STATUS MANIPULATION AND SPECTRAL SOVEREIGNS

Sam Erman*

ABSTRACT

This Essay examines how empire invisibly perpetuates itself through "status manipulation." "Status" refers to formal polity-person and polity-place relationships, perceived to be well-defined, pre-established, unchanging, and consequential. Such relationships are envisioned as automatically creating rights and powers, as well as obligations, detriments, and exclusions. The gap between the perceived fixity of status and its actual malleability gapes wide in the case of U.S. empire. The ambiguity is the result of choices by U.S. empire builders. "Manipulation" places the emphasis on this intentionality. It also describes the misdirection by which changes to status and the changeability of status sustain colonialism while hiding it from view. The U.S. empire dangles sovereignty before people in some of its colonies. In others, it strings people along in their beliefs that colonial sovereignty already exists. Doing so divides, frustrates, and seduces anti-colonialists. Like parched and starved Tantalus, whose fruit and water are always just beyond reach, inhabitants of the colonies endure degraded statuses that are tantalizingly close to a redemption that never arrives. Studies of the smallest and largest populated U.S. territories, American Samoa and Puerto Rico, illuminate the mechanics. This Essay concludes with a recommendation: Academic critics of colonialism should not allow the uncertainty that status manipulation produces to induce their silence. They should instead

* Sam Erman is a Professor of Law at the USC Gould School of Law. I gratefully acknowledge Greg Ablavsky, Hector Amaya, Julia Brown-Bernstein, Cathleen Calderon, Arabella Colombier, Rafael Cox Alomar, Joan Flores-Villalobos, Afam Ibekwe, Daniel Immerwahr, Paul Kramer, Shawn McDaniel, Natalia Molina, Michelle Ong, Moises Ponce-Zepeda, Christina Ponsa-Kraus, Kathy Pulupa, George Sánchez, Tom Sano, Ngoc Tran, Michelle Vasquez Ruiz, Gregory Velloze, Neil Weare, my editors at the *Columbia Human Rights Law Review*, and my unbeatable colleagues at Gould who have helped me individually, through our faculty workshop, and with endless library research.

speak carefully, listen hard, recognize their errors and fallibility, and acknowledge and correct their mistakes.

TABLE OF CONTENTS

INTRODUCTION

The United States is an empire that I participate in as a professor. From that perch, I seek to stand for self-determination by colonized peoples, against empire and colonialism, and in favor of liberal-democratic ideals.[1] I also submit briefs urging the federal judiciary to impose birthright citizenship on American Samoans despite their elected representatives' objections. Perceiving a conflict between my stated anti-colonialism and my contravention of some[2] colonized voices, two of my best students recently challenged me: "What gives? Don't you study the damage done by overconfident stateside academics who impose their views on colonized populations?" It is an incisive and difficult question that has inspired me to ask other ones: What structures cause conflicts among proponents of democracy and anti-colonialism? In the face of U.S. colonialism, what obligations do I, other stateside scholars, and all U.S. citizens have? Would inaction be acceptable? Would action necessarily involve colonial imposition?

I confronted similar questions in 2021, after Democrats won control of Congress and the White House. Suddenly, sufficient political will potentially existed to provide Puerto Rico an off-ramp from its more than half millennium of colonial governance. A group of anti-colonial legal scholars circulated a letter advocating that Congress offer statehood to Puerto Rico.[3] Signatories included some prominent Puerto Ricans—both on and off the Island—as well as many professors who (like me) work at stateside law schools and do not identify as Puerto Rican. But for quibbles over wording, I would have joined.

---

1. On the fraught role of the colonial academic in Indigenous struggles, see *Accomplices Not Allies: Abolishing the Ally Industrial Complex*, INDIGENOUS ACTION (May 4, 2014), https://www.indigenousaction.org/accomplices-not-allies-abolishing-the-ally-industrial-complex/ [https://perma.cc/VJ8C-8J44] (calling for a more all-encompassing on-the-ground collaboration with colonized communities and for a greater willingness to sacrifice the interests of academic institutions to anti-colonial causes than many academics—including myself—have typically displayed).

2. Some, but far from all. For people born in American Samoa who favor birthright citizenship, see *American Samoan Voices*, EQUALLY AM., https://www.equalrightsnow.org/american_samoan_voices [https://perma.cc/C4FZ-PNL3] (last visited Feb. 15, 2022). For those of the same view in other U.S. territories, see, for example, *infra* note 71.

3. Letter from Jack M. Balkin et al., Legal and Constitutional Scholars, to Nancy Pelosi et al., U.S. House of Representatives and U.S. Senate Leaders (Apr. 12, 2021), https://www.law.columbia.edu/sites/default/files/2021-04/Puerto%20Rico%20Letter.pdf [https://perma.cc/X4SL-69DS].

Afterward, a set of constitutional law professors based in Puerto Rico issued a critique: The offer of statehood could itself exacerbate the Island's colonial condition.[4]

These controversies are triumphs of empire. They conceal and thereby sustain coercion behind a façade of consent. Should American Samoans be U.S. citizens? Not if it means ending Indigenous control of the lands that are the cornerstone of the way of life there, as some claim. Is it appropriate to offer statehood to Puerto Rico? Not if doing so forecloses Puerto Ricans from choosing a better available alternative, as others argue. Framed this way, American Samoans and Puerto Ricans are each being offered a choice of evils: forfeit membership and political participation in the sovereign that governs them on the one hand, or abandon cultural survival or meaningful self-determination on the other. The U.S. empire's genius at self-preservation is that the choices are simultaneously posed and not posed. Does U.S. citizenship threaten the American Samoan way of life? Does an offer of statehood prevent Puerto Rico from securing a better alternative arrangement? Nobody can say—at least not in ways that garner consensus support. That uncertainty makes the questions vexing. Mix in a measure of misdirection, and the focus shifts from U.S. colonial oppression writ large to the demerits of competing strategies for ending colonial rule. The status quo could hardly hope for better terms of debate.[5] It is one reason that the revolutionary anti-colonial ideals on which the United States was founded have not prevented it from spending most of its history—123 years—with Puerto Rico as its colony.[6]

This Essay examines how it is that U.S. empire invisibly perpetuates itself. The focus is on a process that I term "status manipulation." Here, status encompasses formal polity-person and polity-place relationships that are generally perceived to be well-defined, pre-established, unchanging, and consequential. [7] Such

4. *See* José Julián Álvarez-González et al., *Letter of Constitutional Law in Puerto Rico* (Apr. 9, 2021), https://www.academiajurisprudenciapr.org/letter-of-constitutional-law-in-puerto-rico/ [https://perma.cc/9UX6-B5EA].

5. As I discuss at greater length below, colonialism can be understood in multiple ways. *See* notes 253–255 and accompanying text. I use colonialism here in the relatively narrow and particular sense of territory whose inhabitants are ruled by a democratic government in which they have no vote.

6. *Compare* THE DECLARATION OF INDEPENDENCE (U.S. 1776) *with* Treaty of Paris, Dec. 10, 1898, 30 Stat. 1754 (annexing Puerto Rico to the United States).

7. In choosing the term status, I draw on Henry James Sumner Maine's famous assertion that the "movement of the progressive societies has hitherto been a movement *from status to contract*." HENRY JAMES SUMNER MAINE, ANCIENT LAW:

relationships are envisioned as automatically conveying rights, privileges, and powers and as equally unthinkingly imposing obligations, detriments, and exclusions. Citizenship and statehood are often conceived in such terms. Regardless of how one becomes a citizen, holding that status means having access to the nation's territory, being endowed with Fourteenth Amendment privileges and immunities, and possessing protections from denaturalization.[8] Similarly, whatever a polity's path into statehood, every state benefits from the equal footing doctrine, elects two U.S. Senators, and enjoys constitutional federalism protections.

Crucially, the gap between the perceived fixity of status and its actual malleability yawns wide in the case of U.S. empire. After more than a century of constitutional development, even basic doctrinal questions in the area remain unsettled.[9] Does the Fourteenth Amendment guarantee birthright citizenship to everyone born in U.S. island territories? Which constitutional rights operate—or don't—in U.S. colonies? Is there any requirement either that all Americans be given a presumptive say in the government to which they are subject or that territorial status be temporary?[10] It is not clear.

The term manipulation nicely captures the frequency with which changes to status and the changeability of status have operated in the context of empire to sustain colonialism while hiding it from view. Even now, status manipulation insulates U.S. colonial governance from immediate anti-colonial reform. It does so by

---

ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 165 (Charles M. Haar ed., Beacon Press 1963) (1861). In that formulation, status referred to pre-ordained, relatively fixed status relationships such as those between parent and child. By contrast, contract characterized the individual legal relations that parties could structure and alter as they liked.

8. *But cf.* Rogers v. Bellei, 401 U.S. 815 (1971) (upholding power of Congress to impose certain conditions subsequent on naturalization outside the United States); 8 U.S.C. § 1451(e) (authorizing revocation of naturalization knowingly procured in violation of law).

9. Similarly, nearly a quarter millennium after the American Revolution, federal Indian law remains famously a "mess" of "incoherence." *Developments in the Law – Indian Law: Introduction*, 129 HARV. L. REV. 1653, 1653 (2016).

10. *But cf., e.g.*, U.S. CONST. amend. XIV, § 2 (exempting disfranchisements for "crime" from the abridgement of voting upon which the basis of a state's representation may be reduced); U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."); Rabia Belt, *Mass Institutionalization and Civil Death*, 96 N.Y.U. L. REV. 857 (2021); Rabia Belt, *Ballots for Bullets?: Disabled Veterans and the Right to Vote*, 69 STAN. L. REV. 435 (2017).

deploying what I term "spectral sovereignty": prophesies by U.S. officials that the United States will newly come to recognize a polity as possessing a preferable status in the nature of sovereignty, if only the colonial status quo is perpetuated a bit longer.[11] The vision provides an attractive path to self-governance and autonomy that requires no commitment to full integration into the United States by way of statehood or to wholesale exit from the United States via independence.

While status manipulation often results from choices by U.S. officials to promote and protect U.S. colonial governance, this Essay leaves aside questions of purposefulness. The argument here is structural: What actions have U.S. officials taken and with what results. Further research will be required to trace what U.S. officials foresaw and intended.

At a structural level, spectral sovereignty occurs when the U.S. empire dangles yet-to-be-achieved sovereignty before the populations of its colonies or strings along those who believe that their colony has already achieved a form of sovereignty that will soon be recognized as such.[12] Like parched and starved Tantalus tortured by sustenance just beyond his grasp, colonized U.S. people and places occupy subordinated statuses for which redemption is tantalizingly close but never quite within reach. This pattern of temptation and denial rests on the dual nature of sovereignty. It often appears to be a natural, well-defined, and essential status of nations. But in reality, it is a highly plastic

11. Polities may be subject to multiple legal regimes, each of which may recognize a polity's sovereignty to a greater or lesser degree. While one might speak of a polity's sovereignty being more or less spectral within each legal regime, this Essay focuses on U.S. officials and U.S. law. Thus, the pages that follow equate spectral sovereignty with instances where U.S. officials hint at a polity's sovereignty without expressly recognizing such sovereignty. Federally recognized Indian tribes that U.S. law treats as pre-constitutional sovereigns are therefore not spectral sovereigns, as the term is used in this Essay. By contrast, a polity that has sovereignty as a matter of international law, natural law, justice, or the polity's own law may nonetheless possess only spectral sovereignty vis-à-vis the United States if federal officials do not recognize the sovereignty in question.

12. On the uses to which the colonized also put sovereignty, see, for example, Frances Negrón-Muntaner, *Introduction*, *in* SOVEREIGN ACTS 3, 3–37 (Frances Negrón Muntaner ed., 2017); Madeline Román, *Sovereignty Still?*, *in* SOVEREIGN ACTS 285, 285–95. Importantly, I do not take a position on whether those who believe that their colony already has sovereignty are right as matters of natural, moral, or international law. Nor do I take a position on whether it would be better if the United States unequivocally recognized such a colony as a sovereign. Rather, my interest is in the ways that U.S. officials both encourage the pursuit of such sovereignty and refuse to recognize it wholeheartedly.

category. Depending on context, it can signify governance,[13] supremacy,[14] unity,[15] origination,[16] immutability,[17] equality,[18] consent,[19] self-determination or autonomy,[20] power,[21] participation,[22] recognition,[23] and more.[24] When pressed to clarify matters, U.S. officials equivocate. As we will see, they sometimes withhold one version of sovereignty from a colony while ostentatiously insisting that another version has not been foreclosed. At other times, they hint that a colony may be sovereign without reaching a definite conclusion.

---

13. *See, e.g.*, Puerto Rico v. Sanchez-Valle, 579 U.S. 59, 84 (2016) (Breyer, J., dissenting) (associating sovereignty with self-government).

14. *See, e.g.*, DON HERZOG, SOVEREIGNTY R.I.P., at xi (2020) ("The classic theory of sovereignty . . . holds that every political community must have a locus of authority that is . . . unaccountable . . . .").

15. *See, e.g.*, *id*. ("The classic theory of sovereignty . . . holds that every political community must have a locus of authority that is . . . undivided . . . ."); Fa'anofo Lisaclaire Uperesa & Adriana Maria Garriga-López, *Contested Sovereignties: Puerto Rico and American Samoa*, *in* SOVEREIGN ACTS 39, 40–41 (acknowledging the sovereignty tradition of "exclusive governmental powers" and describing a more recent turn to openness toward sovereigns coexisting in the same place and time).

16. *See, e.g.*, *Sanchez-Valle*, 579 U.S. at 62 (determining the existence of separate sovereignty with reference to the original source of a polity's authority).

17. *See, e.g.*, HERZOG, *supra* note 14 ("The classic theory of sovereignty . . . holds that every political community must have a locus of authority [that share key traits].").

18. *See, e.g.*, *id.* at xii ("Consider the UN Charter's declaration that 'the organization is based on the principle of the sovereign equality of all its Members.'" (quoting U.N. Charter art. 2, ¶ 1.)).

19. *See, e.g.*, *Sanchez-Valle*, 579 U.S. at 84–87 (Breyer, J., dissenting) (treating a people's consent to a political arrangement as a factor weighing in favor of recognizing that relationship as providing people sovereignty).

20. *See, e.g.*, Negrón-Muntaner, *supra* note 12, at 24–25 (describing theorizations of sovereignty as akin to autonomy); Uperesa & Garriga-López, *supra* note 15, at 42 (similar).

21. *See, e.g.*, HERZOG, *supra* note 14 ("The classic theory of sovereignty . . . holds that every political community must have a locus of authority that is unlimited . . . .").

22. *See, e.g.*, *Sanchez-Valle*, 579 U.S. at 86–87 (Breyer, J., dissenting) (treating a people's participation in creating a political arrangement as a factor weighing in favor of recognizing that relationship as providing sovereignty).

23. *See, e.g.*, Negrón-Muntaner, *supra* note 12, at 27 (describing how claims to sovereignty by Indigenous and other colonized peoples often rest on actual or potential recognition by colonial powers).

24. *Id.* at 4 (nested sovereignty); Uperesa & Garriga-López, *supra* note 15, at 60–61 (Indigenous political practice). Don Herzog collects additional sources in his account of why the world would be better without the concept of sovereignty. HERZOG, *supra* note 14, at x.

By dangling sovereignty before residents in some territories and by stringing along others on false pretenses that sovereignty already exists, the U.S. empire divides, frustrates, and seduces anti-colonialists. This Essay illuminates this status manipulation by examining controversies in the smallest and largest populated U.S. territories: American Samoa and Puerto Rico.

Part I sets the stage by reviewing how the U.S. Constitution was made safe for empire. That history, which has long engaged me as a scholar, is the basis for my public engagement with American Samoans' citizenship status and with the status of Puerto Rico.

Part II turns to American Samoa. Congress labels many natives of the territory noncitizen nationals despite the constitutional guarantee of citizenship to everyone "born . . . in the United States and subject to the jurisdiction thereof."[25] An exception to the constitutional rule exists for federally recognized Indian tribes. But American Samoa enjoys no such recognition, which raises another constitutional issue. American Samoa protects its Indigenous culture by preventing land sales to non-Indigenous buyers. But "Indian tribes" are generally the only subnational polities whom constitutional equal protection permits to draw such indigeneity-based lines. Unless, that is, American Samoa has a novel form of sovereignty that partially exempts it from constitutional equal protection. Some U.S. officials have intimated as much. That suggestion has provoked a division among anti-colonialists over whether to pursue the dangled sovereignty by rejecting citizenship or to doubt the dangle and demand citizenship.

Spectral sovereignty also haunts the struggle to end Puerto Rico's colonial condition, as Part III relates. Despite U.S. protests to the contrary, the primary threat to Puerto Rican self-government is Congress' power to intervene whenever it sees fit. When the Island became a self-governing Commonwealth in 1952, U.S. officials repeatedly declared that the arrangement was permanent, that it could only be altered by mutual consent of the parties, and that it endowed Puerto Rico with a status of a sovereign nature. Seven ensuing decades of U.S. actions have repeatedly contravened those declarations. But uptake of that disproof has been tempered by U.S. rhetoric and restraint that together encourage faith in some alternative form of sovereignty that may yet exist or that soon may be achieved. If true, and if Puerto Ricans would prefer such a relationship with the United States, then an offer of statehood looks suspiciously like an effort to preempt Puerto Ricans from achieving their desired post-colonial

25. U.S. CONST. amend. XIV, § 1.

status. But if one distrusts the whispered intimations that a new Puerto Rican sovereignty will soon arrive, then delaying offers of statehood appears merely to prolong colonialism's reign.

Part IV concludes the Essay with a plea for careful, active involvement by stateside scholars in status debates, notwithstanding the inevitability of mistakes. Better to err, confess, and course correct than to remain silent. Otherwise, status manipulation and the confusion that it sows will protect empire by inducing inaction.

