descent.⁴⁰⁰ Article XII provides that “acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.”⁴⁰¹ The Constitution initially defined long-term interests as any lease over forty years, including renewal rights, but it was amended in 1985 to cover leases longer than fifty-five years and to allow people not of Northern Marianas descent to acquire long-term interests in condominiums above the first floor.⁴⁰² The *Wabol* case arose out of an effort to void a thirty-year renewable lease held by Philippine Goods, Inc., a corporation that did not fit within the Constitution’s definition of corporations of Northern Marianas descent.⁴⁰³ The challengers argued that the

398. See Rolnick, *The Promise of Mancari*, *supra* note 17, at 1015-25 (describing how tribal jurisdiction cases have further narrowed Indianness to reflect only a consent-based model of citizenship).

399. 958 F.2d 1450 (9th Cir. 1990), *cert. denied sub nom.* Philippine Goods, Inc. v. Wabol, 113 S. Ct. 675 (1992).

400. Torres, *supra* note 254, at 162-63, 176; Act of Mar. 24, 1976, Pub. L. No. 94-241, § 805, 90 Stat. 263, 275 (codified at 48 U.S.C. § 1801 (2018)).

401. N. MAR. I. CONST. art. XII, § 1.

402. N. MAR. I. CONST. art. XII, § 3 (amended 1985).

403. The Constitution defines persons of Northern Marianas descent as “a person who is a citizen or national of the United States and who has at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof.” N. MAR. I.

provision violated the Fourteenth Amendment by conditioning property rights on a racial classification.⁴⁰⁴

The Court of Appeals rejected the challenge, holding that Congress had the power to waive certain equal-protection constraints and it had done so in enacting the Covenant.⁴⁰⁵ Neither the court nor the litigants advanced the argument that Hawaii would eventually make in *Rice* would eventually make: that such classifications are governed by *Mancari*'s legal framework. Instead, CNMI argued that in the territories, such a restriction on land ownership was not inconsistent with the Fourteenth Amendment because the Amendment protects only fundamental rights whose enforcement would not be "impractical and anomalous" in light of local social and cultural conditions.⁴⁰⁶

This argument draws on the *Insular Cases*, a series of cases in which the Supreme Court selectively incorporated U.S. constitutional provisions into the unincorporated territories.⁴⁰⁷ According to this doctrine, only "fundamental" constitutional rights apply in the territories,⁴⁰⁸ and the question of whether a particular right is fundamental must be answered with an eye to local context

CONST. art. XII, § 4. A corporation meets this definition only if "it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors one-hundred percent of whom are persons of Northern Marianas descent and has voting shares . . . one-hundred percent of which are actually owned by persons of Northern Marianas descent." N. MAR. I. CONST. art. XII, § 4. Only fifty percent of the stock in Philippine Goods, Inc. was held by persons of NMI descent and only one of its three directors was a person of NMI descent. Petition for Writ of Certiorari at 4, *Wabol v. Villacrusis*, No. 92-255 (U.S. Aug. 7, 1992).

404. *Wabol*, 958 F.2d at 1451; see also Petition for a Writ of Certiorari, *supra* note 403.

405. *Wabol*, 958 F.2d at 1461-62.

406. See *id.* at 1461-62.

407. Compare *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding that the Sixth Amendment right to a jury trial did not apply in Puerto Rico), with *Weems v. United States*, 217 U.S. 349 (1910) (holding that Eighth Amendment protections against cruel and unusual punishment applied in the Philippines).

408. *Downes v. Bidwell*, 182 U.S. 244, 285-87 (1901) (holding that Congress's power with respect to unincorporated territories is not limited by the Constitution); *id.* at 291 (White, J., concurring) (arguing that certain "fundamental" restrictions may nevertheless constrain Congress); *Hawaii v. Mankichi*, 190 U.S. 197, 201 (1903); *Dorr v. United States*, 195 U.S. 138, 144, 148 (1904); *Balzac*, 258 U.S. at 312. "Fundamental" in the territories is not the same as "fundamental" in the states. Whereas rights apply to the states if they are "necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968), personal rights are "fundamental" in the territories only if they are "the basis of all free government," *CNMI v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) (quoting *Dorr v. United States*, 195 U.S. 138, 147 (1904)); see also *Wabol*, 958 F.2d at 1460 (contrasting the two approaches).

and practical effect.⁴⁰⁹ The Ninth Circuit held that “the right of equal access to long-term interests in Commonwealth real estate” was not fundamental and Article XII could not be challenged as a violation of equal protection.⁴¹⁰

Territorial scholars are almost uniformly critical of the *Insular Cases* and the selective-incorporation doctrine.⁴¹¹ One criticism centers on the cases’ constitutionality: scholars argue that the Constitution does not permit Congress to administer permanent territories not destined for statehood.⁴¹² Another criticism is outcome focused: if the Constitution permits residents of unincorporated American territories to have fewer personal rights than other Americans, the Court is effectively embracing a form of second-class citizenship that was rejected with the passage of the Fourteenth Amendment.⁴¹³ For example, the Court has held that defendants being tried in Puerto Rico’s local courts do not have the same right to a jury trial that the Sixth Amendment guarantees to state and federal-court defendants.⁴¹⁴ This criticism is usually framed as a racial problem: the doctrine was developed at the height of U.S. empire and reflects racially coded ideas of conquest and domination.⁴¹⁵ These scholars argue that using the

409. *King v. Morton*, 520 F.2d 1140, 1147-48 (D.C. Cir. 1975) (remanding to the district court for consideration of whether the Sixth Amendment right to a jury trial is fundamental in American Samoa).

410. *Wabot*, 958 F.2d at 1460, 1462.

411. See generally RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (criticizing the *Insular Cases* as being based on outdated ideas about racial superiority and U.S. empire); Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57 (2013) (analyzing the constitutional validity of the colonial relationship between the United States and Puerto Rico and concluding that the colonial regime has, from the start, contravened the Constitution); see also H.R. 279, 117th Cong. (introduced Mar. 6, 2021) (resolution introduced by Rep. Grijalva stating that the *Insular Cases* and the territorial incorporation doctrine “rest on racist views and stereotypes” and “should be rejected as having no place in U.S. constitutional law”).

412. Torruella, *supra* note 411, at 67.

413. See, e.g., Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J.F. 284, 286 (2020) (“[L]ower courts continue to rely on the *Insular Cases* to deprive residents of U.S. territories of rights and constitutional safeguards they almost surely enjoy . . . [and the cases] . . . also continue to implicitly serve 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 Blacks.”).

414. *Balzac v. Porto Rico*, 258 U.S. 298, 310-11 (1922).

415. See ERMAN, *supra* note 36, at 161; KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009); 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/5N47-N5VM].

Insular Cases as positive precedent thus means accepting and advancing the racial and citizenship-based hierarchy encoded in them.⁴¹⁶

Indeed, Justice Gorsuch recently called on the Court to overrule them, declaring, “The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”⁴¹⁷ As if responding to Gorsuch’s request for a suitable case, the plaintiffs in *Fitisemanu v. United States* – a case challenging the designation of American Samoans as nationals instead of citizens – filed a petition for a writ of certiorari six days later, explicitly asking the Court to overrule the *Insular Cases*.⁴¹⁸ Those in favor of overruling the *Insular Cases* argue that they are inconsistent with the Constitution’s text and original meaning, and that they are rooted in racist, imperialist justifications for U.S. expansion.⁴¹⁹

If one focuses only on territorial status without regard to indigeneity, the *Insular Cases* are a net negative: they have resulted in weaker protections for residents. This view argues that residents of the territories are disadvantaged vis-à-vis other Americans because they lack full citizenship, either formally⁴²⁰ or because their formal citizenship comes with a different set of constitutional rights. These criticisms, while important, insufficiently consider the reality of Indigenous rights, which have long been seen as conflicting with U.S. courts’ formulation of equality. Because of Indigenous vulnerability to reverse-discrimination claims, weaker Fifth/Fourteenth Amendment protections actually translate into stronger protections for land and self-determination.⁴²¹ Indeed, at least one scholar has suggested that the court in the CNMI case would have reached an outcome more protective of Indigenous rights if it had applied the *Insular Cases*’ “fundamental” and “impractical and anomalous” standard.⁴²²

The idea that the *Insular Cases* could be useful for Indigenous peoples is exemplified in *Wablol*. There, the selective-incorporation doctrine permitted the

416. See Derieux & Weare, *supra* note 413, at 289; Torruella, *supra* note 411, at 68-71.

417. *United States v. Vaello Madero*, No. 20-303, slip op. at 1 (2022) (Gorsuch, J., concurring).

418. Petition for a Writ of Certiorari at 13-14, *Fitisemanu v. United States*, Nos. 20-4017, 20-4019 (U.S. Apr. 27, 2022).

419. *Vaello Madero*, slip. op. at 2-4, 5-7 (Gorsuch, J., concurring); Petition for a Writ of Certiorari, *supra* note 418, at 14-19, 25.

420. See Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 *FORDHAM L. REV.* 1673, 1675-76, 1711 (2017).

421. See Tapu, *supra* note 267, at 67 (“American Samoans and other Indigenous peoples of the territories, however, must unfortunately rely upon the *Insular Cases* as a means to protect any vestiges of self-determination.”).

422. See Jose P. Mafnas Jr., *Applying the Insular Cases to the Case of Davis v. Commonwealth Election Commission: The Power of the Covenant and the Alternative Result*, 22 *U.C. DAVIS J. INT’L L. & POL’Y* 105, 136-37 (2016).

court to consider the material effects of colonization and the local realities affecting Indigenous residents of CNMI. Specifically, the court acknowledged the importance of land to Indigenous peoples, the potential devastation of land loss, and the importance of Article XII in preventing it.⁴²³

The *Insular Cases*, then, provided an opening for the Ninth Circuit to apply an antisubordination vision of equality that has been suffocated in mainstream equal-protection jurisprudence. As Rose Cuison Villazor has argued, the court was able to protect cultural distinctiveness in *Wabol*.⁴²⁴ I argue, as Villazor does in an earlier article, that *Wabol* protected political rights and identity, not just cultural distinctiveness.⁴²⁵ To the extent that they acknowledge Indigenous rights at all, calls to overrule the *Insular Cases* dismiss the political significance of those rights, describing them instead as efforts to “safeguard[] traditional cultures.”⁴²⁶ Framing Indigenous rights in the territories as a matter of “diverse cultural practices” can make the consequences of losing these rights easier to dismiss.⁴²⁷ Underneath this cultural framing, however, Indigenous political rights and identity are at stake.

The *Wabol* court’s interpretation of equality makes space for the protection of group rights and appreciates the devastation wrought by colonization. It acknowledges that protection of Indigenous group rights was a political imperative for the United States in order to negotiate and ratify its agreements with territories like CNMI.⁴²⁸ Going further, *Wabol*’s interpretation of the *Insular Cases* underscores the importance of nonincorporation to Indigenous communi-

423. *Wabol v. Villacrusis*, 958 F.2d 1450, 1452, 1458 (9th Cir. 1990).

424. Villazor, *supra* note 3, at 139.

425. Villazor has advocated for a concept called “political indigeneity” that would transcend the race-versus-political paradigm of equal-protection cases. Villazor, *supra* note 131, at 807.

426. Vaello Madero, slip. op. at 9, n.4 (Gorsuch, J., concurring) (“[R]ecent attempts to repurpose the *Insular Cases* merely drape the worst of their logic in new garb. . . . Our government may not deny constitutionally protected individual rights out of (purportedly) benign neglect any more than it may out of animus.”).

427. See Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2459 (2022) (“[E]ven if one believes, as the advocates of repurposing do, that it would be tragic not to find a way to accommodate cultural practices in the U.S. territories, those ends cannot justify their doctrinal means, because the cost of resorting to such means is the perpetuation of a system of permanent colonies. In my view, even if certain diverse cultural practices in the territories cannot be reconciled with the Constitution, this fact would not justify the repurposing of the *Insular Cases*.”).

428. *Wabol*, 958 F.2d at 1458-59.

ties. Some residents of the territories, particularly Indigenous residents, have rejected calls for full citizenship.⁴²⁹ This challenges the orthodox view that equality must mean full citizenship⁴³⁰ and raises the possibility that incorporation can sometimes mean annihilation.⁴³¹ The *Wabot* court stated:

For the NMI people, the equalization of access would be a hollow victory if it led to the loss of their land, their cultural and social identity, and the benefits of United States sovereignty. It would truly be anomalous to construe the Equal Protection Clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition.⁴³²

This critique of incorporation as the best way to protect minority rights has been adopted to some degree in Federal Indian law. Courts and scholars

429. For a careful history of U.S. citizenship as a tool of oppression for American Indians, see Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

430. See Rose Cuison Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. 1033 (2022) (reviewing MING CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* (2020)).

431. See JULIAN AGUON, *THE PROPERTIES OF PERPETUAL LIGHT* 65 (2021) (arguing that the *Insular Cases* “contemplate the ability of unincorporated territories to ‘break out’ of the Union”); Sina Najafi & Christina Duffy Burnett [Ponsa-Kraus], *Islands and the Law: An Interview with Christina Duffy Burnett*, CABINET (Summer 2010), https://www.cabinetmagazine.org/issues/38/najafi_burnett.php [<https://perma.cc/9GK5-E36S>] (“At its heart, the distinction between incorporated and unincorporated territories was a distinction between permanence and fungibility. The insular cases in effect smuggled a theory of secession into American law.”).