I. A Constitution Safe for Empire, Again

From the Founding until the annexation of Alaska in 1867, the United States had never gone fifteen years without expanding its borders.[26] The young nation relentlessly stretched its sovereignty over new lands, killing, dispossessing, and subjugating Indigenous peoples as it grew.[27] After 1867, however, formal U.S. expansion screeched to a halt for more than three decades.[28] The cause was the constitutional settlement that emerged from the Civil War and its aftermath, a revolution in favor of rights, equality, and membership that I term the "Reconstruction Constitution." Its far-reaching provisions included several that sharply impeded empire: all Americans other than Indians were citizens; full constitutional rights extended to the full extent of U.S. borders; and every U.S. land other than the national capital was a current or future state. These constitutional consequences were repugnant to U.S. officials inclined to expand U.S. borders, yet steeped in the racism of their day. In response, they opted to leave U.S. borders fixed in place rather than to pursue expansion that would transform nonwhite inhabitants of distant lands into rights-rich citizens of future states.[29]

At the end of the nineteenth century, the naval strategist A. T. Mahan bemoaned this "constitutional lion" still barring the path of U.S. expansion.[30] Prior to 1898, the anti-imperial strands of the Reconstruction Constitution had held fast even as provisions protective

26. *See generally* SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 1–16 (2018) ("Reconstruction and its legacies reverberated through imperial ambitions and designs [of the United States]").

27. *Id.*

28. *Id.*

29. *Id.*

30. A.T. MAHAN, THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE 257 (1897).

of African-Americans had unraveled.[31] But then the United States annexed Hawai'i, Guam, Puerto Rico, the Philippines, and American Samoa between 1898 and 1900.[32] The islands contained millions of people who amounted to more than 10% of the U.S. population,[33] and the vast majority were people of color. The United States confronted a choice: honor the anti-imperial commands of the Reconstruction Constitution and integrate these peoples into the nation, or sever additional strands of the legal legacy of Reconstruction.[34] For many, the choice was obvious, and a constitutional counterrevolution to advance U.S. imperialism gained steam.

The impetus for this constitutional counterrevolution was racism. In the words of officials at the time, the new acquisitions housed "utterly alien" and racially inferior populations of "Malays, Tagals, Filipinos, Chinese, Japanese, Negritos, and various more or less barbarous tribes."[35] Between 1898 and 1901, members of Congress, executive branch officials, and legal academics rapidly innovated a new constitutional theory to hold these new peoples at arm's length.[36] This emergent doctrine gained its first articulation at the Supreme Court in Justice Edward Douglas White's plurality opinion in the 1901 *Insular Case* of *Downes v. Bidwell*.[37] "[M]uch preoccupied by the danger of racial and social questions" presented by the annexation of the Philippines and the other islands, White was "quite desirous . . . that Congress should have a very free hand" in setting imperial policy.[38] Here, he imagined what would be necessary in islands "peopled with an uncivilized race"[39] or "inhabited with

31. *See* Sam Erman, *"The Constitutional Lion in the Path": The Reconstruction Constitution as a Restraint on Empire*, 91 S. CAL. L. REV. 1197, 1204–06 (2018).

32. DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE 78–80 (2019).

33. *Id.* at 79.

34. ERMAN, ALMOST CITIZENS, *supra* note 26, at 1–2. *But cf. id.* at 13–16 (noting the many ways other than expansion that the United States was able to act as an empire during 1868–1898 without contravening the dictates of the Reconstruction Constitution).

35. PAUL A. KRAMER, THE BLOOD OF GOVERNMENT 117 (2006) (quoting Carl Schurz, *American Imperialism: An Address Opposing Annexation of the Philippines, January 4, 1899*, *in* AMERICAN IMPERIALISM IN 1898, at 77–84 (Theodore P. Greene ed. 1955)).

36. ERMAN, ALMOST CITIZENS, *supra* note 26, at 27–55.

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

38. Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 832 (1926).

39. *Downes*, 182 U.S. at 306.

people utterly unfit for American citizenship."[40] To make the Constitution safe for imperial expansion, he proposed that the new acquisitions be deemed so-called "unincorporated territories." In such places, he wrote, constitutional rights might not apply if they were not "fundamental" ones that were the "basis of all free government which cannot be with impunity transcended."[41] The Supreme Court unequivocally declared White's innovation to be binding doctrine in *Balzac v. Porto Rico* (1922).[42] Subsequent glosses on the test did little to clarify its application. In determining the extraterritorial effect of the Constitution in *Boumediene v. Bush* (2008),[43] the Supreme Court wrote approvingly of an alternative formulation that Justice John Harlan had proposed in a concurrence in another extraterritoriality case, *Reid v. Covert* (1957).[44] After considering the relevance of the *Insular Cases* to the matter before him, Justice Harlan had declared that rights should extend except when "impractical and anomalous."[45]

Though the Court treated unincorporated territory as a status, its defining characteristics were its novelty, manipulability, ambiguity, and uncertain consequences—especially where the Reconstruction Constitution's guarantees of statehood, citizenship, and rights were concerned. As to statehood, *Balzac* suggested that it was a question that the Constitution left solely to Congress.[46] Eventual admission to the Union might be mandatory, but the Court was disinclined to force the issue.[47] Some argued that despite the at-least-partial reversal of

40. *Id.* at 311.

41. *Id.* at 291; *cf.* Brief for Amicus Curiae Equally American Legal Defense and Education Fund in Support of Neither Party at 13–15, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 1649 (2019) (No. 18-1334) ("Neither *Downes*, *Dorr*, *Balzac*—nor any of the *Insular Cases*—support the broad assertion . . . that 'only' certain 'fundamental' rights apply to residents of the Territories."); *accord* Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. (forthcoming 2022).

42. Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922). Note that the correct spelling is Puerto Rico, not Porto Rico, as U.S. law eventually came to recognize.

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

44. Reid v. Covert, 354 U.S. 1 (1957).

45. *Id.* at 75 (Harlan, J., concurring); *Boumediene*, 553 U.S. at 770 (applying Harlan's test extraterritorially); *see also Developments in the Law—The U.S. Territories: American Samoa and the Citizenship Clause: A Study in* Insular Cases *Revisionism*, 130 HARV. L. REV. 1680, 1682–83 (2017).

46. *Balzac*, 258 U.S. at 311.

47. *Id.*

Dred Scott v. Sandford (1857)[48] by the Civil War and Fourteenth Amendment, the decision continued to forbid perpetual U.S. colonies. In response, the Court sidestepped.[49] After nearly a hundred and twenty-five years, that issue remains. None of Puerto Rico, Guam, and American Samoa have become states. All remain colonies, denied participation in national governance.[50] Only the Philippines achieved a different status: independence in 1946.[51]

The Court also balked at reaffirming or rejecting the applicability to unincorporated territories of the Fourteenth Amendment's guarantee of citizenship to those "born . . . in the United States, and subject to the jurisdiction thereof."[52] In 1904, *Gonzales v. Williams*[53] held that those born in unincorporated territories were not "aliens," but declined to decide whether they were citizens.[54] Federal agencies—and later Congress—took the Court's reticence as license to attach a new status to the people in U.S. colonies: noncitizen national.[55]

---

48. Dred Scott v. Sandford, 60 U.S. 393 (1857); *see id.* at 446 ("There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies . . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character.").

49. ERMAN, ALMOST CITIZENS, *supra* note 26, at 54; *see also Dred Scott*, 60 U.S. at 542 (McLean, J., dissenting) (also arguing that territories must be governed as future states, not perpetual colonies).

50. The same is true of the U.S. Virgin Islands and Northern Mariana Islands, both of which the United States annexed in subsequent years.

51. Proclamation No. 2695, 11 Fed. Reg. 7,517 (July 4, 1946). As discussed below, democratically chosen independence is among the permanent status outcomes that meet the United Nations' requirements for self-determination. *But cf.* Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 L. & CONTEMP. PROBS. 215 (2017) (contending that international law may not always permit a nation to deannex a subunit against that subunit's wishes).

52. U.S. CONST. amend. XIV, § 1.

53. Gonzales v. Williams, 192 U.S. 1 (1904). On the litigant Isabel Gonzalez's spelling of her last name, which differed from the Court's anglicization of it, see ERMAN, ALMOST CITIZENS, *supra* note 26, at 91.

54. *Gonzales*, 192 U.S. at 12.

55. Veta Schlimgen, *The Invention of "Noncitizen American Nationality" and the Meanings of Colonial Subjecthood in the United States*, 89 PACIFIC HIST. REV. 317, 344 (2020); ERMAN, ALMOST CITIZENS, *supra* note 26, at 60–62, 87, 102, 114–15; 8 U.S.C. § 1408 (1952); Neil Weare & Sam Erman, *Trump's Threat to Restrict Birthright Citizenship Has (Troubling) Precedent*, TAKE CARE (Nov. 13, 2018), https://takecareblog.com/blog/trump-s-threat-to-restrict-birthright-citizenship-has-troubling-precedent [https://perma.cc/CM8Y-JP8A]; 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 L. 659 (2008).

It is similarly murky which constitutional outcomes, other than tariff rules, turn on the question of territorial incorporation.[56] Most other rights have been extended to territories by sub-constitutional law, [57] eliminating opportunities for judicial determinations of the underlying constitutional questions. *Balzac* had held that the Constitution's Jury Clauses were not necessarily fully applicable in U.S. territories.[58] But even that result may not have survived the Court's 1957 determination in *Reid* that U.S. authorities must generally accord jury rights when trying U.S. citizens abroad.[59]

Indeterminate as the specific consequences of unincorporated status are, the status undoubtedly marks places as constitutionally subordinate and limits their residents to less than full constitutional rights.[60] Though the doctrine is rooted in judgments about peoples, it operates at the level of geography. As a formal matter, it is being in Guam—not being CHamoru[61]—that alters one's rights. As a practical matter, individuals may be denied citizenship and participation indefinitely, as America Samoans have experienced. Today, the United

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

57. *See, e.g.*, Philippines Organic Act of 1902, Pub. L. No. 57–245, § 1369, 32 Stat. 6912 (1902) (extending nearly the entire Bill of Rights to the Philippines); Andrew Kent, *The Jury and Empire: The* Insular Cases *and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 454–65 (listing source and applicability of federally protected fundamental rights in states and in the colonies, 1900–1920).

58. Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922).

59. Reid v. Covert, 354 U.S. 1 (1957); *see also* Duncan v. Louisiana, 391 U.S. 145 (1968) (declaring the right to a jury trial to be a fundamental Bill of Rights guarantee that the Fourteenth Amendment incorporated against the states). As discussed earlier, *Reid* also introduced a potential new test for deciding what constitutional rights operated in unincorporated territories. The test was fact intensive and could lead to a different result than that reached in *Balzac*.

60. *See, e.g.*, JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 5 (1985); Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridicial Discourse in the Spanish-American War*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 70–72 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001); ERMAN, ALMOST CITIZENS, *supra* note 26, at 7.

61. The CHamoru are a people indigenous to Guam. On the use of CHamoru, see Daily Post Staff, *Commission: CHamoru, Not Chamorro; Guam's Female Governor Is Maga'håga*, GUAM DAILY POST (Nov. 30, 2018), https://www.postguam.com/news/local/commission-chamoru-not-chamorro-guam-s-female-governor-is-maga [https://perma.cc/A9PD-VDV9].

States is both the world's longest-running experiment in democracy and home to the oldest colony in the world, Puerto Rico.[62]

More than forty years have passed since the Court has cited *Downes* as authority for upholding governmental action in unincorporated territory, perhaps a recognition of the decision's racist origins, democratic deficiencies, and endemic vagueness.[63] Yet the decision still binds the rest of the judiciary, which often applies it as one would expect—racist and colonial logics get extended,[64] chafed at,[65] and all muddled up.[66]

The result is doctrine that perverts the six Ws by pulling them through empire's looking glass.[67] Within the territorial nonincorporation[68] paradigm, *How*, *Why*, *Who*, *What*, *Where*, and *When* transform from foundations of factual investigation into obfuscating wordplay. The doctrinalist who seeks in high court decisions a *how* and *why* of the application of the Constitution to the colonies instead reprises Alice's experiences of receiving only non sequiturs in reply to questions to the red and black queens.

Rather than decide *how* constitutional rights operate in a territory, the Court focuses on *what* is insulated from their operation:

---

62. JOSE TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997).

63. *See* Stanley K. Laughlin Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 357 (2005); Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J. F. 284 (2020), https://www.yalelawjournal.org/forum/after-aurelius-what-future-for-the-insular-cases [https://perma.cc/3HQA-RRZL]; Ponsa-Kraus, Insular Cases *Run Amok*, *supra* note 41; Califano v. Gautier Torres, 435 U.S. 1, 3 n.4 (1978) (citing *Downes*).

64. *See* Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013) (applying *Downes v. Bidwell*, 182 U.S. 244 (1901)).

65. Aurelius Invs. v. Commonwealth of Puerto Rico, 915 F.3d 838, 854–55 (2019).

66. *See* 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/CGW5-M2T2] (discussing *Segovia v. United States,* 880 F.3d 384 (7th Cir. 2018), which rejected equal protection claims to absentee ballots by former residents of states who are now residents of colonies).

67. *See generally* LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE (1872).

68. I use the term territorial nonincorporation to emphasize that the doctrine was invented to exclude. On the origins of the more common term, territorial incorporation, see Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 799–800, n.8 (2005).

colonial governance. Formally, this *what* is really a *where*: unincorporated territory. And that *where* is at bottom a *who*. Ultimately, colonized people are the ones who lack rights, and it is the ostensible nature of a population that drives Congress' decisions to incorporate and admit to statehood.[69] The process is not reversible. Knowing *what*, *where*, and *who* does not reveal *how* citizenship, juries, equal protection, and other important constitutional guarantees will operate. The applicability of such guarantees remains largely unsettled where colonized people subject to colonial governance in unincorporated territories are concerned.[70]

The story is similar as to the reason for the territorial nonincorporation doctrine. The urtext of the nonincorporation doctrine is Justice White's *Downes* concurrence, which is rooted in a racism that the Supreme Court no longer accepts as a valid basis for constitutional doctrine. [71] Rather than explain *why* the doctrine survives, the Supreme Court has relied on the authority that the *when* of the past carries in a precedent-based system. "That which was, still is" has been reason enough for the justices.[72]

II. American Samoa and the (Phantom) Menace of Anti-Indigenous Citizenship

After ten years of researching the history of the relationship of the Constitution to empire, I began seeking to shape the future of that relationship more directly. I wanted to vindicate the same democratic ideals that I had perceived in the Reconstruction Constitution during

---

69. *See, e.g.*, ERMAN, ALMOST CITIZENS, *supra* note 26, at 7, 29–33, 54–55, 146–47, 158–59 (discussing this dynamic in the Puerto Rico context).

70. On lack of clarity today concerning the extent to which citizenship, future statehood, and constitutional rights vary across the incorporated-unincorporated divide, see Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CAL. L. REV. 1181, 1238 (2014).

71. Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Appellees with Respect to the *Insular Cases*, at 23–27; Fitisemanu v. United States, 1 F.4th 862 (2020) (No. 20-4017) (collecting sources).

72. Cepeda Derieux & Weare, *supra* note 63 (discussing the latest manifestation of the trend in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, 120 S. Ct. 1649 (2020)). *But cf.* James Romoser, *Justices Suggest that Congress Has Leeway to Exclude Puerto Rico from Federal Disability Benefits*, SCOTUSBLOG (Nov. 9, 2021), https://www.scotusblog.com/2021/11/justices-suggest-that-congress-has-leeway-to-exclude-puerto-rico-from-federal-disability-benefits/ [https://perma.cc/B7DZ-P5ZZ] (reporting that during oral argument in *United States v. Vaello-Madero*, Justices Neil Gorsuch and Sonia Sotomayor expressed openness to turning a page on the *Insular Cases*).

my studies: All Americans should be rights-rich citizens fully able to participate in national governance. I thus encouraged courts to reject the statuses that underlay U.S. colonialism and thereby to pull the United States and its people back out of the looking glass of U.S. empire.

My first major foray was organizing an amicus brief[73] in support of the citizenship claims of the plaintiffs in *Tuaua v. United States*.[74] The case squarely presented the question that the Supreme Court left open in *Gonzales v. Williams*: was birth in an unincorporated U.S. territory birth "in the United States" for purposes of the Fourteenth Amendment Citizenship Clause.[75] People in all but one unincorporated U.S. territory are statutorily guaranteed *jus soli* citizenship—citizenship based upon being born in the United States and subject to U.S. jurisdiction. The exception is inhabitants of American Samoa, whom the Executive Branch, then Congress, and finally some district and circuit courts have declined to recognize as citizens. Instead, these U.S. authorities label those born in American Samoa as "nationals, but not citizens, of the United States."[76] *Tuaua* arose when American Samoan-born U.S. nationals challenged their status designation and sought recognition as U.S. citizens.[77] Elected representatives, former elected officials, judges, and lawyers from other territories soon filed friend-of-the-court briefs supportive of the plaintiffs.[78] These amici valued how constitutionalized birthright

73. Brief of Citizenship Scholars as Amicus Curiae in Support of Appellants and Urging Reversal, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272) [hereinafter Brief of Citizenship Scholars, *Tuaua*]. I have been fortunate in my coauthors, whose active contributions have produced briefs that showcase their collective expertise. On the question of how historical amicus briefs can and should contribute to judicial decision making, see Sam Erman & Nathan Perl-Rosenthal, *Using History in Law (e.g., Historians' Briefs)*, *in* OXFORD HANDBOOK OF HISTORICAL LEGAL RESEARCH (Markus Dubber & Christopher Tomlins eds., 2018).

74. Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015).

75. 192 U.S. 1 (1904).

76. Immigration and Nationality Act of 1952, Pub. L. 82-414, § 308(1), 66 Stat. 163, 238 (1952) (codified at 8 U.S.C. § 1408(1)); *Tuaua*, 788 F.3d 300 (D.C. Cir. 2015); Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013); Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021); Weare & Erman, *supra* note 55.