432. *Wabot*, 958 F.2d at 1462 (footnote omitted) (citation omitted) (citing Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337, 386 (1980)). The American Samoan high court also upheld an ancestry-based land ownership restriction. *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10 (1980), <https://new.asbar.org/case-law/1asr2d10/> [<https://perma.cc/9HJ3-8Y5A>]. The court held that due-process / equal-protection guarantees were fundamental and applied in the territories, and it further held that Samoan land laws were race-based. However, given the importance of land and the potential harm of land loss, the court concluded that the government had a compelling interest in “preserving the lands of American Samoa for Samoans and in preserving the Fa’a Samoa, or Samoan culture.” *Id.* at 12.

acknowledge that U.S. citizenship was unilaterally bestowed on Indians in part to support the federal government's goal of forced assimilation.⁴³³

The same can be argued about the territories. It is true that the Court was more willing to tolerate indefinite unresolved political status in territories filled with non-White people.⁴³⁴ But by likening the *Insular Cases* to *Dred Scott v. Sandford* and *Plessy v. Ferguson*,⁴³⁵ proponents of incorporation draw a parallel between the territories' particular mechanisms of subordination and Black subordination, positioning citizenship and full incorporation as the solution to both. On the other hand, acknowledging that many territorial residents are not just non-White but also Indigenous suggests that a better parallel might be to the particular mechanisms of Indian subordination, including forced citizenship.

While cases like *Tuaua v. United States*⁴³⁶ and the movement for Puerto Rican statehood may seem to suggest that full incorporation (via citizenship or statehood) would help address territorial inequality, the position of Indigenous peoples in the territories demonstrates how full incorporation can be harmful to

433. See, e.g., *Indian Country USA, Inc. v. Okla. Tax Comm'n*, 829 F.2d 967, 980 n.6 (10th Cir. 1987) (describing the historical link between citizenship assimilation, and the effort by settlers to obtain title to Indian lands); Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1197-1201 (2016); Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 803-04 (2010); Willard Hughes, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West*, 5 NEV. L.J. 126, 129-30 (2004). See generally Kevin Bruyneel, *Challenging American Boundaries: Indigenous People and the "Gift" of U.S. Citizenship*, 18 STUD. AM. POL. DEV. 30 (2004) (noting that Indigenous people did not view their collective naturalization as unambiguously positive); Frederick Hoxie, *What Was Taney Thinking: American Indian Citizenship in the Era of Dred Scott*, 82 CHI.-KENT L. REV. 329, 339-40 (2007) (describing earlier American support for Indian citizenship as linked to removal efforts).

434. See LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 188-89* (2d ed. 2018) (2007) (recounting how opposition to New Mexican statehood was tied to the argument that certain races were unfit for self-government and linking it to support for strong colonial government in the Philippines); see also *Downes*, 182 U.S. at 282 ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.").

435. See, e.g., Ponsa-Kraus, *supra* note 427, at 2459 ("[A]rguing that we need to repurpose the *Insular Cases* to accommodate culture is like arguing that we need to repurpose *Plessy v. Ferguson* to accommodate benign racial classifications.").

436. 788 F.3d 300 (D.C. Cir. 2015); see also Brief of Citizenship Scholars as *Amici Curiae* in Support of Appellants and Urging Reversal at 9-12, *Tuaua v. United States*, 136 S. Ct. 2461 (2016) (mem.) (No. 13-5272) (juxtaposing the *jus soli* doctrine against race-based exceptions to it and emphasizing that the rejection of these exceptions facilitated racial equality).

them—and potentially to all residents of the territories.⁴³⁷ The *Fitisemanu* petition dismisses the argument, important to the majority below, that many Samoans do not desire unilateral naturalization.⁴³⁸ Instead, the petition emphasizes inclusion and assimilation, arguing that, “American Samoa’s ties to the rest of the country have strengthened significantly as it has become part of the Nation’s political, economic, and cultural identity.”⁴³⁹ It also erases Samoan group political identity. In the absence of American citizenship, the petitioners argue, American Samoans “are citizens of nowhere: American Samoa is not a country, nor part of any other besides the United States.”⁴⁴⁰

These arguments attack any attempt to repurpose the *Insular Cases* as misguided and even legally wrong.⁴⁴¹ Of course, litigants regularly repurpose the Court’s precedent, and the meaning of constitutional protections shifts. Indeed, this Article describes a long-term project in which cases interpreting the Constitution to protect the rights of Black Americans have been repurposed to protect the rights of White Americans and to undermine Indigenous political and cultural rights.

Repurposing the *Insular Cases* has parallels to the way advocates use Federal Indian law. The doctrinal basis of modern Indian law is the *Marshall Trilogy*, three cases in which the U.S. Supreme Court defined the unique status of Indian

437. See, e.g., Brief for Intervenors or, in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 18–30, *Tuaua*, 136 S. Ct. 2461 (No. 13–5272) (opposing unilateral imposition of citizenship and explaining how citizenship could negatively affect self-determination rights); see also *Fitisemanu v. United States*, 1 F.4th, 862 865 (10th Cir. 2021) (noting that American Samoa’s “democratically elected representatives . . . remind us that their people have not formed a consensus in favor of American citizenship and urge us not to impose citizenship on an unwilling people from a courthouse thousands of miles away”); ERMAN, *supra* note 36, at 132–34 (explaining how, for some, citizenship in Puerto Rico signaled permanent inclusion with inferior status and contrasting that with the Philippines’ path to independence); Kauanui, *Precarious Positions*, *supra* note 240, at 15–16 (summarizing arguments that incorporation of Kānaka Maoli via federal acknowledgement as an Indian tribe would undercut claims to sovereignty and self-determination based in international law); Vézina, *supra* note 52, at 175 (describing resistance to citizenship in American Samoa).

438. Petition for a Writ of Certiorari, *supra* note 418, at 12 (citing Judge Bacharach’s assertion that it “lacks factual support” and that, regardless, the Constitution’s application “cannot change with ‘every change in the popular will’”).

439. *Id.* at 8.

440. *Id.* at 30.