77. *Tuaua*, 788 F.3d at 301.

78. Brief of the Puerto Rican Bar Association, Inc., as Amicus Curiae in Support of Petitioner, Tuaua v. United States, 788 F.3d 300 (Mar. 2, 2016) (No. 15-981); Brief for Amici Curiae Members of Congress and Former Governmental Officials in Support of Petitioners, Tuaua v. United States (Mar. 2, 2016) (No. 15-981), 2016 WL 860960; Brief of Amicus Curiae Virgin Islands Bar Association in Support of Appellees' Petition for Rehearing, Fitisemanu v. United

citizenship would be insulated against congressional whims,[79] at least absent an accompanying conferral of independence.[80]

As a legal historian opposed to racist and colonial doctrines, I co-authored an amicus brief highlighting two facts about the past that were favorable to the *Tuaua* plaintiffs: (1) the Fourteenth Amendment had codified a longstanding common law rule of birthright citizenship for those born anywhere within the nation's sovereignty[81]; and (2) the noncitizen U.S. national was a twentieth-century innovation by the political branches that the Supreme Court had expressly declined to adopt.[82]

States, 1 F.4th 862 (Aug. 6, 2021) (No. 20-4017); Brief of Former Federal and Local Judges as Amici Curiae in Support of Petitioners, Tuaua v. United States, 579 U.S. 902 (Mar. 2, 2016) (No. 15-981).

79. *See, e.g.*, Brief for Amici Curiae Members of Congress and Former Governmental Officials in Support of Petitioners, at 3, Tuaua v. United States, 579 U.S. 902 (Mar. 2, 2016) (No. 15-981) ("If birthright citizenship really is something that persons born in the Territories enjoy only as a matter of legislative grace, then there is nothing to stop Congress from denying citizenship to persons born in Puerto Rico, Guam, the U.S. Virgin Islands, or the Northern Mariana Islands tomorrow.").

80. Brief of Citizenship Scholars as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance, at 26–31, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. May 12, 2020) (No. 20-4017).

81. From the Founding into the twentieth century, the United States had followed the common law rule that birth within U.S. sovereignty and allegiance brought U.S. citizenship. That was the antebellum rule to which *Dred Scott v. Sandford*, 60 U.S. 393 (1857) infamously made a single exception for people of African descent. In overturning *Dred Scott*, the Fourteenth Amendment codified the common law rule, which remained in effect throughout the nineteenth century. Within that codification, birth within U.S. sovereignty became birth "in the United States" and birth within U.S. allegiance became "subject to the jurisdiction" of the United States. For a recent review of this evidence, see Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020).

82. One reason that this point mattered was that the district court had tried to extract from the fractured opinions in support of the judgment in *Downes v. Bidwell* a Supreme Court holding that birth in unincorporated territories was not birth "in the United States" for Citizenship Clause purposes. Tuaua v. United States, 951 F. Supp. 2d 88, 94–96 (D.D.C. 2013). But that question was unanimously and expressly reserved by the justices just three years after *Downes*, in *Gonzales v. Williams*, 192 U.S. 1, 12 (1904), as we told the U.S. Court of Appeals for the District of Columbia Circuit. Brief of Citizenship Scholars, *Tuaua*, *supra* note 73, at 25.

The government of American Samoa submitted its own brief opposing birthright citizenship.[83] In its view, the result that I favored would itself be a colonial imposition.[84]

A. The Divide-and-Conquer Status Trap

The conflict between American Samoa's brief and others filed in *Tuaua* illuminates status manipulation at work. Elected American Samoans, academic amici, friend-of-the-court officials and lawyers from other territories, and stateside American Samoan litigants all oppose colonialism. Yet they find themselves at odds over the desirability of Fourteenth Amendment *jus soli* citizenship in American Samoa. That opposition arises from the novel constitutional statuses with which the United States has undergirded its colonial governance. By tethering anti-Indigenous coercion to democratic forms, the Court has forged a doctrine that forces a hard choice. Articulating the relevant doctrine in the seemingly fixed and universal terms of status and the Constitution then raises the stakes by creating the expectation that the choice for one territory will apply to all.[85] Inter-territorial division is the predictable result.

The United States made its Constitution safe for empire by displacing key tenets of the Reconstruction Constitution with novel statuses consistent with colonialism. Many residents of territories chafe against those statuses. But others have found reasons to embrace them. Such embraces can put self-determination at odds with democracy, as with demands that American Samoans be allowed to be noncitizen Americans in potentially perpetual colonies.[86] Such a result

---

83. Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. Aug. 25, 2014) (No. 13-5272) [hereinafter Brief for Intervenors]. The elected, nonvoting representative of American Samoa in Congress and the government of American Samoa have together filed several briefs in litigation in which I have coauthored amicus briefs. For simplicity, I refer to arguments made in these briefs as the arguments that American Samoa has made in its briefs. These briefs are collected at *Impact Litigation*, EQUALLY AM., https://www.equalrightsnow.org/litigation [https://perma.cc/2PH4-Q6EF].

84. Brief for Intervenors, *supra* note 83, at 32–35.

85. Jamal Greene makes a similar point about rights in HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

86. *But cf.* Rafael Cox Alomar & Christina Duffy Ponsa-Kraus to Raúl Grijalva, *Proposed Compromise Status Legislation for Puerto Rico and Companion Memorandum with Background & Commentary* 4, COLUMBIALAW (Oct. 1, 2021), https://www.law.columbia.edu/sites/default/files/202110/Compromise%20Proposal%20Puerto%20Rico%20Status%20Legislation_0.pdf [https://perma.cc/KT6F-

cannot be squared with the Reconstruction Constitution's democratic vision of a national people composed only of citizens and of a national territory made up only of states, future states, and its capital.

Honing in on the Fourteenth Amendment sharpens the problem. American Samoa had no say in the ratification of the Fourteenth Amendment, entered the United States under highly constrained circumstances, and cannot vote on alterations to the Fourteenth Amendment. Any presupposition of the primacy of the Fourteenth Amendment could itself be colonial.[87] But ignoring the principle that subnational entities may not withhold national citizenship[88] would be to disserve a liberal-democratic purpose of the amendment: protecting vulnerable U.S. populations from antagonistic subnational majorities.[89] Consider a noncitizen national living stateside. She suffers particular detriment from her noncitizenship, but gets no vote in the American Samoan elections of those who oppose recognition of her as a U.S. citizen.[90]

The nub of the conflict is the relationship between citizenship and the Constitution. In their briefs, American Samoan elected officials emphasize the possibility that citizenship could have unwelcome

---

NFXE] (arguing that self-determination cannot culminate in outcomes such as territorial status).

87. Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960*, 60 AM. J. LEGAL HIS. 311, 314–21 (2020) (describing the circumstances of American Samoa's entry into U.S. sovereignty).

88. Slaughter-House Cases, 83 U.S. 36, 72–73 (1872) (clarifying that the Fourteenth Amendment Citizenship Clause applies to birth in territories as well as in states).

89. Rose Cuison Villazor, *Problematizing the Protection of Culture and the* Insular Cases, 131 HARV. L. REV. F. 127, 129 (2018) (noting tension between vindicating the Fourteenth Amendment as a protector of vulnerable individuals and ensuring Indigenous self-determination); *Developments in the Law, The U.S. Territories: American Samoa and the Citizenship Clause: A Study in* Insular Cases *Revisionism*, 130 HARV. L. REV. 1680, 1685 (2017) (positing "fundamental conflict between our commitments to local self-determination and to individual rights").

90. Brief of League of United Latin American Citizens, Asian Americans Advancing Justice, and the National Asian Pacific American Bar Association as Amicus Curiae in Support of Petitioner at 19–24, Tuaua v. United States, 788 F.3d 300 (Mar. 2, 2016) (No. 15-981); REVISED CONST. OF AMERICAN SAMOA, art. II, § 7, https://new.asbar.org/revised-constitution-of-american-samoa [https://perma.cc/W2KF-QW5A]; American Samoa Code Annotated §§ 6.0210-11, https://new.asbar.org/section/title-06-elections/chapter-02-registration/ [https://perma.cc/254J-RHAB].

consequences.[91] One worry is that receipt of U.S. citizenship could legally preclude independence.[92] But that concern would not apply to a judicial recognition that the Citizenship Clause uses "United States"

91. Elected officials in American Samoa are not the first U.S. colonized peoples who sought to turn non-citizenship to their advantage. Early-twentieth-century Puerto Rican political leaders demanded independence, ERMAN, ALMOST CITIZENS, *supra* note 26, at 125, 132. They well knew that Congress had no intention of providing it. *Id.* Their goal was to embarrass federal officials and thereby secure concessions from them. *Id.* And they did get officials' attention. One reason that Congress recognized Puerto Ricans as U.S. citizens in 1917 was to foreclose demands for independence by signaling that the Island was a permanent part of the United States. *Id.* at 132. Puerto Rico's elected, non-voting representative in Congress, Luis Muñoz Rivera, opposed the transformation of his people into such "citizens of an inferior class." *A Civil Government for Porto Rico: Hearings Before the H. Comm. on Insular Affairs on H.R. 13818*, 63d Cong. 54 (1914) (a Bill to Provide a Civil Government for Porto Rico, and for Other Purposes).

Today, independence is no longer unthinkable for U.S. colonies. Indeed, it is historical fact: the United States granted independence to several Pacific islands after World War II. Claiming a local national citizenship is now a strategy that proponents of independence use to gain leverage where the majority in a territory favors remaining within U.S. sovereignty. *See, e.g.*, Dennis Hevesi, *Juan Mari Bras, 82, Voice for Separate Puerto Rico, Dies*, N.Y. TIMES (Sept. 11, 2010), https://www.nytimes.com/2010/09/11/us/politics/11bras.html [https://perma.cc/NV3S-PB8L] (describing Mari Bras's pro-independence strategy of renouncing his U.S. citizenship).

Another reason to disfavor citizenship is the threat that it can pose to a colonial population's sense of being a distinct national people. But that result is not inevitable. In Puerto Rico, an exceptionally strong sense of national identity co-exists with over a century of U.S. citizenship. Brief for Members of Congress and Former Governmental Officials as Amici Curiae in Support of Petitioners, Tuaua v. United States (2016) (No. 15-981), 2016 WL 860960. *See generally* JORGE DUANY, PUERTO RICAN NATION ON THE MOVE: IDENTITIES ON THE ISLAND AND IN THE UNITED STATES (2002) (defining and describing Puerto Rican nationalism). U.S. citizenship has facilitated mass Puerto Rican migration to the continental United States, which has created a diaspora binding Puerto Rico to the United States. *See id.* at 193–226. But American Samoa also has a large stateside diaspora notwithstanding its lack of citizenship. *Compare* SAMOA BUREAU OF STATISTICS, 2016 CENSUS BRIEF NO. 1, 3 (Oct. 30, 2017), https://www.sbs.gov.ws/images/sbs-documents/2016-Census-Brief-No_1%20(Revised%20Version2).pdf [https://perma.cc/XX4J-9JGU] (reporting 2016 population of 195,979), *with* CIA, THE WORLD FACTBOOK (July 20, 2021), https://www.cia.gov/the-world-factbook/countries/american-samoa/#people-and-society [https://perma.cc/J6YE-575M] (estimating 2021 population of 46,366) *with* UNITED STATES CENSUS BUREAU, NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER ALONE OR IN ANY COMBINATION BY SELECTED GROUPS (2019), https://data.census.gov/cedsci/table?q=pacific&g (on file with the *Columbia Human Rights Law Review*) (reporting an additional 204,640 individuals of Samoan or American Samoan descent living in the United States).

92. *See, e.g.*, Brief for Intervenors, *supra* note 83, at 34–35 (treating citizenship as incompatible with subsequent independence).

to mean all lands within U.S. sovereignty. Any such ruling would be equally applicable to the Philippines during the period of U.S. sovereignty there, yet the archipelago achieved independence in 1946.[93]

The other concern is that citizenship could expose American Samoans' traditional practices to rigorous and perhaps fatal constitutional review.[94] Elected representatives of American Samoa see equal protection as a particular threat.[95] They hope that evading citizenship will prevent the Indigenous Samoan way of life from being sacrificed on the altar of fidelity to the Constitution.[96] By contrast, litigation out of Puerto Rico has sought to wield constitutional equal protection as a weapon against inequitable treatment of the territory.[97] Elected American Samoans' concern that citizenship could transform equal protection from a territorial shield into an anti-Indigenous sword is itself the product of a second status manipulation—the dangling of spectral sovereignty. Remove that dangle, and the basis for conflict might lessen or vanish.

B. Dangling Spectral Sovereignty

For Indigenous populations in U.S. territories, unforgiving Supreme Court review poses a threat to their traditional ways of life.[98] In response, a number of lower federal courts have proposed that

---

93. Contrary to the overheated arguments sometimes made in opposition to birthright citizenship in territories, see *Tuaua v. United States*. 788 F.3d 300, 305 n.6 (Mar. 2, 2016), the recognition that many Filipinos were U.S. citizens prior to 1946 would not mean that they remained citizens after the Philippines gained its independence in 1946. *See* Brief for Citizenship Scholars as Amici Curiae Supporting Appellees at 26–31, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. May 12, 2020) (No. 20-4017) (describing a long history of changes in people's nationalities accompanying changes in a territory's nationality) [hereinafter Brief for Citizenship Scholars, *Fitisemanu*].

94. Brief of Intervenor Appellants at 17–24, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2020) (No. 20-4017).

95. *Id.*

96. *Id.*

97. Brief of the Puerto Rican Bar Association, *supra* note 78, at 18; Uperesa & Garriga-López, *supra* note 15, at 41–42.

98. Courts are not the only threats, of course. Fearing congressional impositions, American Samoan leaders asked Congress in the 1940s to wait ten years before legislating for their territory. *See* Dardani, *supra* note 87, at 352. On executive branch actions that undercut American Samoan home rule, see *id*. at 330 ("[T]he first few decades of U.S. Navy rule over American Samoa caused Samoans to increasingly view this centralized form of rule and policies as despotic, abusive, and disrespectful toward Samoan culture.").

American Samoa and other territories might find refuge in the territorial nonincorporation doctrine. Reinterpreting the *Insular Cases*, these courts have sought to secure territories a measure of self-determination typically associated with sovereignty. Were the Supreme Court inclined to transform this for-now-spectral sovereignty into binding national doctrine, U.S. citizenship for American Samoans would neither impede nor facilitate the effort. Nonetheless, two courts of appeals have recently set citizenship and spectral territorial sovereignty at odds. They argued that American Samoa is a colony, that the Constitution poses a real threat to American Samoan culture, and that citizenship might exacerbate that threat. These premises leave American Samoa a highly constrained choice—so long as it remains within U.S. sovereignty—either face potential cultural obliteration or embrace colonial status to somewhat improve their odds. Just like that, status manipulation and coercion combine to cast colonialism as consent.

1. The Constitutional Threat

American Samoa's briefing warns that the Indigenous Samoan way of life, *fa'a Samoa*, faces an existential threat from the U.S. Constitution, albeit not directly from the Citizenship Clause of the Fourteenth Amendment. [99] In its modern form, [100] *fa'a Samoa* prominently features Christian beliefs, family clans (*'aiga*) headed by *matai*, and group-based landholding.[101] *'Aiga* hold more than 90% of the territory's land. [102] *Matai* manage their respective *'aiga*'s communally possessed holdings. [103] To preserve and honor these practices and beliefs, American Samoa integrates them into its institutions and laws—often in ways that could raise constitutional concerns. [104] For instance, the territory reserves governmental

99. *See, e.g.*, Brief for Intervenors, *supra* note 83, at 26–31.

100. *Cf.* Uperesa & Garriga-López, *supra* note 15, at 52–54, 59–60 (noting how American Samoan practices have changed over time).

101. Proposed Intervenors' Motion to Dismiss, or, in the Alternative, Cross-Motion for Summary Judgment at 12–14, Fitisemanu v. United States, 426 F. Supp. 3d 1155 (D. Utah 2018) (No. 1:18-cv-00036) [hereinafter Proposed Intervenors' Motion to Dismiss]; Brief for Intervenors, *supra* note 83, at 26–31; Tuaua v. United States, 788 F.3d 300 (D.C. Cir., Aug. 25, 2014) (No. 13-5272).

102. *See supra* note 101.

103. *Id.*

104. Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN PAC. L. & POL'Y J. 69 (2001).

positions for *matai*,[105] bars alienation of communal lands to anyone who is of less than 50% Samoan descent,[106] and allows locally enforced prayer curfews.[107] As American Samoa and other commentators have observed, all of these practices could be vulnerable to constitutional challenges if they took place in a state.[108]

American Samoa is right to worry. Consider the threat of an equal protection challenge to America Samoa's land-alienation and *matai* office-holding laws. [109] Consequential governmental classifications by race are typically subject to strict scrutiny. Indeed, when the Appellate Division of the High Court of American Samoa confronted such a challenge to American Samoa's land-alienation law in *Craddick v. Territorial Registrar* (1980), [110] it applied strict

105. *See* Proposed Intervenors' Motion to Dismiss, *supra* note 101, at 12; Reply of the Honorable Eni F.H. Faleomavaega as Amicus Curiae in Support of Defendants at 7, Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. Dec. 12, 2012) (No. 1:12-cv-01143-RJL) [hereinafter Reply of the Hon. Eni F.H. Faleomavaega]; Ian Falefuafua Tapu, Comment, *Who Really Is a Noble? The Constitutionality of American Samoa's Matai System*, 24 ASIAN PAC. AM. L.J. 61, 79 (2020).

106. *See* Proposed Intervenors' Motion to Dismiss, *supra* note 101, at 6; Brief for Intervenors, *supra* note 83, at 26–31; Am. Samoa Code Ann. § 37.0204(a–b).

107. Proposed Intervenors' Motion to Dismiss, *supra* note 101 at 14; Hall, *supra* note 104, at 97–98.

108. Equal protection may be the greatest threat, but challenges could also come under Due Process Clause, the Nobility Clause, the Establishment Clause, and the Fifteenth Amendment. *See* Tapu, *supra* note 105, at 79; Laughlin, *supra* note 63, at 345; Reply of the Hon. Eni F.H. Faleomavaega, *supra* note 105, at 7–8; Brief for Intervenors, *supra* note 83, at 12–14, 26–31; Hall, *supra* note 104, at 104–06; Rice v. Cayetano, 528 U.S. 495 (2000). Though American Samoa does not emphasize it in its briefing, the territory also has laws barring same-sex marriages that are similarly vulnerable. Fili Sagapolutele & Jennifer Sinco Kelleher, *American Samoa Questions Gay Marriage Validity in Territory*, SEATTLE TIMES (July 10, 2015), https://www.seattletimes.com/nation-world/american-samoa-questions-gay-marriage-validity-in-territory/ [https://perma.cc/N2VY-BLTZ].

109. *See* Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, HARV. L. REV. F. 127, 140 (2018); Laughlin, *supra* note 63, at 345–463. *But cf.* Ponsa-Kraus, Insular Cases *Run Amok*, *supra* note 41. As Ponsa-Kraus points out:

> [I]t may be possible to achieve the objective of cultural accommodation in the territories by employing ordinary constitutional doctrines, such as standard equal protection doctrine[;] . . . the claims advanced under the rubric of the repurposing project could and should be decoupled from the Insular Cases jurisprudence and reframed and adjudicated under . . . these doctrines.

Id. at 8.

110. Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (1980).

scrutiny[111] and upheld the law as necessary to the government's compelling interest in preserving *fa'a Samoa*.[112] But there is no guarantee that the U.S. Supreme Court would agree.[113] Indeed, outside of the contexts of higher education and remediation of past identifiable racial discrimination, the U.S. Supreme Court has never recognized a consequential racial classification that it then upheld.[114]

Alternatively, American Samoa could seek uncertain refuge in the Supreme Court's Indian law doctrines. Two cases illustrate the promise and peril of such an approach. *Morton v. Mancari* (1974)[115] upheld federal hiring preferences for Indians—"members of 'federally recognized' tribes"—on the ground that the preferences were "political rather than racial."[116] The Court has also indicated that federally recognized tribes may exclude non-Indians from tribal elections.[117] By contrast, *Rice v. Cayetano* (2000)[118] declared that the Fifteenth Amendment barred a state from denying its non-Indigenous citizens the right to vote for trustees of a program to benefit Indigenous Hawaiians.[119] In Justice Anthony Kennedy's words, the tribal voting law was "the internal affair of a quasi sovereign," while that of the state was a forbidden "racial classification."[120]

The cases can be reconciled in several ways, with varying implications. On one view, *Rice* is primarily a Fifteenth Amendment case. The problem with the Hawai'i law was that its racial classification applied to voting. That would bode relatively well for

111. *Id.* at 12.
112. *Id.*
113. *Cf.* Brief for Intervenors, *supra* note 104, at 26–31 (arguing that if courts determine that Fourteenth Amendment *jus soli* citizenship attaches to birth in American Samoa, it could also emerge in the land-alienation contexts that "prior determinations of constitutionality do not control").
114. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a law-school affirmative-action plan that was held to include an express racial classification); Cooper v. Aaron, 358 U.S. 1 (1958) (upholding desegregation order mandating admission of Black students to previously all-white school); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 502–15 (2003); Stephen M. Rich, *Inferred* Classifications, 99 VA. L. REV. 1524, 1526 n.4 (2013) (collecting sources). The Supreme Court is poised to revisit the higher-education context in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, 980 F.3d 157 (2020), *cert granted* 142 S. Ct. 895 (2022).
115. Morton v. Mancari, 417 U.S. 535 (1974).
116. *Id.* at 553 n.24.
117. Rice v. Cayetano, 528 U.S. 495, 520 (2000).
118. *Id.*
119. *Id.*
120. *Id.* at 520–21.

American Samoa's land-alienation law, though less well for the *matai* officeholding rule, which has a closer connection to voting. Alternatively, *Rice*'s primary objection could be that the Indigenous beneficiaries of Hawai'i's law were not members of a federally recognized tribe. That would be bad for both American Samoan laws because American Samoans are also not a federally recognized tribe. A third possibility is that *Rice* condemns the voting preference for Indigenous Hawaiians because it was enacted by a state rather than by a tribe. If so, lack of federal recognition of Samoans as a tribe would again weigh against the American Samoan laws. But, the status of American Samoa as an unincorporated territory rather than as a state could weigh in the American Samoan laws' favor.[121]

Several courts and commentators have responded to the otherwise challenging constitutional landscape for American Samoa's laws by seeking to transform the *Insular Cases* from swords of empire into shields for indigeneity. In the Tenth Circuit's words:

> The flexibility of the Insular Cases' framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution. This same flexibility permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course.[122]

Some courts have operationalized this interpretation by demanding that colonies have access to the sweet along with the bitter.

---

121. It is also possible to make this argument without emphasizing nonincorporation. *See* U.S. CONST., art. IV, § 3, cl. 2 ("The Congress shall have Power to . . . make all needful Rules and Regulations respecting the Territory . . . belonging to the United States . . . .").

122. Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021); *see also* Rose Cuison Villazor, Commentary, *Problematizing the Protection of Culture and the* Insular Cases, 131 HARV. L. REV. F. 127, 129–30, 134, 139 (2018), https://harvardlawreview.org/2018/04/problematizing-the-protection-of-culture-and-the-insular-cases/ [https://perma.cc/4H6L-ND2T] (quoting *Developments in the Law - The U.S. Territories*, 130 HARV. L. REV. 1680 (2017)) ("[The] *Insular Cases*, which have long been associated with colonialism and racism, have now become 'bulwarks for cultural preservation'"); Laughlin, *supra* note 63, at 374 (nonterritorial incorporation doctrine "allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that their cultures are substantially different from those of the mainland United States and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures."). *But cf.* Ponsa-Kraus, Insular Cases *Run Amok*, *supra* note 41 (arguing that the same flexibility might be found in the alternative, traditional constitutional doctrines).

One version of this approach identifies the bitter as Indigenous Pacific Islanders remaining unable to rely on any rights other than fundamental ones that express principles which are the basis of all free government. Here, the accompanying sweet is that the same restrictions apply to anyone seeking to overturn territorial laws protective of Indigenous culture. In *Bishop v. Hodel* (1987),[123] the D.C. Circuit used such reasoning to uphold a judgment enforcing the territory's land-alienation laws against a due process challenge to the peculiar structure of the American Samoan courts.[124] An alternate interpretation takes as its bitter colonial residents' lack of access to individual rights that it would be impractical and anomalous for them to have. The corresponding sweet protects Indigenous culture by declaring it impractical and anomalous to impose a constitutional provision that "the culture of the island would make . . . unworkable" and that would "damage or destroy the indigenous culture or some aspect of it."[125] The Ninth Circuit deployed such reasoning in *Wabol v. Villacrusis* (1990)[126] to uphold a Northern Mariana Islands law barring sales and long-term leases of land to those not of Northern Mariana Islands descent.[127]

Such reclamations are only attractive because the rest of the constitutional landscape is abysmal.[128] It is only where ordinary

123. 830 F.2d 374.

124. *Id.*; *see also* Rayphand v. Sablan, 95 F. Supp. 2d 1133 (D.N. Mar. I. 1999) (upholding the apportionment of the Northern Mariana Islands Senate against an equal protection challenge), *summarily aff'd*, Torres v. Sablan, 528 U.S. 1110 (2000).

125. Laughlin, *supra* note 63, at 332; *see also* Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN PAC. L. & POL'Y J. 69, 96–97 (2001) (advancing a test which requires that courts take into consideration "the relationship between the right and the Indigenous culture where the right is to be applied" in order to prevent anomalous applications).

126. 958 F.2d 1450 (1990).

127. *Id.*; *see also* Cuison Villazor, *supra* note 122, at 135–36 (describing how "what may be viewed as the redemptive use of the *Insular Cases*" also found its way into the court's reasoning in *Tuaua v. United States*).

128. Whether the *Insular Cases* are capable of redemption has been the subject of considerable recent debate. *Compare* Public Hearing on Resolution 56-36 Supporting U.S. House Resolution 279, May 4, 2021 (citing testimony by Christina D. Ponsa-Kraus) (arguing that the Supreme Court should overrule the *Insular Cases*) *with* Written Testimony of Julian J. Aguon "Testimony on Resolution 56-36 (COR)," 36th Guam Legislature, Hagatna, Guam, May 10, 2021 (cautioning against too hastily abandoning the *Insular Cases*). Those more partial to the *Insular Cases* presume that the Supreme Court may be willing to permit territories to protect Indigenous cultures in ways that it would not permit states to do. I am dubious.

constitutional interpretation forbids attempts to preserve Indigenous culture and to promote Indigenous self-determination that the reclamations offer benefits. *Bishop* rests on the further depressing assumption that American Samoa is an individual-rights desert. *Wabol*'s consequentiality depends on the even-worse premise that the Constitution would otherwise demand self-defeating rulings that would transform the Constitution into a "genocide pact for diverse native cultures."[129] Nor is there any guarantee that the Supreme Court will ultimately accept either approach. No reasoned decision of the

---

Such an approach would require the Court to engage in doctrinal incoherence. Either the justices would assign special value to Indigenous cultures that happen to exist in unincorporated territories, or they would exacerbate a problem with one hand while mitigating it with the other. Consider, for instance, how *Rice v. Cayetano* would have to fare for the reclamation project to matter. Either *Rice* must not apply to Fifteenth Amendment cases in the territories or *Rice* must control Fourteenth Amendment cases in the states. But evidence of either is anemic. Courts have consistently struck down territorial voting laws similar to those at issue in *Rice*. *See* Davis v. Guam, 932 F.3d 822 (9th Cir. 2019) (statute restricting voting to native inhabitants of Guam served as proxy for race, in violation of Fifteenth Amendment); Davis v. Commonwealth, 844 F.3d 1087 (2016) (provision of constitution restricting voting in certain elections to individuals of Northern Marianas descent violated the Fifteenth Amendment). The Supreme Court has not extended *Rice* beyond the Fifteenth Amendment context. *Cf.* Fisher v. Texas, 570 U.S. 297, 309 (2013) (citing *Rice* in a Fourteenth Amendment context for a general point about the evils of race-based decision making); Parents Involved v. Seattle, 551 U.S. 801, 746 (2007) (same). Other courts continue to give *Mancari* effect in Fourteenth Amendment cases. *See, e.g.*, EEOC v. Peabody Western Coal Co., 773 F.3d 977 (2014).

Even if the Court is inclined to treat Indigenous cultures more favorably in U.S. territories (or to uphold the elements of the political deal that created the current relationships between the Pacific colonies and the United States), it can do so just as easily without a doctrine of territorial nonincorporation as with one. Indeed, it is unclear what purpose the doctrine of territorial nonincorporation today serves other than to muddy the question of birthright citizenship in the territories. The United States has not had any incorporated territories since Alaska and Hawai'i became states, and it is unlikely to ever have another incorporated territory. It is possible that no individual constitutional right rests on the distinction between incorporated and unincorporated territories. The only constitutional provision that clearly does turn on the distinction is the Uniformity Clause. And there is little to prevent the Court from preserving such rare results by relocating them to the Territory Clause. Given that the Court has yet to recognize a constitutional shield for Indigenous cultures in the colonies, it could if it were so inclined do so now under the Territory Clause and the Indian Commerce Clause, without even involving the *Insular Cases*. U.S. CONST. art. IV, § 3, cl.2; *Id.* art. I, § 8, cl. 4; *accord* Ponsa-Kraus, Insular Cases *Run Amok*, *supra* note 41.

129. *Wabol*, 958 F.2d at 1462.

Supreme Court endorses them.[130] Indeed, it is possible that such results will only survive as long as they manage to avoid a slot on the Supreme Court's argument calendar.[131]

2. The Absence of Reasons in the Doctrinal Argument Against U.S. Citizenship

None of the disheartening doctrinal intricacies above provides authority for American Samoa's objection that "extending U.S. citizenship to all American Samoans could, in turn, subject existing American Samoan traditions to heightened—and potentially fatal—constitutional scrutiny."[132] Citizenship is formally irrelevant to such doctrines. Equal protection may not be denied to "any person," regardless of citizenship. The Fifteenth Amendment flatly bars race discrimination in voting, citizen or no. The *Insular Cases* distribute rights based on the status of places, not people.[133]

This irrelevance has been reality-tested in the other territories, which all have statutory citizenship. In the words of elected representatives and former officials from those other territories, "Birthright citizenship status has not entered into the analysis of how other constitutional rights apply to residents of U.S. Territories that enjoy birthright citizenship."[134]

---

130. *But cf.* Rayphand v. Sablan, 95 F. Supp. 2d 1133 (D.N. Mar. I. 1999) (upholding malapportioned legislative chamber because it is not a basis of all free government), *summarily aff'd in* Torres v. Sablan, 528 U.S. 1110 (2000).

131. One of the "key reasons offered against" creating a federal district court in American Samoa "is the concern that a federal court would impinge upon Samoan culture and traditions." GOV'T ACCOUNTABILITY OFF., AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT (Sept. 18, 2008), https://www.gov info.gov/content/pkg/GAOREPORTS-GAO-08-1124T/html/GAOREPORTS-GAO-08-1124T.htm [https://perma.cc/9LZM-SB9B].

132. Intervenor Defendant-Appellants' Opening Brief at 18, United States v. Fitisemanu, 1 F.4th 862 (10th Cir. 2021) (No. 20-4019).

133. *See also* U.S. CONST. art. I, § 9, cl. 8 (barring the United States from granting any "title of nobility" and drawing no distinction between citizens and others); *id.* amend. I ("Congress shall make no law respecting an establishment of religion"); *id.* amend. V ("No *person* shall be . . . deprived of life, liberty, or property, without due process of law.") (emphasis added); *id.* amend. XIV ("[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law . . . .) (emphasis added).

134. Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials in Support of Plaintiffs-Appellants and in Support of Reversal at 22–23, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272).

Conversely, the argument that only noncitizenship can save Indigenous cultures in unincorporated territories has catastrophic implications for the Native peoples of Guam and the Northern Mariana Islands, whose birth in those lands brings them statutory U.S. citizenship.[135] Here again, colonialism grounded in constitutional status relationships ties the fates of the territories together in ways that cause their interests to diverge.

American Samoa's briefs, the legislative and executive authorities that American Samoa cites, and the judicial decisions favoring its position are all notable for what they lack: doctrinal reasons that U.S. citizenship might threaten *fa'a Samoa*. Instead, American Samoa quotes a stray pair of legislative and executive ipse dixit. The first is a 1961 report to the Committee on Interior and Insular Affairs. The report recounted that many Samoans were "gravely troubled as to whether the 'equal protection of laws' doctrine implicit in citizenship would not conflict with the 'Samoan land for Samoans' doctrine and the *matai* system."[136] The second is this statement to another Senate committee by Deputy Assistant Attorney General Robert B. Shanks of the Office of Legal Counsel: "[M]aintenance of fa'a Samoa . . . stems in part from the fact that American Samoans are noncitizen nationals rather than American citizens."[137] Neither American Samoa's briefs nor the underlying sources elaborate on why citizenship might threaten *fa'a Samoa* and the communal land ownership and *matai* system that are integral to it.[138]

---

135. 8 U.S.C. §§ 1101(a)(38), 1401(a), 1407.

136. Reply of the Honorable Eni F.H. Faleomavaega as Amicus Curiae in Support of Defendants at 4, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) [hereinafter Reply of the Hon. Eni F.H. Faleomavaega, D.C. Circuit] (quoting Study Mission to Eastern (American) Samoa 9, Report of Sens. Long & Gruening to the Sen. Comm. on Interior and Insular Affs., S. Doc. No. 33, 87th Cong., 1st Sess. (1961)).

137. Proposed Intervenors' Motion to Dismiss, *supra* note 101 (quoting *Revised Constitution of American Samoa: Hearing Before the Subcomm. on Energy Conservation and Supply of the Comm. on Energy and Natural Res.*, 98th Cong. 46 (1984) (Statement of Robert B. Shanks)) (lack of emphasis restored).

138. *See also* Ivy Yeung, *The Price of Citizenship: Would Citizenship Cost American Samoa Its National Identity?*, 17 ASIAN PAC. L. & POL'Y J. 1, 28–34 (2016). Ross Dardani provides additional history of this pattern of asserting that citizenship would destroy Indigenous culture while being "somewhat indefinite as to how the destruction of the Samoa way of life would result." Dardani, *supra* note 87, at 354–55, 336–41 (adding that many American Samoans believed that they became U.S. citizens when American Samoa joined the United States in the early twentieth century, that American Samoans favored U.S. citizenship prior to World

Stranger still is the menacing circular logic by which recent courts of appeals have endorsed American Samoa's argument. In *Tuaua*, the D.C. Circuit acknowledged American Samoa's concern that citizenship "could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa's traditional, racially based land alienation rules."[139] It also acknowledged that the question could be determined by the courts, but declined to order the development of the factual record.[140] Though it identified no other legal consequence of U.S. citizenship to which American Samoa objected,[141] the court found the otherwise legally naked opposition to a judicial recognition of citizenship to be a sufficient basis on which to withhold it.[142] It was as if a playground bully successfully demanded lunch money because otherwise "who knows what I might do," then patted himself on the back for respecting his victim's choices.[143]

By streamlining and clarifying the argument that citizenship could threaten *fa'a Samoa*, the Tenth Circuit's 2021 *Fitisemanu v. United States* decision made the argument's fundamental flaw more apparent. The court perceived:

> [I]nsufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa'a Samoa*. The constitutional issues that would arise in the context of America Samoa's unique culture and social structure would be unusual, if not entirely novel, and therefore unpredictable . . . . Citizenship simply

War II, and that the first people to voice the unelaborated fear that citizenship would threaten traditional ways of life were U.S. naval officials).