441. *Id.* at 31–32 ([I]f the panel majority’s decision is allowed to stand, it would set a dangerous precedent that this Court’s decisions are malleable, that they may be ‘repurposed’ by lower courts as they see fit, and that lower courts are free to expand the *Insular Cases* to deny American citizens their constitutional rights.”).

tribes under U.S. law.⁴⁴² Like the *Insular Cases*, the *Marshall Trilogy* can be read as almost irretrievably racist.⁴⁴³ But Indian tribes and legal advocates have repurposed the doctrine over time to protect Indigenous group rights.⁴⁴⁴ Less directly, critical race theorists have even employed aspects of *Plessy* to challenge modern legal conceptions of race.⁴⁴⁵

This is not to suggest that the question of whether the *Insular Cases* are more harmful than they are helpful is an easy one. Rather, it is worth considering the issue from multiple angles. Because scholars of territorial law tend to focus on one category (colonized status) at the expense of others (racialized or Indigenous), criticism of the *Insular Cases* insufficiently engages with the impact of embracing or rejecting the cases on racialized Indigenous peoples who live there.

Indigenous Pacific Islanders stand to gain the most from repurposing the *Insular Cases*. When Congress or the territorial governments act to protect land and self-determination rights, the selective incorporation doctrine offers a way to argue that Congress may constitutionally treat the territories differently, just as it may treat Indian tribes differently under the Indian Commerce Clause and *Mancari*.

442. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

443. See, e.g., Adam Creppelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 541-46 (2021); Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 330-31 (2011); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 674-76 (2006); Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMPAR. L., Fall 1991, at 51, 72-74.

444. E.g., Reid Peyton Chambers, *Judicial Enforcement of the Federal Responsibility To Indians*, 27 STAN. L. REV. 1213, 1216-23 (acknowledging that the federal-trust doctrine is rooted in part in the Marshall Court's characterization of Indians as dependent and in a permanent "state of pupilage" and offering an alternative vision of the trust responsibility as a federal obligation to support tribal autonomy); Steele, *supra* note 71 (employing the concept of federal plenary power to defend tribal sovereignty and jurisdiction while acknowledging that the cases establishing it were concerned with undermining tribal nationhood); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALBANY GOV'T L. REV. 1, 4 (2017) (arguing that "despite its racist language and its limitations on tribal property rights, the Johnson opinion can be read as protective of both tribal property rights and sovereignty").

445. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1747, 1789 (1993) (describing *Plessy* as recognizing and protecting a property interest in Whiteness and arguing that affirmative action programs should be understood as challenging this property interest).

But this protection comes with the risk that Congress or the territorial government could act to harm Indigenous territorial residents with minimal constitutional checks.⁴⁴⁶ While *Mancari* is also a double-edged sword, it does offer some protection by demanding that “Indian” classifications be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”⁴⁴⁷ The territorial incorporation doctrine is even more forgiving in the sense that once a court determines that a right is not fundamental, it is not required to balance state infringement on that right against the asserted reason for doing so. Nonincorporation happened to protect Indigenous rights in *Wabob* because the right invoked (equal protection) was being used by non-Indigenous residents to further subordination.⁴⁴⁸ There is nothing in the selective incorporation doctrine, however, to ensure this result in other contexts. For example, if territorial courts regularly tried and convicted Indigenous residents at high rates in non-jury trials, any effort to mitigate the damage through jury trials would be a dead end, at least as a constitutional argument, because the courts have determined that the right does not even apply. Further, because any holding that a right is not fundamental would apply equally to all residents of the territories, non-Indigenous residents could be harmed as well.⁴⁴⁹ *Wabob* helped the government protect Indigenous interests, but the same approach could leave the government’s power to legislate *against* Indigenous interests unchecked. For example, *Wabob*’s holding that one aspect of equal protection is not fundamental has been invoked to limit constitutional protections in other areas.⁴⁵⁰

446. See Stephen Carino, *True Self-Determination Lies in Sovereignty*, SAIPAN TRIB. (May 23, 2018), <https://www.saipantribune.com/index.php/true-self-determination-lies-in-sovereignty> [<https://perma.cc/7F66-PL53>] (“The Insular Cases grant the territories as much flexibility as a leash grants a dog, it can be tightened and pulled back at the whims of its owner, in this case, Congress.”).

447. *Morton v. Mancari*, 417 U.S. 535, 555 (1974); see also Goldberg, *supra* note 109, at 263 (pointing out that the *Mancari* Court articulated something more exacting than typical rational-basis scrutiny). *But cf.* *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (applying *Mancari* and upholding Congress’s decision to exclude some groups from the benefits of a settlement); *United States v. Antelope*, 430 U.S. 641, 646-47 (1977) (applying *Mancari* and upholding the extension of federal criminal jurisdiction into Indian country in a manner that results in more severe punishments for Indian people than for similarly situated non-Indians punished under state law).

448. See Haney-López, *supra* note 212, at 1784 (explaining how modern equal-protection doctrine furthers racial subordination).

449. See Duffy Ponsa-Kraus, *supra* note 427, at 2482-512 (explaining how the *Insular Cases* have hurt the interests of territorial residents).

450. *Accord* *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139-40 (D. N.M.I. 1999) (relying on *Wabob* to hold that “one person, one vote” is not fundamental).

The *Insular Cases* are undeniably racist and extra-textual. But so is this Court's race jurisprudence. Unless that, too, is re-envisioned, Indigenous peoples in the territories stand to lose an important source of protection against the existential threat posed by the Court's race cases. The Court—and the advocates and scholars urging it to rule on the question—must take into account the unique political status of Indigenous peoples in the territories and grapple with the material effect on those people of any decision to overrule them.

C. Import International Law

For Indigenous peoples in the territories, international-law principles may offer another way to protect political, land, and cultural rights. International law specifically protects cultural distinctiveness, self-determination, and group identity for Indigenous peoples within nation-states.⁴⁵¹ It also recognizes that colonized peoples have a right to political self-determination that encompasses independence,⁴⁵² an option not acknowledged for Indigenous peoples within nation-states.⁴⁵³ Indigenous residents of non-state territories have rights under both regimes.⁴⁵⁴ If U.S. courts were to recognize and import international principles, those principles would supply an alternative doctrinal basis for upholding Indigenous land and self-determination rights in the territories.

Acts of Congress should be construed whenever possible not to violate international law.⁴⁵⁵ The laws at issue in the CNMI case and in both Guam cases were creatures of territorial legislatures, but the definitions they employed (NMI descent, Native inhabitant, Native Chamorro) were each traceable to acts of Congress. In the CNMI case, the United States signed a covenant that referred to “people of Northern Marianas descent.”⁴⁵⁶ In Guam, both the “Native inhabitants” and “Native Chamorro” classifications referred to a class of people granted

451. G.A. Res. 61/295, at 3-4 (Sept. 13, 2007).

452. G.A. Res. 1514 (XV), at 66-67 (Dec. 14, 1960); International Covenant on Civil and Political Rights arts. 1, 27, Dec. 15, 1966, 999 U.N.T.S. 171.