139. Tuaua v. United States, 788 F.3d 300, 310 (D.C. Cir. 2015).

140. *Id.* ("The resolution of this dispute would likely require delving into the particulars of American Samoa's present legal and cultural structures to an extent ill-suited to the limited factual record before us.").

141. *Id.* at 311 (describing the consequences of citizenship as its "rights, obligations, and implications for cultural identity" and identifying no rights or obligations other than possible equal protection consequences).

142. *Id.* at 310 ("We hold it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives.").

143. The analogy equates the judges in *Tuaua* with the entire federal judiciary. Doing so reflects the Essay's larger metonym between individual state actors and U.S. empire. But the point can be made without the device. Imagine a playground gang with a nasty leader. We would not think that a member should pat herself on the back for respecting victims' choices to fork over money if she first told the victims, "If you don't give me your lunch money, who knows how our leader might force it out of you."

> cannot be confidently declared irrelevant to how the Constitution will affect American Samoa.[144]

Here, the Tenth Circuit correctly cast the relevant question as whether citizenship would trigger any doctrines harmful to *fa'a Samoa*. As it realized, land alienation laws are not the only territorial policies protective of Indigenous Samoan culture that could face constitutional challenges. The court also avoided the mistake of declaring itself capable of determining the impact of citizenship but disinclined to do so. Nor did the court rely solely on unsupported speculation. Were the omnipresent possibility that a legal decision might produce an unintended legal consequence grounds for inaction, courts could not function.

Where *Fitisemanu* stumbled was in its attempt to provide a reason to fear citizenship:

> Citizenship status has often been an important factor in determining how the Constitution applies to the unincorporated territories. For example, the "most common interpretation of *Reid* [*v. Covert*]," the 1957 case that introduced the "impracticable and anomalous" standard, was that "citizenship [was] the fundamental variable" in determining the constitutional rights afforded to inhabitants of unincorporated territories. [Kal] Raustiala, [*Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (2009),] at 150.[145]

The first red flag is that only a single example supports the claim that citizenship often operates as described. Nor does the example feature a case about unincorporated territories; it involves jury rights of U.S. citizens abroad. The events in that case occurred outside unincorporated territories and did not involve their peoples. Justice Harlan's concurrence proposed an impractical and anomalous standard for extraterritorial application of the Constitution that the full Court recounted with approval in another exterritoriality case, *Boumediene v. Bush*.[146] Tellingly, however, *Fitisemanu* did not cite either case for its claim that citizenship is the fundamental variable for determining rights in the unincorporated territories. That is because *Reid* and *Boumediene*'s discussion of the importance of citizenship was centrally concerned with a different context: the rights of people subject to U.S. control beyond U.S. borders. Raustiala

144. Fitisemanu v. United States, 1 F.4th 862, 881 (10th Cir. 2021).
145. *Id.*
146. Boumediene v. Bush, 553 U.S. 723, 759–60, 770 (2008).

presumably knows all this perfectly well. He says nothing to the contrary on page 150 of his book. Indeed, page 150 contains no mention of unincorporated territories. It is only through selective quotation that *Fitisemanu* creates a contrary impression.[147]

By contrast, good reasons do exist to cleave the question whether unincorporated territories are part of the United States for Citizenship Clause purposes from the question whether constitutional rights will apply in unincorporated territories in ways that harm Indigenous cultures. Territorial nonincorporation doctrine distributes rights without regard to citizenship status, both in theory and in practice. Across nearly a decade of litigation, American Samoa, its bevy of lawyers, and more than half a dozen federal judges have failed to turn up a single piece of doctrinal evidence to the contrary.

The underlying logics of the Citizenship Clause and the individual rights provisions already discussed provide an additional reason to separate the question of citizenship from that of rights. Only the Citizenship Clause defines its geographic scope.[148] It may thus require citizenship for those born in unincorporated territories for reasons inapplicable to other individual rights provisions. Citizenship is also uniquely a status. Rights vary as one moves from state to territory to foreign country; citizenship status remains fixed. For the resident of an unincorporated territory, it is migration, not citizenship, that brings the full suite of constitutional rights.

Nor is there any general relationship in U.S. law between citizenship, status of place, and non-application of constitutional provisions. Places in which birth has never conferred U.S. citizenship and those in which birth always has can both be excepted from fidelity to some constitutional provisions. Courts regularly apply *forum non conveniens* to give effect to foreign proceedings that depart from U.S. constitutional practices.[149] The premise of the halting, incomplete incorporation of the Bill of Rights through the Fourteenth Amendment is that states may decline to enforce some constitutional rights.[150] That was even more true during the early years of the U.S. oceanic empire, for today the United States is a "far more truly nationalized juridical

147. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 150 (2009).

148. *But cf.* U.S. CONST., art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.").

149. Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1706–13 (2017).

150. *Id.*; Christina Duffy Ponsa-Kraus, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1020–27 (2009).

union."[151] Native nations within U.S. borders have also long been excepted from various constitutional provisions, both prior to the era of statutory U.S. citizenship for American Indians and afterward.[152]

But in the context of Indigenous peoples specifically, a relationship exists between sovereignty, Fourteenth Amendment *jus soli* citizenship, and constitutional exceptionalism. Indian tribes are heirs to a pre-constitutional sovereignty retained at the grace of the United States.[153] Birth within the allegiance of tribes is not birth within the jurisdiction of the United States as the Fourteenth Amendment uses the term. Hence, Indians are not Fourteenth Amendment *jus soli* citizens.[154] Once their tribes gain federal recognition, those tribes gain the *Mancari* exception to equal protection.

3. Spectral Native Sovereignty

Were American Samoa to achieve a status akin to that of federally recognized tribes, it would place them on the favorable side of the *Rice*/*Mancari* divide, thereby eliminating an existential constitutional threat to *fa'a Samoa*. Similarities between American Samoa and a tribe provide a surface plausibility to the notion. Both are polities. Both are heavily Indigenous. Both seek self-governance.[155] Both are committed to preserving the culture of Indigenous people conceptualized as having held full pre-constitutional sovereignty.[156] But this strategy does not demand fleeing from citizenship, which all

151. Sanford Levinson, *Citizenship and Equality in an Age of Diversity: Reflections on* Balzac *and the Indian Civil Rights Act*, 29 CENTRO 76, 100 (2017).

152. *See, e.g.*, Elk v. Wilkins, 112 U.S. 94, 102 (1884) (confirming that those born owing primary allegiance to Indian Tribes are not born "subject to the jurisdiction" of the United States for purposes of the Citizenship Clause); Morton v. Mancari 417 U.S. 535, 551 (1974) (upholding hiring preferences for American Indians because of "the unique legal status of Indian tribes," notwithstanding constitutional equal protection); United States v. Lara, 541 U.S. 193, 210 (2004) (permitting the federal government to retry individuals already prosecuted for the same underlying offense by a tribe).

153. Gregory Ablavsky, *With the Indian Tribes: Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1070–71 n.219, 1072–73 n.226 (2018) (collecting sources).

154. *Elk*, 112 U.S. at 103.

155. *See, e.g.*, Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1862 (2019) (describing how Native Nations act as polities engaged in extensive self-governance).

156. *See, e.g.*, Constitution of the Cherokee Nation, 1999, art. VI, sec. 14 (1999) ("Members of the Council and all Executive Officers shall be bound by oath . . . to promote the culture, heritage and traditions of the Cherokee Nation . . . .").

American Indians already have by statute. Rather, it envisions pursuing a type of sovereignty akin to that of a federally recognized tribe. Where citizenship enters is the notion that the today-still-spectral status could, if recognized, be judged to be inconsistent with the Fourteenth Amendment *jus soli* citizenship that is unavailable to American Indians born owing primary allegiance to a tribe.

Circuit courts have encouraged the pursuit of spectral sovereignty to the exclusion of Fourteenth Amendment *jus soli* citizenship by associating the latter with heightened constitutional scrutiny. Most directly, *Tuaua* analogized American Samoa to an Indian tribe, then questioned whether birth owing allegiance to the territory really was birth subject to the jurisdiction of the United States.[157] The analogy began by recounting the 1884 *Elk v. Wilkins* affirmation that members of Indian tribes did not meet the Fourteenth Amendment *jus soli* citizenship requirement of birth "subject to the jurisdiction" of the United States.[158] In that case, Justice Harlan had agreed while dissenting from the judgment on other grounds.[159] Repeating the phrasing in Justice Harlan's *Elk* dissent that the rights and obligations of citizenship were "obviously inconsistent with the semi-independent character of such a tribe,"[160] the D.C. Circuit declared itself "skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States's sphere of sovereignty."[161]

This judicial dangling of a status akin to that of Indian Tribes is disingenuous. The surface similarity between American Samoa and federally recognized tribes mostly extends to Native Hawaiians. But they lost in *Rice v. Cayetano*. It is tempting to distinguish Hawai'i from American Samoa on the ground that American Samoa is overwhelmingly Indigenous, with nearly 90% of its population being of

157. Tuaua v. United States, 788 F.3d 300, 306–08 (D.C. Cir. 2015).

158. *Id.*

159. *Elk*, 112 U.S. at 110 (Harlan, J., dissenting).

160. *Tuaua*, 788 F.3d at 306 (quoting *Elk*, 112 U.S. at 119–20 (Harlan, J., dissenting)).

161. *Id.* On significant limits to American Samoa's ability to self-govern, see, for example, Eleasalo Vaalele Ale, United Nations Pacific Regional Seminar on the Implementation of the Third International Decade for the Eradication of Colonialism (May 9–11, 2018) ("[O]ur Legislature cannot now override a veto of a bill by the Governor without the approval of the Secretary of Interior. Our Constitution cannot be amended without the approval of Congress . . . . The Secretary of Interior continues to appoint the senior members of our Judiciary. . . . Territory [is] vulnerable to unilateral U.S. actions. Too often, these federal actions expose us to harmful impacts in ways we cannot anticipate . . . .").

Samoan descent.[162] But tribal recognition is up to Congress, which has chosen to structure American Samoa as a territory rather than a tribe. *Rice* rejected precisely the notion that indigeneity should trump formal federal recognition.

Nor is there reason to think that federal recognition will be forthcoming. Congress has put the question beyond the power of the courts and executive officials by statutorily limiting eligibility for recognition to continental tribes.[163] The Ninth Circuit affirmed the constitutionality of that discrimination against U.S. islands.[164] Moreover, Congress has declined to act on proposed legislation that would end the exclusion.[165]

Most telling is the timing. Spectral sovereignty has not manifested in lawsuits involving attacks on the cultural practices of Indigenous peoples in the territories. It has not been the basis of federal decisions rejecting such attacks.[166] Nor has it prevented the

---

162. *Compare* U.S. CENSUS BUREAU, *Quick Facts: Hawaii* (July 1, 2019), https://www.census.gov/quickfacts/HI [https://perma.cc/ZGY8-SZ8H] (reporting that Hawai'i's population is between 10% and 35% Indigenous) *with* CIA, WORLD FACTBOOK (June 29, 2021), https://www.cia.gov/the-world-factbook/countries/american-samoa/#people-and-society [https://perma.cc/MLW6-VVHR] (reporting that American Samoan's population is 89% of Samoan descent and 95% or more of Pacific Islander (including the Philippines) descent).

163. *See* Rose Cuison Villazor, *Problematizing the Protection of Culture and the* Insular Cases, 131 HARV. L. REV. F. 127, 141 (2018) (citing 25 C.F.R. §§ 83.1, 83.3 (2017)); *cf.* Brief for Amici Curiae Members of Congress and Former Governmental Officials in Support of Petitioners, *supra* note 73 ("And no matter the result here, the territorial governments' powers will derive not from inherent sovereignty but from congressional authorization . . . .").

164. *See* Villazor, *supra* note 163. As Zachary S. Price explains, courts could reconceptualize the division of sovereignty within U.S. borders so that tribes, states, and territories are each the national government's co-sovereigns. Doing so would shift the question from what status does each place have to how governmental functions are or should be divvied up between polities. Zachary Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657–727 (2013). But when presented the opportunity to do so in a Double Jeopardy case, the Court contemplated the possibility and declined it. Puerto Rico v. Sanchez Valle, 579 U.S. 59 (2016).

165. *See* Villazor, *supra* note 163, at 141 n.100 (citing A Bill to Express the Policy of the United States Regarding the United States' Relationship with Native Hawaiians, S. 2899, 106th Cong. (2000); S. REP. No. 112-251 (2012)).

166. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (1990); *cf.* Territory of American Samoa v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. 2017) (accepting an analogy between tribal treaties and the American Samoan deeds of cession while hastening to add "that American Samoa is a territory, not a Native American tribe," and that there was no claim "that the federal courts should treat American Samoa . . . in the same manner that they treat Native American tribes"),

federal judiciary from establishing constitutional bounds on American Samoans' autonomy.[167] Instead, spectral sovereignty has figured in citizenship litigation. Here, the argument that American Samoa might have a quasi-tribal status that entitles it to governmental power, territorial autonomy, and constitutional exclusions has had no concrete consequences—other than to maintain the exclusion of American Samoans from citizenship.

If courts are being disingenuous by dangling spectral status as a solution to American Samoa's problems, their juxtaposition of unincorporated territories and Indian Tribes also illuminates a core truth: Native dispossession in the continental United States and U.S. colonialism in the islands are related episodes in the long, continuous history of U.S. empire.[168]

That shared history and its corresponding consequences underlie common moral claims to distinctive treatment.[169] Modern Indigenous and colonized communities typically first came within U.S. sovereignty through a process that was either less than voluntary or predicated upon promises of distinctive treatment.[170] Such

---

rev'd on other grounds 822 Fed. Appx. 650 (9th Cir. 2020). *But cf.* United States v. Gov't of Guam, 2018 WL 6729629 (D. Guam 2018) (analyzing preferences for Native CHamoru through the framework for continental American Indians).

167. *See* King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975) (mandating jury trials in American Samoa).

168. *See, e.g.*, DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019) (collecting sources), *reviewed by* Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188 (2021) (collecting further sources).

169. Rennie, *supra* note 149.

170. ERMAN, *supra* note 26, at 5, 27–34 (describing annexation of Puerto Rico without its population's consent and accompanying promises by U.S. officials of statehood, rights, and citizenship); Dardani, *supra* note 87, at 314–21 ("It is important to remember that cessions by Samoan leaders were the result of external pressures from European and U.S. colonizers . . . ."); RICHARD E. WELCH, JR., RESPONSE TO IMPERIALISM: THE UNITED STATES AND THE PHILIPPINE-AMERICAN WAR, 1899-1902, at 1–42 (1979) (describing the annexation of the Philippines in opposition to active war of independence); PAUL KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES 87–159 (2006) (same); CHRISTOPHER CAPOZZOLA, BOUND BY WAR: HOW THE UNITED STATES AND THE PHILIPPINES BUILT AMERICA'S FIRST PACIFIC CENTURY, ch. 1 (2020) (same); ROBERT F. ROGERS, DESTINY'S LANDFALL: A HISTORY OF GUAM 108 (rev. ed. 2011) ("At no time in the transfer of sovereignty did American or Spanish officials consult with the inhabitants of Guam."); 48 U.S.C. § 1681 Note, Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, §§ 103, 501(a), 603–04, 805 (containing provisions on self-government, no jury trials, and descent-based

constitutional exceptionalism remains crucial for Native and Indigenous peoples seeking to prevent their cultures and self-governance from falling victim to ordinary constitutional interpretation and to general U.S. republican governance. But as important as the exceptions are, they are also inadequate to redress the entirety of the wrongs done.[171]

The situation is similar for American Samoa. The territory is a colony; ultimate authority over it lies in a U.S. government body in which the territory's people do not participate. In turn, Samoan culture and American Samoan self-governance rely on the grace of Congress—

---

restrictions on land transfers); *see also, e.g.*, Treaty with the Cherokee (1791) art. II, https://avalon.law.yale.edu/18th_century/chr1791.asp [https://perma.cc/26YT-RZNN] ("The undersigned Chiefs and Warriors, for themselves and all parts of the Cherokee nation do acknowledge themselves and the said Cherokee nation, to be under the protection of the said United States of America, and of no other sovereign whosoever."); *id.* art. VIII ("If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please."); MISSALL, JOHN & MARY LOU MISSALL, THE SEMINOLE WARS: AMERICA'S LONGEST INDIAN CONFLICT (2004). *Compare* Vaalele Ale, *supra* note 161, at 2 ("Our relationship with the United States is one built on consent . . . .") *with* Federal Defenders' Combined Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgement and in Support of Federal Defenders' Cross-Motion for Summary Judgement at 28, Topasna Borja v. Nago (D. Haw. Dec. 21, 2021) (No. 20-00433 JAO-RT) ("Unlike every other Territory [including American Samoa], CNMI entered the United States voluntarily . . . ."). *But see* Isaac Dookhan, *Changing Patterns of Local Reaction to the United States Acquisition of the Virgin Islands, 1865-1917*, *in* 15 CARIBBEAN STUDIES 50, 71 (1975) (describing a majority vote among Virgin Islanders in favor of the then-looming U.S. annexation).

171. Indeed, a chasm exists between what the United States should do and what it will do to right the wrongs done to American Indians. The question is not whether Indigenous claims will be vindicated in full, but rather what fractional measures can be achieved and what prior gains can be preserved. Of course, when the whole is so large, fractional does not mean inconsequential. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (holding a large portion of Oklahoma to be Indian Territory for Major Crimes Act purposes as a result of a congressional reservation of that land to the Creek nation). On the need to defend gains made, see, for example, Brief for Historical and Legal Scholars as Amicus Curiae Supporting Respondents at 3, Nebraska v. Parker, 576 U.S. 1095 (2015) (No. 14-1406), 2015 WL 9412675 (urging the Court not to "ignore more than 100 years of precedent" in a way that would harm Native interests); Brief for Amici Curiae Historians and Legal Scholars Gregory Ablavsky, Bethany R. Berger, Ned Blackhawk, Daniel Carpenter, Matthew L.M. Fletcher, Maggie Mckinley, and Joseph William Singer in Support of Respondents, Dollar General Corp. v. Miss. Band of Choctaw Indians, 576 U.S. 1021 (2015) (No. 13-1496), 2015 WL 6445771 (seeking to preserve tribes' "inherent authority to subject nonmembers to civil suit in tribal court" (quoting Brief for the Petitioners, at 16)) (emphasis omitted).

and of the Secretary of the Interior, to whom the political branches have delegated near-total authority.[172] Sufficient political will to end U.S. colonial governance of American Samoa has never materialized. Instead, American Samoa finds itself on a legal tightrope. Its self-government and its protection of Indigenous Samoan culture teeter on the edge of free fall, vulnerable to Congress rattling the federal statutory underpinnings or to courts suddenly cutting the constitutional slack in the line.[173]

Spectral Native sovereignty here reemerges, now opposing citizenship with lurking threats instead of empty promises.[174] The danger is that Supreme Court scrutiny of American Samoa's local laws could bring pressure to conform them to U.S. constitutional norms. Such pressure will especially be likely if the justices are inclined to conclude that circuit courts have been protecting Indigenous cultures in the territories by evading *Rice*. Litigation on how the Citizenship

172. *See* 48 U.S.C.A. § 1661 (2022) ("[A]ll civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct . . . ."); Exec. Order 10264 (June 29, 1951) ("The administration of American Samoa is hereby transferred from the Secretary of the Navy to the Secretary of the Interior . . . ."). The United Nations lists American Samoa as a non-self-governing territory. *Non-Self-Governing Territories*, UNITED NATIONS (Aug. 17, 2021), https://www.un.org/dppa/decolonization/en/nsgt [https://perma.cc/F42Y-H8M3]. This reflects a judgment that American Samoa is not an independent nation, integrated into the United States, in free association with the United States, nor in another political status that its people freely chose. G.A. Res. 1541 (XV), at ann. principle VII(b) (Dec. 15, 1960); G.A. Res. 2625 (XXV), at ann. 124 (Oct. 20, 1970). To achieve free association, American Samoa would have to gain the "right to determine its internal constitution without outside interference." G.A. Res. 1541 (XV), at ann. principle VII(b) (Dec. 15, 1960). It is in this sense that I label American Samoa a colony. *But cf.* Kirisitina Gail Sailiata, The Samoan Cause: Colonialism, Culture, and the Rule of Law 76–77 (2014) (Ph.D. dissertation, Univ. of Mich.) ("In 2001, [a United Nations] committee named American Samoa to the roster of global polities in need of decolonization. This political move infuriated [American Samoa] Governor Tauese Sunia . . . because the UN refused to acknowledge the Samoan territory as self-governing. [Among other things, the objection] was also an obvious re-direction of the conversation away from the colonial relationship between Samoa and the United States."); Uperesa & Garriga-López, *supra* note 15, at 62 (similar); Statement by Eleasalo Vaalele Ale, *supra* note 163 ("[W]e, the people of American Samoa, do not consider ourselves a colonized people. We do not live under a regime for which colonization must be eradicated. Our relationship with the United States is one built on consent, trust and respect for our Indigenous people and our Samoan culture.").

173. Uperesa & Garriga-López, *supra* note 15, at 60–61.

174. *See* Brief for Intervenors, *supra* note 83 (asserting that constitutional *jus soli* citizenship would endanger Indigenous practices in American Samoa).

Clause operates in American Samoa raises a similar risk. It is possible to resolve the issue without mention of American Samoa's laws or of constitutional individual rights,[175] but some justices may be primed[176] to consider the symbolic stakes of citizenship.[177] If they do view matters through the lens of spectral Native sovereignty,[178] they may perceive citizenship to be at odds with constitutional exceptionalism.

Two forms of spectral sovereignty combine to discourage American Samoa from seeking to mitigate its colonial plight. Spectral territorial sovereignty offers space for self-government and cultural autonomy, but only so long as the Supreme Court looks away. If American Samoa leans too hard on this constitutional exceptionalism, it risks being toppled off its high wire by a Supreme Court rebuke. Spectral Native sovereignty links citizenship to similar constitutional scrutiny. American Samoa hazards a similar plummet if it reaches too far toward constitutionally guaranteed citizenship as a marker of national membership. Together, these spectral sovereignties imply that American Samoa faces highly constrained options: accept U.S. colonialism roughly as is or risk even greater colonial subordination.

III. The Dread and Allure of Puerto Rico's Spectral Sovereignty

If American Samoa fares best when the Supreme Court ignores it, Puerto Rico's recent experiences illustrate that disregard is no panacea. Indeed, it can be fatal.

In 2017, Hurricane Maria devastated Puerto Rico. Floods raged, roads became unusable, buildings and infrastructure collapsed,

---

175. For an example of such an approach, see Brief of Citizenship Scholars, *Tuaua*, *supra* note 73, at 26–31 (urging the D.C. Circuit Court to recognize birthright citizenship for persons born in American Samoa).

176. I use the word "primed" in two senses. Some justices may be primed to consider the symbolic stakes of citizenship in such a context. But the elected officials in American Samoa have also repeatedly primed them to do so through briefs declaring that citizenship and constitutional constraints go hand in hand. *See, e.g.*, Intervenor Defendant-Appellants' Opening Brief, *supra* note 132, at 18 ("U.S. citizenship cannot be conferred as an isolated, standalone benefit; instead, it necessarily comes together with its concomitant . . . obligations.") (internal citation omitted); Reply of the Hon. Eni F.H. Faleomavaega, D.C. Circuit, *supra* note 136, at 4.

177. On the gap between citizenship as a formal legal status and citizenship as a powerful symbol, see ERMAN, ALMOST CITIZENS, *supra* note 26, at 127–59.

178. The sovereignty is spectral with regards to American Samoa because U.S. law does not clearly recognize its existence. I do not suggest that the sovereignty of federally recognized tribes is spectral.

and the fragile electrical system crumbled.[179] Federal emergency relief was desperately needed. Yet relief arrived far too slowly, especially in comparison to the responses in states battered by hurricanes.[180] On the Island, the power stayed out for almost a year.[181] Preventable deaths multiplied[182] as the initial official death toll of sixteen swelled to around three thousand.[183]

The disastrously inadequate federal response demonstrated that Puerto Rico's status quo had become intolerable. Lacking a single vote in Congress, the Island was dependent on the United States, yet without any leverage or representation. The colony needed access to federal power, and instead got U.S. neglect.[184]

I responded with an op-ed stating: "It is time for the U.S. to fulfill its ideals. Absent a constitutional amendment, a newfound appetite among Puerto Ricans for independence, or Supreme Court activism, the only legitimate path is to offer Puerto Rico the option to

---

179. JORDAN R. FISCHBACH ET AL., AFTER HURRICANE MARIA: PREDISASTER CONDITIONS, HURRICANE DAMAGE, AND RECOVERY NEEDS IN PUERTO RICO vii–viii, xiii (2020).

180. Danny Vinik, *How Trump Favored Texas over Puerto Rico*, POLITICO (Mar. 27, 2018), https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557 [https://perma.cc/S5YL-DG99].

181. FISCHBACH ET AL., *supra* note 179, at vii–viii.

182. *Hurricane Maria Project*, P.R.'S CTR. INVESTIGATIVE JOURNALISM, QUARTZ, & ASSOCIATED PRESS (Dec. 19, 2018), https://hurricanemariasdead.com/ [https://perma.cc/M9H9-PNJ2].

183. *Puerto Rico: Trump Compares Maria and Katrina Deaths*, BBC (Oct. 4, 2017), https://www.bbc.com/news/world-us-canada-41487814 [https://perma.cc/A2R2-7NS7]; FISCHBACH ET AL., *supra* note 179, at 95.

184. Yarimar Bonilla disagrees: "Well-meaning observers speculate: would this happen in a US state? The answer is Yes. The answer is . . . abandoned urban spaces in Detroit, poisoned water reserves in Flint, displaced communities in New Orleans." Yarimar Bonilla, *The Coloniality of Disaster: Race, Empire, and the Temporal Logics of Emergency in Puerto Rico, USA*, 78 POL. GEOGRAPHY 102–81 (2020). While I agree that "to understand Puerto Rico we must place it within this larger archipelago of racialized neglect, connected through deep currents of racialized governance," I am not convinced that statehood and accompanying congressional representation are irrelevant. Detroit, Flint, and New Orleans are blue cities in purple or red states. Were each its own state, the cities might have found additional ways to mitigate or minimize the neglect. On non-resolution of the status question as an impediment to progress on other issues in Puerto Rico, see Christina Duffy Burnett [Ponsa-Kraus], "*'None of the Above' Means More of the Same: Why Solving Puerto Rico's Status Problem Matters," in* NONE OF THE ABOVE: PUERTO RICANS IN THE GLOBAL ERA 73 (Frances Negrón-Muntaner ed., 2007).

become a state. Democracy accepts no less."[185] My aim was to facilitate Puerto Rican self-determination by urging an offer of the only constitutionally permissible alternative to the status quo that seemed capable of achieving majority support in Puerto Rico. But others saw an offer like the one I proposed as a colonial imposition calculated to preempt Puerto Ricans from considering and perhaps opting for another non-colonial status. Like the disagreement discussed in Part II, this disagreement among opponents of colonialism reflects status manipulation at work.

A. The Sovereign Commonwealth that Wasn't

Puerto Rico has long lived under the spell of spectral sovereignty. The modern incarnation arose after World War II, when colonial governance of Puerto Rico undermined U.S. anticolonial leadership. After the Philippines gained its independence in 1946, Puerto Rico was by far the largest U.S. entry on the United Nations' list of non-self-governing territories.

To secure its removal, the United States cloaked the Island in self-determination. Congress and Puerto Rico negotiated a Puerto Rican constitution that granted the Island extensive self-government as a so-called Commonwealth. The Constitution entered into effect pursuant to congressional legislation after the Island electorate approved it by referendum.[186]

The difficulty was that terms like "commonwealth," "constitution," and "referendum" could look like window dressing for "colonialism." Puerto Rico had not become a state, independent country, or Indian tribe.[187] The other polity status that the U.S. Constitution names and recognizes is "territory," which has no sovereignty and is subject to plenary congressional control

185. Sam Erman, *Devastation Without Representation in Puerto Rico*, L.A. TIMES (Sept. 20, 2018), https://www.latimes.com/opinion/op-ed/la-oe-erman-puerto-rico-hurricanes-20180920-story.html [https://perma.cc/4JTN-B2WY].

186. Joint Resolution of Mar. 3, 1952, Pub. L. 82-447, 66 Stat. 327; Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950) (approving the organization of a constitutional government by the people of Puerto Rico); Dieter Nohlen, 1 ELECTIONS IN THE AMERICAS: A DATA HANDBOOK 556 (2005) (describing results of the 1952 referendum).

187. IMMERWAHR, *supra* note 32, at 256; Joint Resolution of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327.

unaccompanied by any say in the national government.[188] If applicable, the constitutional rule that past Congresses may not bind future ones left Puerto Rico's gains only as secure as the next statute.[189]

Yet U.S. officials secured the Island's delisting from the United Nations list of non-self-governing territories. They did so through equivocations and inaccuracies as to the balance of sovereignty, obligation, and control that the territory's new Commonwealth status established between the Island and the United States. The key word was "compact." The preamble to the congressional enabling act that authorized Puerto Rico's Constitution declared itself "adopted in the nature of a compact."[190] The Commonwealth Constitution then located its powers "within the terms of the compact agreed upon between the people of Puerto Rico and the United States."[191] To convince the United Nations to remove Puerto Rico from the list of non-self-governing territories, the U.S. delegate classified the new legal regime as "a bilateral compact of association . . . which has been accepted by both and which in accordance with judicial decisions may not be amended without common consent."[192] The strong implication was that Puerto Rico had gained a sort of sovereignty that the United States lacked the legal authority to eliminate.[193]

Many Puerto Ricans initially embraced this vision of Puerto Rican sovereignty within U.S. sovereignty, notwithstanding its uncertain underpinnings. The aspiration to autonomy has a storied

---

188. Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1238 (2021) (reviewing IMMERWAHR, *supra* note 32).

189. IMMERWAHR, *supra* note 32, at 257; The Puerto Rico Self-Determination Act, S. 865, 117th Cong. § 3 (2021).

190. Puerto Rico Federal Relations Act, 48 U.S.C. § 731 ch. 446, § 1, 64 Stat. 319, 319 (1950).

191. P.R. CONST. art. I, § 1.

192. Press Release, Mission at the United Nations N.Y., U.N. Press Release GA/SPD/1802 (Nov. 3, 1953), *reprinted in* 3 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, at 1457, U.N. AFFS. (statement by the Hon. Frances P. Bolton, United States Representative in Committee Four on Puerto Rico); *see also* G.A. Res. 748 (VII) (Nov. 28, 1953) (describing Commonwealth status as Puerto Rico's "compact agreed upon with the United States of America"); DEP'T OF STATE BULLETIN, *Puerto Rico's New Self-Governing Status* (Apr. 20, 1953), http://www.justicia.pr.gov/wp-content/uploads/2016/01/un-memo-and-letter.pdf [https://perma.cc/PFR7-4YNP] (making repeated reference to a "compact").

193. This paragraph closely tracks one in Erman, *Truer U.S. History*, *supra* note 188, at 1239.

history in Puerto Rico.[194] The arrangement also brought benefits. Being within U.S. sovereignty guaranteed U.S. citizenship, as a practical matter and perhaps constitutionally. Separate Puerto Rican sovereignty created the same sort of guarantee for self-government. It also honored many Islanders' self-identification as members of a distinct people separate and apart from the United States and its colonialism. The Island's government joined the original U.S. effort to delist Puerto Rico as a non-self-governing territory.[195]

For many years, politics reflected approval of the new arrangement. In a 1967 plebiscite on status, more than 60% of voters opted for Commonwealth.[196] In an electoral field in which political parties were defined by which of commonwealth, statehood, or independence they advocated, [197] defenders of Commonwealth dominated Island politics for two decades.[198] Their political party remains a powerful, albeit much diminished, force today.[199] As late as 1993, a plebiscite recorded plurality support for what is sometimes called Commonwealth plus: the status that would result if a new Commonwealth compact were negotiated with terms more generous to Puerto Rico.[200]

U.S. officials long encouraged Puerto Ricans' faith in their Island's spectral sovereignty. The Supreme Court declined to elevate compact theory into constitutional doctrine, but did send positive signals: "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'"[201] Nonjudicial

194. On the nineteenth-century origins of that tradition, see, for example, ERMAN, ALMOST CITIZENS, *supra* note 26, at 16–26.

195. Samuel Issacharoff et al., *What Is Puerto Rico*, 94 INDIANA L.J. 1, 11–12 (2019).

196. H.R. REP. NO. 104-713, pt. 1, at 42 (1996).

197. JORGE DUANY, PUERTO RICO: WHAT EVERYONE NEEDS TO KNOW 78–87 (2017).

198. *Consultado de Resultos*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO (2002), http://209.68.12.238/cgi-bin/municipios.pl [https://perma.cc/WAH3-3BNA]; *Eventos Electorales*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, https://ww2.ceepur.org/Home/EventosElectorales [https://perma.cc/Z2PZ-3GVQ].

199. *Governor: Island Wide Results*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO (2020) [hereinafter *Governor*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO], https://elecciones2020.ceepur.org/Noche_del_Evento_92/index.html #en/default/GOBERNADOR_Resumen.xml [https://perma.cc/R88X-CKFN].

200. H.R. REP. NO. 104-713, pt. 1, at 18 (1996).

201. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982); *see also* Issacharoff et al., *supra* note 195 ("As the Court has chronicled many times, Puerto Rico's 'demand[] for greater autonomy' led Congress to pass Public Law 600 and Puerto Rico to enact its own Constitution; with that constitution, Puerto Rico

officials generally avoided decisions that would clearly contravene the notion of a compact and associated sovereignty.[202] For many years, the Department of Justice opined that one "Congress could create vested rights in the status of a territory that could not be revoked unilaterally."[203] It was possible to believe that the United States was a benevolent, anti-colonial sovereign—especially when federal tax breaks for Puerto Rico reshaped the Island's economy in ways that seemed to spur rapid and extended economic growth.[204]

But the anticolonial moment that ushered in Commonwealth status was not destined to last. By the 1980s, most former colonies had become independent, and the attention of the world and the United States had drifted away from Puerto Rico.[205] U.S. officials began to prioritize other goals, which resulted in the dismantling of the political and doctrinal underpinnings of support for Commonwealth status.

Beginning in the early 1990s, it became increasingly untenable to argue that the United States could be trusted to act in Puerto Rico's best interest. Between 1993 and 2006, the United States removed the tax breaks around which Puerto Rico's economy had come to be structured.[206] The Island's economy spiraled into a major recession from which it has yet to recover.[207] Puerto Rico's debt then became unsustainable,[208] yet federal law barred the Island from entering

---

gained 'the degree of autonomy and independence normally associated with States of the Union.'") (footnotes omitted) (quoting Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976)); Cordova Simonpietri v. Chase Manhattan Bank, 649 F.2d 36, 41 (1st Cir. 1981) ("Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens."); *id.* at 38 n.4 (citing Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITTSBURGH L. REV. 1 (1953) (elaborating the ways that the new United States–Puerto Rico relationship was insulated from congressional whim).

202. Issacharoff et al., *supra* note 195, at 12.

203. Mutual Consent Provisions in the Proposed Guam Commonwealth Act, Op. O.L.C. Supp. at *1–2 n.2, (July 28, 1994), https://www.justice.gov/file/163646/download [https://perma.cc/5W47-YCQN] (reporting prior views of the department as part of noting and explaining the department's reversal).

204. *Id.* at 26–27.