453. See Aguon, *supra* note 182; Daes, *supra* note 75, at 15-17, 23. *But see* Lâm, *Remembering*, *supra* note 87 (arguing that Indigenous peoples within state borders do have a right to political self-determination).

454. Indigenous peoples within states have a less clear claim to the status of colonized peoples, but the claim has certainly been advanced in the context of Kānaka Maoli. See Aguon, *supra* note 121, at 385-93.

455. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81 (1804).

456. See *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America* § 805(a), 90 Stat. 275 (1976) (approved by 48 U.S.C. § 1801); Torres, *supra* note 254, at 182; *Covenant* § 805(a).

citizenship by Congress pursuant to the Guam Organic Act.⁴⁵⁷ Chamorros and Carolinians are Indigenous peoples, and Guam and CNMI were both at one point non-self-governing territories eligible for decolonization rights.⁴⁵⁸ Although CNMI is no longer on the U.N. list, the Covenant implements the agreement upon which its current relationship with the United States is based.⁴⁵⁹ Applying the *Charming Betsy* canon,⁴⁶⁰ the laws at issue in those cases could be construed as classifications based on international concepts of indigeneity or colonization, not as racial classifications, in order to avoid an interpretation that pits international obligations against U.S. constitutional commands.

Even if courts were to treat the classifications in these cases as racial ones, the United States arguably has a compelling interest in upholding its obligations under international law toward Indigenous and colonized peoples. To survive strict-scrutiny analysis the classifications must still be narrowly tailored, but as described in Parts I and III, ancestry may be a necessary proxy for identifying present-day Indigenous and colonized peoples in the absence of formal rules of group membership. As the Guam cases demonstrate, the U.S. government has struggled to find a way to define the class of colonized peoples without using terms that invoke either race or ancestry, and any category that includes all present-day residents of U.S. territories would allow postcolonization immigration to dilute or overpower the interests of those groups who experienced colonization.⁴⁶¹

Drawing on international law would benefit Indigenous peoples in the territories by centering indigeneity and colonized status, two categories that have limited or no significance in U.S. law. Instead of having to liken their situations

457. See Torres, *supra* note 254, at 187. Congress used the term “Native inhabitants” in its committee report. H.R. Rep. No. 81-1677 (1950), reprinted in 1950 U.S.C.C.A.N. 2840, 1950 WL 1716.

458. Hawaii was too, but the designation was revoked before any bilateral negotiation took place, a historical fact that remains a site of contestation today. Ramon Lopez-Reyes, *The Re-Inscription of Hawaii on the United Nations’ List of Non-Self-Governing Territories*, 28 PEACE RSCH. 71, 71 (1996).

459. *Non-Self-Governing Territories*, *supra* note 115. Exclusion from this list does not mean they are not entitled to any protections. Rather, they are viewed as having exercised their self-determination rights via the Covenant, and the Covenant therefore governs the terms of their relationship and political rights.

460. The *Charming Betsy* canon is a rule that ambiguous statutes should be construed so as not to conflict with international law. Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1217 (2008).

461. See Torres, *supra* note 254, at 187; see also *supra* note 280.

to those of American Indian tribes,⁴⁶² Indigenous Hawaiians and Pacific Islanders could more accurately describe their unique political status by invoking international-law frameworks.⁴⁶³ Importantly, international-law definitions of “indigeneity” acknowledge that descent or ancestry is part of what ties present-day Indigenous peoples to those who were colonized in the past.⁴⁶⁴ A stronger focus on international-law concepts like decolonization, peoplehood, self-determination, consultation, and free, prior, and informed consent would also benefit recognized Indian tribes and their citizens.⁴⁶⁵

This approach is imperfect for several reasons. First, U.S. courts often look to international norms and obligations, but they have stopped short of treating them as binding rules.⁴⁶⁶ Second, both *Davis v. Commonwealth Election Commission* and *Davis v. Guam* were decided, like *Rice*, on Fifteenth Amendment grounds. While international law may be a compelling interest for equal-protection purposes, the Fifteenth Amendment’s prohibition is more direct. Any classification construed as race-based could still violate that Amendment if used in the context of voting. Third, this approach fails to recognize the common interests of and obligations toward Indian tribes and other Indigenous peoples under the jurisdiction of the present-day United States. Instead, it treats Indigenous peoples in the territories as outside the scope of standard American Indian law doctrine and protected only by international-law norms. As a result, defenses of the Indian Child Welfare Act would continue to be doctrinally disconnected from defenses of Indigenous rights in the Pacific Islands even though, as this Article demonstrates, the litigation attacking each one employs the same strategy and precedent.

462. There are over 500 federally acknowledged Indian tribes, and each has a different history of political relations with the United States. Nevertheless, the histories of federally acknowledged tribes in the contiguous United States have certain commonalities that are not shared by Alaska Native peoples, by Kānaka Maoli, or by Indigenous Pacific Islanders. The framework of Federal Indian law is thus an awkward fit. See Kauanui, *Precarious Positions*, *supra* note 240, at 14-19.

463. Some scholars have argued in other contexts that the United States should expand its recognition of Indigenous group rights to be more in keeping with international law. See Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *Clarifying Cultural Property*, 17 INT’L J. CULTURAL PROP. 581, 582-84 (2010).

464. Erica-Irene A. Daes, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People* 19-21 (Econ. & Soc. Council, Working Paper, 1996).

465. See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 699-704; S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 UNIV. OF TORONTO L.J. 435, 462-64 (2017).

466. See Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 948 (2012).

D. *Replace Indianness with Indigeneity*

A simple – but practically unlikely – solution would be for the Court to overrule *Rice* (or reject its reasoning) and expand the *Mancari* rule to encompass all classifications that further protections for Indigenous property, self-determination, and self-government. The dissenting Justices in *Rice* adopted a version of this approach by reasoning that a classification identifying “Indigenous Hawaiians” was a political classification analogous to “Indian” classifications and therefore covered by the *Mancari* rule.⁴⁶⁷ While the majority’s decision to treat the classification as outside the scope of Indian law may have seemed limited enough that it would not forbid recognition of indigeneity, hindsight shows that it has been used to do just that. Because *Rice* is the only Supreme Court decision addressing the legality of ancestry-based Indigenous classifications, the Court could simply overrule it or clearly reject its reasoning, allowing lower courts to engage in more nuanced consideration of whether a given classification involving indigeneity is political. This approach would incorporate Villazor’s theory of political indigeneity into legal doctrine.⁴⁶⁸

Of course, the legal category of Indian could also be expanded to include Indigenous peoples in the territories. Ablavsky has demonstrated that “Indian” had multiple meanings in constitutional history.⁴⁶⁹ Taking this history seriously means that courts should expand, rather than contract, the legal definition of “Indian.” Several Indigenous peoples today that are uncontroversially considered to be Indians were not always so clearly included. This was especially true as the U.S. government decided how to interact with Indigenous peoples in territories that became states after the mid-1800s. In New Mexico, the Court engaged in a sustained debate about whether Pueblo peoples were legally Indian even though their cultural and religious practices were different than those of other Indian groups and their citizenship and property rights under U.S. treaties set them

467. *Rice v. Cayetano*, 528 U.S. 495, 527-47 (2000) (Stevens, J., dissenting); *id.* at 547-48 (Ginsburg, J., dissenting).

468. Villazor, *supra* note 131, at 833 (applying and examining political indigeneity in the context of Indigenous property rights).

469. Ablavsky, *supra* note 57, at 1049-60.

apart from other Indian groups.⁴⁷⁰ Similar questions about Indian status surfaced in the territory of Alaska⁴⁷¹ and resurfaced when Alaska became a state⁴⁷² and after passage of the Alaska Native Claims Settlement Act.⁴⁷³ The legal status of Alaska's Indigenous communities was not fully resolved until the 1990s, when Congress passed the Federally Recognized Tribes List Act and clarified the status of the Central Council of the Tlingit and Haida Indians of Alaska.⁴⁷⁴ That these peoples were eventually included speaks as much to the flexibility of "Indian" as a legal category as it does to the Court's concern with expanding federal power and the problem of unresolved aboriginal title in the new territories.⁴⁷⁵ Certainly, historical evidence exists that would support redefining Indigenous Pacific Islanders as Indians.⁴⁷⁶

A U.S. legal category of "indigeneity" that embraces more than citizens of federally acknowledged tribes would more closely reflect international-law definitions of "indigeneity." It would also undermine the ancestry-race equivalence that has characterized subsequent uses of the *Rice* rule. Susan Serrano has argued that, for Indigenous peoples, a reparative justice approach requires that ancestry be delinked from race in constitutional law because delinking would allow courts to measure and address the harms of colonization.⁴⁷⁷ Descent (or ancestry) is one of the primary means that both American and international bodies have used

470. Compare *United States v. Joseph*, 94 U.S. 614 (1876) (Pueblos are not Indians) with *U.S. v. Sandoval*, 231 U.S. 28 (1913) (Pueblos are Indians); *United States v. Candelaria*, 271 U.S. 432 (1926).

471. See Sidney Haring, *The Incorporation of Alaska Natives Under American Law: United States and Tlingit Sovereignty, 1867-1900*, 31 ARIZ. L. REV. 279, 283-91 (1989).

472. Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 28-31 (2013).

473. *Id.* at 35-40.

474. Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791. Indeed, the Court recently interpreted the Indian category expansively to account for the unique legal status of Alaska Native communities post-ANCSA. See *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434 (2021) (holding that ANCSA corporations are Indians tribes for purposes of the Indian Self-Determination and Education Assistance Act and the CARES Act).

475. For in-depth discussions of the role of federal authority in the New Mexico cases, see Laura Gomez, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2d ed. 2018); GERALD TORRES, *WHO IS AN INDIAN? : THE STORY OF UNITED STATES V. SANDOVAL*, INDIAN LAW STORIES (Goldberg, et al., eds.) (2014).

476. See, e.g., Brian Rouleau, *Maritime Destiny as Manifest Destiny: American Commercial Expansionism and the Idea of the Indian*, 30 J. EARLY REPUBLIC, 377, 382-88 (2010) (examining maritime journals classifying indigenous peoples in the Pacific as "Indians").

477. Serrano, *supra* note 170, at 504.

to connect present-day peoples to peoples who lived in colonized nations before settlement.⁴⁷⁸

When it is used to identify groups as Indigenous, ancestry serves as a proxy for historical continuity.⁴⁷⁹ When used to identify individuals properly associated with those groups, ancestry serves as a proxy for both history and kinship.⁴⁸⁰ In both cases, ancestry serves to delineate a group that is legally significant because of its political and historical relationship to the United States. Once this use of ancestry is highlighted, it is harder for advocates to make the argument that ancestry is always race. As the Ninth Circuit recognized in *Davis v. Guam*, ancestry is sometimes a proxy for race, but it isn't always.⁴⁸¹ Courts can and should engage in a careful inquiry each time about how it is being used.⁴⁸²

Delinking ancestry and race could also have benefits beyond Indigenous rights. For example, reparations are an attempt at compensating a present-day group in order to repair a specific historical harm. While many contemporary conversations about reparations envision them as flowing to a racially identified group, this approach could potentially present constitutional problems if presented to a court that has adopted a colorblind, anticlassification view.⁴⁸³ The U.S. government and some states have already provided reparations for racial harms, but they have typically done so on the basis of ancestry. That is, the class of people entitled to reparations payments includes those who either directly experienced a particular harm or are descended from ancestors who experienced

478. See *supra* note 83 and accompanying text; *supra* note 99-101 and accompanying text.

479. The biological understanding of ancestry does not capture its political function as a proxy for kinship, group affiliation, and political identity. See *In re Estate of Tudela*, No. 05-0027-GA, 2009 WL 2461676 (N. Mar. I. Commw. Super. Ct. Aug. 7, 2009) (exempting a surviving spouse who lacked biological NMI ancestry from the land-alienation restriction); see also Torres, *supra* note 254, at 177 (making this point).

480. See generally Goldberg, *supra* note 191 (arguing that descent can be a proxy for kinship); Tall-Bear, *supra* note 154 (arguing that blood quantum is often used metaphorically as a proxy for number of relatives or strength of connection).

481. *Davis v. Guam*, 932 F.3d 822, 834-35 (9th Cir. 2019).

482. The *Davis* court nevertheless concluded that ancestry was being used as a proxy for race in that particular case. See *Davis v. Guam*, 932 F.3d at 825.