205. Rogers M. Smith, *The Unresolved Constitutional Issues of Puerto Rican Citizenship*, 29 CENTRO J. 56, 68–70 (2017).

206. Issacharoff et al., *supra* note 195, at 26–29.

207. *Id.* at 27–29.

208. *Id.* at 29.

bankruptcy.[209] Puerto Rico created its own bankruptcy provision, which the Supreme Court promptly struck down.[210] It was then that the Island suffered Hurricane Maria and the disastrous federal non-response.

During the same period, all three federal branches contravened compact theory. Across 1994 to 2016, the Department of Justice asserted with growing stridency that Puerto Rico was a U.S. territory with no guarantee of self-government that a future Congress was bound to respect.[211] Congress embraced that principle in 2016 when it met the Island's debt crisis by unilaterally transferring many governmental functions from the elected Island government to a federally appointed fiscal board.[212] That same month, the Supreme Court rejected the notion that the ultimate source of authority for Puerto Rico's Constitution was popular sovereignty and instead held that Puerto Rico's self-government flowed from Congress.[213] Then, in 2020, the Supreme Court upheld the new fiscal board. It reasoned that Puerto Rico is a territory subject to Congress' power to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," prior statements by the Court and other U.S. officials notwithstanding.[214] Nearly seventy years after Commonwealth status had begun, its foundations were revealed to be constitutional sand.

For the better part of a century, decolonization had been frustrated by the constitutional chimera that Puerto Rico was already a sovereign within a sovereign.[215] Enough Puerto Ricans supported

209. Puerto Rico v. Franklin Cal. Tax-Free Tr., 579, U.S. 115, 118 (2016).

210. *Id.*

211. Issacharoff et al., *supra* note 195, at 13–16.

212. PROMESA Act, Pub. L. No. 114-187 (2016).

213. Puerto Rico v. Sanchez-Valle, 579 U.S. 59 (2016); *see also* Brief for Professors Christina Duffy Ponsa-Kraus and Sam Erman as Amici Curiae Supporting Respondents, Puerto Rico v. Sanchez-Valle, 579 U.S. 59 (2016) (No. 15-108). Having declared that the ultimate source of authority for Puerto Rico's constitution was U.S. sovereignty rather than popular Puerto Rican sovereignty, the justices four days later declined to decide whether birth within such a U.S. sovereignty brought U.S. citizenship pursuant to the Citizenship Clause. *See* Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 579 U.S. 902 (2016).

214. Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1656 (2020); *see also* Christina Duffy Ponsa-Kraus, *The Battle over Puerto Rico's Future*, BALKINIZATION BLOG (Apr. 21, 2021), https://balkin.blogspot.com/2021/04/the-battle-over-puerto-ricos-future.html [https://perma.cc/V8K7-VMUL].

215. *See* Bonilla, *Coloniality of Disaster*, *supra* note 184, at 13 ("Javier Auyero suggests that waiting is a temporal process through which political subordination is produced . . . . [W]aiting also implies the existence of a certain

Commonwealth status that the Island had not effectively pressured the United States to offer concrete, non-colonial governance alternatives.[216] U.S. officials had dithered on decolonization out of deference to Puerto Ricans' indecision—notwithstanding the many ways that U.S. actions had created and sustained the impasse.[217]

As in American Samoa, the dangle of spectral sovereignty in Puerto Rico divided anti-colonialists and caused many on the Island to defend colonial statuses. But the bait differed markedly. American Samoans were presented with the prospect of quasi-tribal status, a second-class version of a second-class sovereignty. By contrast, Puerto Rico's Commonwealth status was often described as akin to statehood or, less frequently, independence, neither of which is a colonial status.[218] The tragedy of the Puerto Rican Commonwealth was that its idealized form had promise as a possible end result to a process of Puerto Rican self-determination—if only the U.S. Constitution had been found to permit such a non-territorial alternative to statehood, independence, and tribal recognition.

B. Statehood: Decolonization or Colonial Imposition?

Recently, constitutional law professors at Puerto Rico's ABA-accredited law schools jointly observed that Puerto Ricans cannot make an "informed decision regarding their political future" when "the United States government has never made a clear, binding, offer to Puerto Ricans" of any—much less all—available non-colonial statuses.[219] After the 2020 election, it briefly appeared that such an offer might be possible. Democrats controlled the White House and Congress. Lawmakers were contemplating abandoning the filibuster, and party leaders began expressing support for legislation aimed at offering Puerto Rico an alternative to colonial governance. One such bill was H.R. 1522. Introduced in early 2021, it proposed to admit Puerto Rico to statehood if a majority of voters agreed in a future

---

horizon of expectation: a faith in the chances of an arrival. Waiting (*esperar*) implies hope (*esperanza*). It involves anticipation, a form of thinking and living towards the future.") (citations omitted).

216. Christina Duffy Ponsa-Kraus, *supra* note 214.

217. *Id.*

218. *See supra* note 201 and accompanying text; Erin F. Delaney & Christina Duffy Ponsa-Kraus, *Fantasy Island*, YALE J. INT'L L. ONLINE (May 19, 2018), https://www.yjil.yale.edu/fantasy-island/ [https://perma.cc/7NKE-6GRT].

219. Álvarez-González et al., *supra* note 4.

Island-wide referendum.[220] Another bill, H.R. 2070,[221] envisioned a Puerto Rican status convention to identify "self-determination options for Puerto Rico, which shall be outside the Territorial Clause,"[222] and among which Puerto Ricans would ultimately choose.[223] The two bills reflected competing and mutually exclusive visions of how best to end colonial governance of Puerto Rico. Those who backed one bill tended to oppose the other as a further perpetuation of colonialism. Spectral sovereignty marked out the divide.

The core dispute was legal: What statuses other than statehood and territory did the U.S. Constitution recognize? Constitutional law scholars soon weighed in on both sides. First, one set issued a joint letter supporting H.R. 1522. Their bottom lines: statehood and independence were the only non-territorial options available to Puerto Rico; identifying other options was a waste of time; and only statehood would guarantee U.S. citizenship.[224] The letter also observed that Puerto Ricans overwhelmingly want guaranteed U.S. citizenship and a non-territorial status.[225]

The letter's aim was quick congressional action. Immediate legislation mattered because another opportunity might be a long time coming. Puerto Rico is appropriately nicknamed the "Forgotten Island."[226] Compared to the United States, it occupies little space, contains a small population, and presents distinct concerns. At the time of Hurricane Maria, barely half of stateside U.S. citizens knew that Puerto Ricans were U.S. citizens.[227] Recent crises, increased stateside concern with racial justice, and the potential role of the Island in the national partisan balance of power have brought Puerto

220. H.R. 1522, 117th Cong. (2021) (introduced Mar. 2).

221. Puerto Rico Self-Determination Act of 2021, H.R. 2070, 117th Cong. (2021) (introduced Mar. 18).

222. *Id.* § 3(c)(1).

223. *Id.* § 5(a).

224. Balkin, *supra* note 3.

225. *Id.*

226. *See, e.g.*, NEMESIO R. CANALES, PALIQUES 111 (Univ. of P.R. Press ed. 1952) ("la isla olvidada").

227. Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html [https://perma.cc/3FUC-68JN] (citing MORNING CONSULT, NATIONAL TRACKING POLL #170916 7 (Sept. 22–24, 2017), https://morningconsult.com/wp-content/uploads/2017/10/170916_crosstabs_pr_v1_KD.pdf [https://perma.cc/L62M-SMWX]).

Rico temporary attention.[228] But if history is any guide, this confluence of events will offer only a reprieve from U.S. neglect.[229]

The anti-Puerto Rican racism institutionalized in the modern Republican Party is also at odds with a robust decolonization process. To mention just a few examples, President Trump's co-partisans let stand his fatally inadequate response to Hurricane Maria; his tarring Puerto Rico as "one of the most corrupt places on earth,"[230] and "totally broken and crime infested";[231] and his looking into swapping or selling the Island to another power because "Puerto Rico was dirty and the people were poor."[232] It is hard to see a party so open to anti-Puerto Rican policy and rhetoric agreeing to the admission of the Island to statehood—especially if Island voters' resentments against recent slights and harms inclined them to vote Democratic.[233] Yet, statehood

228. *See, e.g.*, Natalia Renta, *The Self-Determination Act Could Finally End US Colonization of Puerto Rico*, JACOBIN (Apr. 1, 2021), https://jacobinmag.com/2021/04/puerto-rico-self-determination-act-aoc-us-colonialism [https://perma.cc/G4GF-YJEH]; Ricardo Rossello, *Puerto Rico Could Be the Next Purple State: Gov. Rossello*, USA TODAY (Oct. 31, 2018), https://www.usatoday.com/story/opinion/2018/10/31/puerto-rico-statehood-purple-state-column/1752107002/ [https://perma.cc/H4WG-DZ6K]; AJ Vicens, *Why Puerto Rico Statehood Is So Much More Complicated than It Is for DC*, MOTHER JONES (Apr. 14, 2021), https://www.motherjones.com/politics/2021/04/puerto-rico-statehood/ [https://perma.cc/P7MK-HP4U] ("[R]acism is an undergirding reason the disenfranchisement persists . . . .").

229. Pedro A. Cabán, *Puerto Rico: State Formation in a Colonial Context*, 30 CARIBBEAN STUD. 170, 173 (2001).

230. *Trump Calls Storm-Threatened Puerto Rico One of Most Corrupt Places on Earth*, REUTERS (Aug. 28, 2019), https://www.reuters.com/article/us-storm-dorian-trump-puertorico/trump-calls-storm-threatened-puerto-rico-one-of-most-corrupt-places-on-earth-idUKKCN1VI1VD [https://perma.cc/2QYF-448H].

231. Bianca Quilantan & David Cohen, *Trump Tells Dem Congresswomen: Go Back Where You Came from*, POLITICO (July 14, 2019), https://www.politico.com/story/2019/07/14/trump-congress-go-back-where-they-came-from-1415692 [https://perma.cc/HWU5-WKCC].

232. Matt Mathers, *Trump Wanted to Trade 'Dirty and Poor' Puerto Rico for Greenland, Says Ex-White House Official*, INDEPENDENT (Aug. 20, 2020), https://www.independent.co.uk/news/world/americas/us-politics/trump-trade-puerto-rico-greenland-dirty-poor-a9679346.html [https://perma.cc/6MSV-W7MX].

233. On whether Puerto Rico would be a blue, purple, or perhaps even red state, see Ponsa-Kraus, *The Battle over Puerto Rico's Future*, *supra* note 214 (discussing that Puerto Rico might be a blue state); Rossello, *supra* note 228 (discussing that Puerto Rico might be a purple state); Olivia Reingold, *Is Puerto Rico the Next Senate Battleground?*, POLITICO (Sept. 9, 2020), https://www.politico.com/news/magazine/2020/09/09/puerto-rico-statehood-politics-democrats-republicans-senate-409191 [https://perma.cc/Q379-84MC] (discussing that Puerto Rico might be a red state).

is the option for which a majority of Puerto Rican voters recently expressed support.[234]

Institutional arrangements further impede any robust U.S. commitment to decolonization. Getting Congress to act even once is hard. Both chambers are large, multi-member bodies full of competing priorities, ideologies, and alliances.[235] On questions of possible statuses for Puerto Rico, the Department of Justice also weighs in, introducing more cooks into the kitchen.[236] Legislative choke points such as the filibuster and the veto make action even harder, as does partisan polarization. Matters get even more complicated for any status that federal courts may clarify, redefine, or reject and that Congress may then want to revise in response.

H.R. 2070 exacerbated these difficulties with provisions susceptible to drift and inaction. The bill proposed to establish negotiations between two yet-to-be-created institutions, set no deadline for a self-determination vote, and imposed no fallback provision if negotiations failed.[237]

Soon after the letter supporting the statehood bill was drafted, a second set of constitutional law scholars rejected it for rushing a political result under the false cover of constitutional necessity.[238] The authors of this second letter conceded that statehood might serve Puerto Ricans' interests through guaranteed U.S. citizenship and nonterritorial status, but argued that statehood was in tension with an Island "consensus" favoring a "national and cultural identity distinct from the US."[239] The authors were also not convinced that statehood and traditional independence exhausted potentially available nonterritorial status options.

The competing letters raise the question of whether constitutional arguments in favor of an offer of statehood are themselves a type of colonial imposition. The crudest version of the

234. *Home*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, https://ww2.ceepur.org/Home/Index [https://perma.cc/KK7K-6MZJ].

235. *See* Kenneth A. Shepsle, *Congress Is a They, Not an It: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (describing a classic statement of the complexities involved in decision making by Congress).

236. *See, e.g.*, Issacharoff et al., *supra* note 195, at 13–16 (chronicling the development of the Department of Justice's position on the status of Puerto Rico).

237. *Hearing on H.R. 1522 Puerto Rico Statehood Admission Act and H.R. 2070 Puerto Rico Self-Determination Act Before the H. Comm. On Natural Res.*, 117th Cong. 2 (2021) [hereinafter Hearing on H.R. 1522]; Ponsa-Kraus, *The Battle over Puerto Rico's Future*, *supra* note 214.

238. Álvarez-González et al., *supra* note 4.

239. *Id.*

argument would simply contrast authors of each letter.[240] The first letter's authors were self-described "Americans" largely (but not exclusively) from stateside law schools who mostly (but not entirely) identified as non-Puerto Rican.[241] The second letter's authors wrote as "professors of Constitutional Law at ABA approved law schools in Puerto Rico."[242] But as some scholars on both sides of the issue agreed, the imbalance partly reflected an "'inhospitable environment' in the Island's academic institutions 'for anyone who dared express support for statehood.'"[243] Certainly, Puerto Rico contains numerous statehood advocates who draw sustenance for their views from analysis of the U.S. Constitution.[244]

More substantive was the charge that an immediate vote on statehood threatened to short-circuit self-determination.[245] In the words of the constitutionalism and democracy scholar Joel Colón-Ríos:

> Imagine that there is a colony and an empire. The colony is a colony because it is subject to imperial laws, and the empire is an empire because it enacts and applies its laws in the colony. One day, someone in the empire suggests that the colonial subjects should be asked whether they want the colony to become part of

240. *Compare* Joel I. Colón-Ríos, *Of Colonies and Empires*, IACL-AIDC BLOG (June 1, 2021) [hereinafter Colón-Ríos, *Of Colonies and Empires*], https://blog-iacl-aidc.org/2021-posts/2021/06/1of-colonies-and-empires [https://perma.cc/KHY7-3K8U] (contrasting the letter signed by "US law professors" to that signed by "all professors in PR's ABA's approved law schools teaching constitutional law or related courses"), *with* Christina Duffy Ponsa-Kraus, *The Perils of Politics in the Scholarly Debate on Puerto Rico's Constitutional Status,* IACL-AIDC BLOG (May 25, 2021), https://blog-iacl-aidc.org/2021-posts/2021/05/25the-perils-of-politics-in-the-scholarly-debate-on-puerto-ricos-constitutional-status [https://perma.cc/RX9Q-7AT6] [hereinafter Ponsa-Kraus, *The Perils of Politics*] (reading Colón Ríos as treating the identities of the authors as support for his argument that first letter "reflects a U.S.-centric perspective").

241. Balkin et al., *supra* note 3; Ponsa-Kraus, *The Perils of Politics*, *supra* note 240.

242. Álvarez-González et al., *supra* note 4.

243. Colón-Ríos, *Of Colonies and Empires*, *supra* note 240 (quoting Ponsa-Kraus, *The Perils of Politics*, *supra* note 240).

244. *See, e.g.*, PUERTO RICO PROMETE: PROGRAMA DE GOBIERNO 2020 PARTIDO NUEVO PROGRESISTA 191 (2020), https://assets.websitefiles.com/5f3fdb701694ae391ad573cd/5f908349ae373e359c31decf_Plataforma%20de%20Gobierno%20PNP%202020.pdf [https://perma.cc/U7UW-749Z].

245. *Id.*; *see also, e.g.*, Álvarez-González et al., *supra* note 4 (protecting "peoples . . . in the elaboration of the . . . principle of their right to self-determination" and emphasizing that the touchstone of decolonization is that the successor "political status" be "freely determined); Hearing on H.R. 1522, *supra* note 237 (similar).

> the empire and that, if they reject the offer, they would remain a colony. And suppose a group of scholars describes this as a process of self-determination. This is not a charitable analogy to explain the support the Puerto Rico Statehood Admission Act (SAA) received in a recent letter signed by several colleagues. But it is not an analogy, it is exactly what happened.[246]

One might understand this objection in two ways. Perhaps the problem is that Hobson's choices for Puerto Rico—statehood or nothing—are inherently non-choices. On that view, it would be a mistake of language to describe an offer of statehood as self-determination even if statehood was the only alternative to the status quo that the United States would ever be willing to offer. That is not Colón-Ríos's point.

Rather, the argument is that statehood does not exhaust the set of plausible alternatives to territorial status. If so, the order in which Puerto Rican voters are asked to choose between alternatives rather than Puerto Ricans' true preferences could determine the ultimate decision. Such objections have plagued Puerto Rico's status referendums during the past quarter century. Every time one party organized one, another rejected it as biased and thus illegitimate.[247] To see how the problem arises, consider a voter who prefers independence over statehood but statehood over the status quo. If she interpreted a congressionally induced up-down statehood vote as evidence that Congress would not grant independence, she might vote yes on statehood despite it being her second choice.[248] The process can also work in reverse. In 2020, the Island held a nonbinding up-down vote

246. Colón-Ríos, *Of Colonies and Empires, supra* note 240.

247. On an objection of this sort to the 2012 referendum, which asked Puerto Ricans first to vote up or down on the current status and then to choose among alternatives, see García Padilla, *Exhorta a Dejar la Segunda Pregunta en Blanco*, EL NUEVO DÍA (Feb. 11, 2012), https://www.elnuevodia.com/noticias/politica/videos/garcia-padilla-exhorta-a-dejar-la-segunda-pregunta-en-blanco-121288/ [https://perma.cc/64YC-4TVD]; *see also* Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html [https://perma.cc/5NH3-VQZ3] (describing results of objections to 1998 and 2017 plebiscites).