483. Whether the group could be identified in the first place would depend on whether remedying historical harm would count as compelling interest and whether the use of racial criteria was narrowly tailored. With *Rice* and *Bakke* as precedent, both could easily be answered in the negative.

the harm.⁴⁸⁴ Consider reparations for slavery. While there are compelling arguments for expanding the class of beneficiaries to include all Black Americans today, it would be doctrinally simpler to provide reparations to descendants of enslaved Americans, provided that the Court is willing to differentiate between ancestry as a proxy for historical connection to a political harm and ancestry as a proxy for race.⁴⁸⁵

The language of *Mancari* notwithstanding, legal recognition of indigeneity need not entail delineating between racial and non-racial classifications. Rather, it could acknowledge that racial equality is not inconsistent with the recognition of Indigenous rights. For example, the Canadian Supreme Court upheld, against a constitutional challenge, a program in which aboriginal fishers were issued commercial fishing licenses for a period during which nonaboriginal commercial fishers were excluded from the fishery.⁴⁸⁶ In contrast to the U.S. Supreme Court's approach in *Mancari* and *Rice*, the Canadian court accepted two premises: "[T]he right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences."⁴⁸⁷ The Canadian court also acknowledged the conflict between formal equality of access to fishing rights and the pilot program's treatment of aboriginal fishers.⁴⁸⁸ Nevertheless, it held that the

484. See, e.g., Act of Aug. 10, 1988, Pub. L. No. 100-383, § 105(a)(7) (providing for payments to descendants of Japanese American citizens and permanent residents who experienced internment); 1994 Fla. Laws 3296, 3297-98 (authorizing payments to victims of the Rosewood massacre and creating a scholarship fund for their direct descendants); *The U.S. Public Health Service Syphilis Study at Tuskegee: Frequently Asked Questions*, U.S. CTRS. DISEASE CONTROL & PREVENTION (Apr. 22, 2021), <https://www.cdc.gov/tuskegee/faq.htm> [<https://perma.cc/9K66-MB7L>] (describing settlement authorizing payments to victims of Tuskegee study and their descendants).

485. See Soumya Karlamangla, *California Task Force Votes to Offer Reparations Only to Descendants of Enslaved People*, N.Y. TIMES (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/us/california-reparations.html> [<https://perma.cc/TX6V-GTT2>] (describing arguments against descendant-only reparations, including the fact that the harms set in motion by slavery echoed far beyond that specific institution); Lil Kalish, *California Task Force: Reparations for Direct Descendants of Enslaved People Only*, CALMATTERS.ORG (Mar. 30, 2022), <https://calmatters.org/california-divide/2022/03/california-reparations-task-force-eligibility/> [<https://perma.cc/6T3T-EQNH>] (summarizing arguments for and against descendant-only reparations and reporting that Erwin Chemerinsky testified about the possibility of a race-neutral classification based on lineage).

486. *R. v. Kapp*, 2 S.C.R. 483, 496 (2008).

487. *Id.* at 547.

488. *Id.* at 489. ("There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licenses under the pilot sales program.").

program was constitutional, noting that the protection of group rights and efforts to ameliorate the conditions of a disadvantaged group were not inconsistent with the idea of equality, even if there appeared to be a facial conflict.⁴⁸⁹

E. Acknowledge that Race Is Political

In each of the scenarios described in the previous Sections, fixing one aspect of *Rice's* damage requires leaving another untouched and unquestioned. For example, territorial residents who emphasize international rights to decolonize necessarily imply that Hawaiians, because they are within a state and not on the U.N. list, do not have the same rights. This argument thus tacitly condones the illegal U.S. annexation of Hawaii. The fourth scenario—replacing Indianness with indigeneity—does not require distinguishing among Indigenous peoples according to who the U.S. government formally acknowledges or who has a better claim to decolonization. However, it would leave untouched *Rice's* jurisprudential understanding of race. It would thus shield Indigenous peoples from the bludgeon of the colorblindness, but it would do nothing to contest the flat understanding of race as ahistorical and personal—meaning that *Rice* could still be used to stifle the political power and collective voice of non-Indigenous minorities.

Recognition and protection of Indigenous Pacific Islanders' rights poses a problem under current U.S. constitutional jurisprudence on race for two basic reasons. First, in the absence of an acknowledged tribal government with a clear citizenship rule, governments have defined Indigenous Pacific Islanders with reference to descent. Because courts equate ancestry with race, this type of classification runs headlong into the presumption against facial racial classifications. Second, even if a classification could be drawn that excised ancestry, the Court has also suggested that any effort to recognize Indigenous peoples as continuing political entities outside of Federal Indian law could be unconstitutional because

489. The court began its analysis with the Canadian Charter of Rights, which contains two provisions that address the meaning of equality. Section 15(1) prohibits governments from making “distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping.” *Kapp*, 2 S.C.R. at 511 (citing Canadian Charter of Rights and Freedoms, s 15, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.)). Section 15(2) protects the ability of governments to create programs that proactively prevent discrimination. *Id.* Section 25 of the Charter specifically protects aboriginal rights where application of the Charter would otherwise impair them. *Id.* at 520-21 (citing Canadian Charter of Rights and Freedoms, s 25, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.)).

such political recognition amounts to a racial purpose.⁴⁹⁰ While this objection is less clear, it seems that courts may see Indigenous Pacific Islander populations as racial groups because they have been historically racialized.⁴⁹¹ Any attempt to imbue them with political significance, then, is suspect because race is not supposed to have political significance under U.S. law.

Race is not the only lens for understanding the experience of Indigenous peoples in the territories; it may even be the clumsiest framework available. However, race as it is understood in U.S. constitutional jurisprudence is the most intractable barrier to protecting Indigenous rights. The litigation campaign described in this Article is a strong indicator that the political right plans to use race jurisprudence to prevent recognition of Indigenous rights and, in turn, to use the newly strengthened vision of colorblindness to further chip away at the rights of non-Indigenous minorities. If this is true, efforts to distinguish or adopt a different legal framework will always be of limited efficacy. Until U.S. courts can embrace a thicker conception of racial equality, race jurisprudence will always render Indigenous rights precarious.

Another strategy for protecting Indigenous rights, then, would be to directly address the thin, colorblind understanding of race that permeates Fourteenth and Fifteenth Amendment case law. In this scenario, Federal Indian law could serve as a model for reenvisioning race law.⁴⁹² The “Indian” category is a legal and historical fiction. But it signals the shared experience of colonization, and the “Indian” legal category reflects, albeit imperfectly, other important present-day ties such as political citizenship, kinship, and culture. A reenvisioned legal approach to race could acknowledge that race, while a constructed and illegiti-

490. *Rice v. Cayetano*, 528 U.S. 495, 518 (2000) (“It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes.”); *id.* at 515 (“The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.”).

491. *See, e.g., Davis v. Guam*, No. 11-00035, 2017 WL 930825, at *1 (D. Guam Mar. 8, 2017) (interpreting federal census data to explain that Chamorros were the predominant race living in Guam in the year 1950); *see also Davis v. Commonwealth Election Comm’n*, No. 1-14-CV-00002, 2014 WL 2111065 (D.N.M.I. May 20, 2014) (decision and order granting in part and denying in part plaintiff’s motion and defendant’s cross motion for summary judgment) (taking judicial notice of 1950 census data for the CNMI, including population breakdown by race).

492. *See Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1793-1800 (2019).

mate category, has nevertheless bound groups of people together in shared experience,⁴⁹³ and its boundaries often track geographic, cultural, and relational ties that further connect people.

If race were understood in this manner, the argument that Indigenous classifications look like racial classifications would not threaten them. First, the invocation of descent would not transform the classifications into racial ones because race would not be defined solely in terms of ancestry. More importantly, even if they were understood that way, recognized Indigenous political rights would not appear to be potential constitutional violations because the law would recognize that racial classifications could have ongoing political significance.⁴⁹⁴ Such a shift would stop a significant source of legal challenges to Indian tribal rights. It would also permit recognition of Indigenous rights outside the context of Federal Indian law, whether or not those rights accrue to members of racial groups.

In practice, this strategy is dangerous. It ties Indian rights, which have largely survived constitutional attack, to race-conscious remedies, which largely have not. For this reason, it makes little sense for Indian tribes to pursue it; even Indigenous residents of the territories, while shut out of Federal Indian law, can employ the arguments set forth above while steering clear of the conversation about race. This Article's premise, though, is that the opportunity for Indigenous Pacific Islanders to make nonracial arguments is rapidly disappearing. Whether or not Chamorros and Carolinians understand themselves primarily in racial terms, opponents of Indigenous political and land rights understand them that way, and, more importantly, they are willing to use that understanding to obtain land and oppose Indigenous political self-determination.

This result has occurred in large part because advocates have accepted the doctrinal divisions between Indians, racial groups, and territorial residents, thus failing to see the link between racialization and colonization and advance arguments that seek to contest the divisions. If race were redefined as a fluid classification that is part of an ongoing process of domination and subordination, the

493. See Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88, 90-91 (2019).

494. Were the Court to adopt this thicker conception of race, it might reconsider its rule that benign classifications are to be strictly scrutinized just like invidious ones. See Addie C. Rolnick, *Rice v. Cayetano Reconsidered*, in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND LAW (Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig 2022); Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1122-27 (2019) (explaining how recognizing the nonneutrality of merit-based admissions and conceptualizing of affirmative action as a structural countermeasure would call into question the appropriateness of strict scrutiny for these programs).

links between the subordination of various groups could be more clearly elucidated. Such a strategy would better reflect the collective action that has characterized past and present social movements.⁴⁹⁵

One way to resist the limit of categories without sacrificing the rights that are protected by current doctrine would be to argue in the alternative. Litigants seeking to defend against allegations that Indigenous rights are race-based could primarily rely on existing doctrine. For example, Indian tribes and the federal government could defend the ICWA on the theory that its “Indian child” classification turns on citizenship eligibility and it only applies to federally acknowledged tribes. Similarly, territorial governments and Indigenous Pacific Islander communities could emphasize their unique territorial status and use that doctrinal opening to highlight international obligations to colonized and Indigenous peoples and the United States’ acceptance of those obligations in instruments like the Covenant.

In such cases, litigants should explain the political and historical significance of the classification and importance of the right in question without regard existing doctrinal categories. For example, litigants defending the ICWA could emphasize the historical harm of child loss, its continued effects today, its connection to colonization, and the importance of the ICWA as a reparative measure. Litigants defending property law regimes in the territories could emphasize the importance of land to Indigenous peoples, the role of land transfer in colonization, and the material consequences of land loss to Indigenous communities.

These litigants could then briefly set forth an alternative argument about why the classification should be upheld, even if the Court were to determine it was race-based. In so doing, these litigants would be acknowledging that the collective historical harms of child loss and land loss were also racial harms and could use the lens of indigeneity to more clearly elucidate why a remedy is required. This strategy is important because it leaves room for an understanding that non-Indigenous entities may have experienced similar historical harms and may have similar group claims to a remedy. It would create a theoretical opening to defend group-based remedies for historical harms against non-Indigenous racial minorities in future cases, rather than entrenching the Court’s individualized, ahistorical view of race. The goal of this strategy is to use any available tool

495. For example, Kyle Mays highlights the interrelated histories of Black and Indigenous resistance. KYLE T. MAYS, *AN AFRO-INDIGENOUS HISTORY OF THE UNITED STATES* (2021). Robert Chang and Neil Gotanda emphasize the importance of coalition movements that focus on White supremacy and point out that this approach requires that minority groups reject the invitation to be included or protected at the expense of another group. Robert S. Chang and Neil Gotanda, *The Race Question in Latcrit Theory and Asian American Jurisprudence*, 7 *NEV. L.J.* 1012, 1017, 1021-22, (2007).

to protect the right in question while minimizing potential damage to the rights of other peoples or groups in future cases.

CONCLUSION

American law mediates the rights of Indigenous peoples, racial minorities, and colonized peoples through Indian law, race law, and territorial law, respectively. Each of the three areas of law relies on a distinct set of legal categories and doctrines. They are rarely analyzed together because they appear to be concerned with fundamentally different rights, issues, and historical processes. This Article makes the case that they are not so different. Rather, each doctrinal area is an attempt to mediate through law the relationship between dominant and subordinated groups. At times, the doctrine carves out protections for subordinated peoples. More often, law functions to further the colonizing project. Within each area, advocates and scholars have worked to identify the subordinating effects of specific laws and, with uneven success, to restructure or reenvision those laws to further antisubordination.

This Article demonstrates that the different doctrinal strands also interact with each other to narrow the protections offered by each one and undermine the possibility of collective action. *Rice v. Cayetano* was a pivotal moment in this regard: the Court imported race jurisprudence into the area of Indigenous rights, but it did so by equating the claims of excluded Black people with the claims of White settlers, rather than with the claims of Indigenous communities. With this sleight of hand, the majority engaged in a juridical act of colonization, reducing massive historical harms and present day material subordination to “dismay” that is shared equally by everyone,⁴⁹⁶ and it used race jurisprudence as the tool to do so.

The *Rice* Court borrowed across doctrinal areas in order to narrow the liberatory potential of both areas. This process has culminated in recent cases limiting Indigenous Pacific Islanders’ right to land and self-determination. This Article highlights the destructive effect of legal categories by focusing on what happens to people who are left out of all the categories. The fact that the Reconstruction Amendments now pose a significant threat to domestic protections of Indigenous peoples’ land and self-governance rights is a cruel absurdity. But absurdity results when legal categories are restricted and unmoored from their historical purposes and material realities.

496. *Rice v. Cayetano*, 528 U.S. 495, 524 (2000) (“When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and *their dismay may be shared by many members of the larger community.*”(emphasis added)).

More importantly, it demonstrates that this process of interdoctrinal borrowing has been used intentionally by advocates on the right for the purpose of attacking Indigenous rights and non-Indigenous racial minority rights. Left unprotected by the doctrine and unexamined in legal scholarship, Indigenous Pacific Islanders have been a casualty of this project and of the left's failure to engage in the same kind of interdoctrinal analysis and advocacy. These most recent cases are lesson in the costs of such an approach. 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.