248. *See, e.g.*, Colón Ríos, *Of Colonies and Empires*, *supra* note 240 (arguing that a congressionally authorized up-down vote on statehood "would put that [pro-independence] voter in an impossible position: she either abandons her preferred self-determination option and accepts the offer of statehood (in order to end colonialism) or rejects the offer (and implicitly supports the continuation of colonialism). Perhaps the rational thing . . . would be to vote 'yes' . . . .").

on statehood. A modest majority (53%) of voters chose statehood.[249] That majority likely included some pro-independence voters who favor statehood above the status quo.[250] A congressperson who interpreted this result instead as indicating that Puerto Ricans prefer statehood above all other options might be induced to vote for an immediate offer of statehood.[251]

The claim that plausible non-statehood alternatives to territorial status exist is a key contention of the two longstanding political coalitions in Puerto Rico that disfavor statehood. The party associated with Commonwealth has opposed statehood (and independence) with gauzy predictions of a new and better alternative just over the horizon.[252]

There is surface appeal to rejecting the status options currently envisioned for Puerto Rico and instead demanding something different and better, even at the cost of interim unpleasantness. Existing status options are imperfect.[253] So long as colonialism structures the broader world, no choice to integrate, separate, nest, crisscross, tangle, or interweave Puerto Rican and U.S. governance will bring Puerto Rico

249. *Plebiscito: Resultas Isla*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO (2020), https://elecciones2020.ceepur.org/Escrutinio_General_93/index.html#es/default/PLEBISCITO_Resumen.xml [https://perma.cc/8TXA-T2PD].

250. *Compare* Balkin et al., *supra* note 3, at 2 (stating that a "clear majority" of Puerto Ricans voted "yes" in their own referendum on statehood) *with* Julio Ricardo Varela, *All the Reasons Puerto Rico Statehood Efforts Keep Stalling*, WASH. POST (Mar. 3, 2021), https://www.washingtonpost.com/opinions/2021/03/03/puerto-rico-statehood-bill-pedro-pierluisi/ (on file with the *Columbia Human Rights Law Review*) ("[S]tatehood advocates lack urgency, grass-roots organization, a clear narrative and a united front.").

251. Álvarez-González et al., *supra* note 4 (discussing that while the results of the Puerto Rican vote were in favor of statehood, to characterize this issue as settled for the people of Puerto Rico would be "inaccurate").

252. *See, e.g.*, DUANY, PUERTO RICO: WHAT EVERYONE NEEDS TO KNOW, *supra* note 197, at 85 (describing the pro-Commonwealth status ideology of the Popular Democratic Party in Puerto Rico).

253. *See* Frances Negrón-Muntaner, *Introduction*, *in* NONE OF THE ABOVE 6, 10 (Frances Negrón-Muntaner ed., 2007) ("But what is this way of life that is imagined to be slightly better than that of a full-fledged U.S. citizen, with all her rights and financial perks, and miles away from independence, with its promise of dignity and self-determination?"); YARIMAR BONILLA, NON-SOVEREIGN FUTURES: FRENCH CARIBBEAN POLITICS IN THE WAKE OF DISENCHANTMENT 2–4, 11, 13–14 (2015) ("I contend that throughout the Caribbean the problems of freedom and sovereignty are parallel and entwined: both have hinged upon abstract promises of codified equality accompanied by a careful escort into codified systems of intrinsic inequality.").

wholly out from colonialism's shadow.[254] And it is not clear that palliatives are the best way to dismantle colonialism writ large. Colonized peoples with uncertain, unsettled, and unsatisfying relationships to colonial powers have repeatedly innovated promising approaches to exposing, opposing, cabining, and mitigating broader colonial legacies and realities.[255]

---

254. *See, e.g.*, Negrón Muntaner, *Introduction*, *in* SOVEREIGN ACTS, *supra* note 12, at 27–28 ("[S]tate recognition of indigenous and colonized groups preserves colonial dynamics . . . . [T]he actions of some U.S. tribes to gain or maintain federally recognized sovereign status can lead indigenous groups to accept colonial racial hierarchies . . . ."); Uperesa & Garriga-López; *supra* note 15, at 61–62 ("This model of economic development [American modernization efforts in Puerto Rico meant to dissuade other countries from revolution during WWII] . . . has been a disastrous failure, with relative increases in quality of life standards , . . masking the ongoing expropriation and pollution of land and other resources"); Bonilla, *Coloniality of Disaster*, *supra* note 184, at 2, 12, 32 ("This [U.S. 'racialized neglect' of sites of natural disaster, especially Hurricane Maria] in turn requires us to interrogate the United States as a racial-imperial formation and to critically assess the intertwined nature of racial and imperial governance."); BONILLA, NON-SOVEREIGN FUTURES, *supra* note 253, at 4 ("Drawing inspiration from other decolonization struggles . . . Antillean activists . . . created new political organizations that sought to replicate the model of national liberation through armed struggle. However [d]epartmentalization . . . failed to fully transform their colonial economies or their marginal place in the French nation."); MARISOL LEBRON, POLICING LIFE AND DEATH 6, 56–82 (2019) (describing Puerto Rico state's choice not to "radically transform social relations and institutions in order to address pressing social problems" and instead to seek to make itself useful and relevant to the United States by setting itself up as a test case for extremely heavy policing); Jessica A.F. Harkins, *Same-Sex Marriage in the Cherokee Nation*, *in* SOVEREIGN ACTS 175 (describing tension between Cherokee sovereignty and acceptance of same-sex marriage); Brian Klopotek, *Of Shadows and Doubts: White Supremacy, Decolonization, and Black-Indian Relations*, *in* SOVEREIGN ACTS 230 (describing anti-Blackness among members of some southeastern U.S. Indian tribes); *cf.* Sailiata, *supra* note 172 (describing "this pernicious myth that by reforming the law, settler law that is, it will become less colonial, and that's simply impossible," then criticizing legal scholars for seeking merely "to trade in 'domestic in a foreign sense,' for 'foreign in a domestic sense,' and vice versa"). Sailiata's quotation is a good reminder of the thicker and thinner ways in which colonialism may be used. Throughout much of this Essay, I use "colonialism" to refer to a system of governance in which a population is subjected to the rules of a democratic polity in which it has no say. Thus, I assert that Puerto Rico would cease to be a colony if it became a state. I disagree with Sailiata's implication that such a shift would be inconsequential. *Id.* at 22–23, 70. But I acknowledge her point that a major problem would remain: colonialism in the thicker sense of harms suffered by existing in a world shaped by the colonialisms of formal colonial governance, subordination of Native nations, oppression of internal racial minorities, and so on. *Id.*

255. *See, e.g.*, AUDRA SIMPSON, MOHAWK INTERRUPTUS (2014) (examining the ways in which the Mohawks, an Indigenous people, maintain their own polity

But there is scant reason to think that most Puerto Ricans favor this errand. It is not a pleasant undertaking. Sustained dissatisfaction often fuels the trail blazing.[256] Progress is not guaranteed.[257] Nor have Puerto Ricans embraced such an approach at the polls. For decades, parties that favored one or another concrete status outcome won nearly the entirety of the votes.[258] Even in 2020, when status was less of a central issue, only around 14% of the electorate favored the political party unaligned with a particular status[259]—and even that party favored a choice between familiar

within the United States and Canada); KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY (2007) (examining how Indigenous political actors seek to reclaim or redraw political status boundaries drawn by the United States); Bonilla, *Coloniality of Disaster*, *supra* note 184, at 4, 10 (addressing the ways that the results of Hurricane Maria have led some Puerto Ricans to envision decolonization beyond independence); BONILLA, NON-SOVEREIGN FUTURES, *supra* note 253, at 4–6, 10–11, 15 (examining how Guadeloupean militants reconceptualized their anticolonial movement as a workers' movement); Uperesa & Garriga-López, *supra* note 15, at 60–61 ("In the case of American Samoa, the space provided by the ambiguity present around the question of sovereignty has been filled by a continuous yet evolving indigenous political practice and selective engagement with Western-style institutions."); Negrón-Muntaner, NONE OF THE ABOVE, *supra* note 253, at 13–15 (discussing the Puerto Rican movement to evict the U.S. Navy, which focused not on independence but immediate resolution of a series of "small problems" affecting everyday life); Sailiata, *supra* note 172, at 22–23 (collecting sources).

256. *See, e.g.*, Bonilla, *Coloniality of Disaster*, *supra* note 184; BONILLA, NON-SOVEREIGN FUTURES, *supra* note 253; Negrón-Muntaner, NONE OF THE ABOVE, *supra* note 253.

257. For an argument that Puerto Rico itself was better off at an earlier time, see, for example, Issacharoff, *supra* note 195, at 10–12.

258. *See Consultado de Resultos*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, *supra* note 198 (archiving election results at the Island and municipal level in Puerto Rico starting with results in 1932).

259. Mariah Espada, *'We're Literally Fighting for Our Lives.' A New Political Movement Emerges Outside Puerto Rico's Two-Party System*, TIME (Nov. 18, 2020), https://time.com/5913496/puerto-rico-elections/ [https://perma.cc/CT4F-MJJ3]; ALL THINGS CONSIDERED, *Young Puerto Ricans See Governor's Election as a Chance for a Change*, NPR (Nov. 2, 2020), https://www.npr.org/2020/11/02/930504048/young-puerto-ricans-see-governor-s-election-as-a-chance-for-a-change [https://perma.cc/97QZ-VYAS]; Francisco Casablanca, *Lucha por las Descolonizacion*, MOVIMIENTO VICTORIA CIUDADANIA (May 21, 2021), https://www.victoriaciudadana.pr/por_la_descolonizacion [https://perma.cc/6G5V-LUVX]; *compare* Negrón-Muntaner, NONE OF THE ABOVE, *supra* note 253, at 6 (arguing that a majority of voters selecting "none of the above" in a non-binding 1998 status referendum in Puerto Rico illustrated how most Puerto Ricans oppose resolving the status question "as presently articulated") *with* Mireya Navarro, *Looking Beyond Vote in Puerto Rico After 'None of the Above' Is Top Choice*, N.Y. TIMES (Dec. 15, 1998), https://www.nytimes.com/1998/12/15/us/looking-beyond-vote-in-puerto-rico-after-none-of-the-above-is-top-choice.html [https://perma.cc/9TDN-FNXJ] (relaying attributions of

status options rather than an abandonment of those options altogether.[260]

The traditional alternative to statehood and the status quo is independence. But recent history suggests that independence has no realistic chance of achieving majority support in the near future. Puerto Rican voters have repeatedly rejected independence and independence candidates by wide margins. During the Commonwealth era, independence has never reached 6% support in any Island-wide plebiscite, nor has the pro-independence party ever captured even 20% of the vote counts for governor or resident commissioner.[261] The median vote share for the independence party hovers in the single digits. That remain true regardless of whether one examines all Island-wide elections together or separates the Island-wide vote counts for governor and resident commissioner—and regardless of whether one goes back five years, all the way to 1952, or any time in between.[262] The independence party placed fourth even in the fractured 2020 election, when Puerto Ricans' anger at the United States had reason to run especially high and when the statehood party had been harmed by

many people's choice of "none of the above" to the party associated with Commonwealth, which urged such a choice as a way to protest what they perceived to be an inaccurate description of the Commonwealth option).

260. Casablanca, *supra* note 259.

261. *Home*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, *supra* note 234 (providing vote totals for governor, 1952-present; resident commissioner, 1980-present; referendums, 1952-present). For results in earlier resident commissioner elections, see EARL ROCKWOOD, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 1952, at 50 (1953), https://clerk.house.gov/member_info/electionInfo/1952election.pdf [https://perma.cc/M2ZP-7AET]; DIETER NOHLEN, 1 ELECTIONS IN THE AMERICAS: A DATA HANDBOOK 552 (2005); BENJAMIN J. GUTHRIE, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 8, 1960, at 49 (1961), https://clerk.house.gov/member_info/electionInfo/1960election.pdf [https://perma.cc/8AZ9-PEQ7]; BENJAMIN J. GUTHRIE, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 3, 1964, at 51 (1965), https://clerk.house.gov/member_info/electionInfo/1964election.pdf [https://perma.cc/99YD-252J]; BENJAMIN J. GUTHRIE, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 5, 1968, at 51 (1969), https://clerk.house.gov/member_info/electionInfo/1968election.pdf [https://perma.cc/CZV4-5GPW]; BENJAMIN J. GUTHRIE, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 7, 1972, at 50 (1973), https://clerk.house.gov/member_info/electionInfo/1972election.pdf [https://perma.cc/T5GN-PN2G]; BENJAMIN J. GUTHRIE, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 2, 1976, at 54 (1977), https://clerk.house.gov/member_info/electionInfo/1976election.pdf [https://perma.cc/HU2V-JBUZ] (providing statistics for elections in Puerto Rico).

262. *See supra* note 261.

a serious scandal.[263] It received less than 14% of the vote and fell nearly twenty percentage points short of victory.[264]

Advocates of independence counter that low support for independence stems from a shameful history of U.S. persecution. During the early Cold War in particular, official actions targeting advocates of independence coincided with a plunge in support for the status.[265] On this view, statehood would be the culmination of more than a century of colonial machinations to snuff out Puerto Rican national existence.[266] By contrast, if a consultative process revealed U.S. willingness to grant independence, more Puerto Ricans might embrace separation.[267] Yet, other objections would remain.

Many Puerto Ricans disfavor independence for reasons that consultation is not likely to eliminate. Some are positive, including U.S. citizenship, ties to a mainland that contains the majority of people of Puerto Rican descent, and the economic and other benefits that have accompanied U.S. sovereignty.[268] Others are negative, such as the

263. Patricia Mazzei & Frances Robles, *Ricardo Rosselló, Puerto Rico's Governor, Resigns After Protests*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/24/us/rossello-puerto-rico-governor-resigns.html [https://perma.cc/A9JT-WZ6N].

264. *Governor*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, *supra* note 199.

265. *See, e.g.*, DUANY, PUERTO RICO: WHAT EVERYONE NEEDS TO KNOW, *supra* note 197, at 86–87 (describing how the FBI and the insular police targeted advocates of independence and labeled them subversives); NELSON ANTONIO DENIS, WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA'S COLONY (2016) (arguing that officials targeted advocates of independence and associated them with communism); Hearing on H.R. 1522, *supra* note 237 (statement of Rep. Luis Gutierrez) (similar).

266. Among the many voices making this point in the wake of the counter letter, see, e.g., Lilia Luciano, *Is Statehood the Answer to Puerto Rico's Problems?*, CBS NEWS (June 24, 2021), https://www.cbsnews.com/news/puerto-rico-statehood-debate/ [https://perma.cc/L3HY-JU5U] (quoting 2020 Independence Party candidate for governor Juan Dalmau); Joel I. Colón Ríos, *Scholars and the Politics of Puerto Rico's Constitutional Status*, IACL-AIDC BLOG (May 6, 2021) [hereinafter Colón Ríos, *Scholars*], https://blog-iacl-aidc.org/2021-posts/2021/05/06-puerto-ricos-constitutional-status [https://perma.cc/7L87-D24W]; Vicens, *supra* note 228.

267. *See, e.g.*, Colón Ríos, *Scholars*, *supra* note 266; DENIS, *supra* note 265 (recounting perspectives on the 1950 armed insurrection of the Nationalist Party of Puerto Rico, and its relationship to post-1898 U.S. involvement in Puerto Rico and the contemporary struggle over self-determination).

268. *See, e.g.*, DUANY, PUERTO RICO: WHAT EVERYONE NEEDS TO KNOW, *supra* note 197; ERMAN, ALMOST CITIZENS, *supra* note 26, at 160; Issacharoff et al., *supra* note 195, at 26–27; Amelia Cheatham & Diana Roy, *Puerto Rico: A U.S. Territory in Crisis*, COUNCIL ON FOREIGN RELS. (Nov. 25, 2020), https://www.cfr.org/backgrounder/puerto-rico-us-territory-crisis [https://perma.cc/GNN8-2679].

reality that independence may reduce formal colonial governance by expanding neocolonial U.S. influence, as the examples of Cuba, Haiti, the Dominican Republic, Nicaragua, and the Philippines all attest.[269]

Now consider again the objection that an immediate offer of statehood precludes self-determination by short-circuiting consideration of plausible alternatives. As Democratic Representative from New York Alexandria Ocasio-Cortez (D-NY) put it: "Justice isn't the colonizing country deciding fate for the colonized. It is the people's decision."[270] True enough. But such justice may also be out of reach if it requires an anti-colonial coalition to hold national power in the United States across many years. If so, the question becomes one of second-best options: Should Puerto Ricans choose between statehood and territorial status now? Or should they engage in a consultative process that might give them the same choice later, but that also might consign Puerto Rico to indefinite colonialism? If those are the options, consultation seems futile—unless one has reason to expect a plausible non-territorial alternative to statehood to emerge.[271]

Enter free association.

---

269. *See* Paul A. Kramer, *Power and Connection: Imperial Histories of the United States in the World*, 116 AM. HIST. REV. 1348, 1366–73 (2011); Paul A. Kramer, *How Not to Write the History of U.S. Empire*, 42 DIPLOMATIC HIST. 911, 925–29 (2018) (collecting sources on the Philippines); JESSE HOFFNUNG-GARSKOF, A TALE OF TWO CITIES: SANTO DOMINGO AND NEW YORK AFTER 1950 (2008); Jesse Hoffnung-Garksof, *"Yankee Go Home . . . and Take Me with You!" Imperialism and Migration in the Dominican Republic, 1961–1966*, 28 CANADIAN J. LATIN AM. & CARIBBEAN STUDS. 39 (2004); MICHEL GOBAT, CONFRONTING THE AMERICAN DREAM: NICARAGUA UNDER U.S. IMPERIAL RULE (2005); MARY A. RENDA, TAKING HAITI: MILITARY OCCUPATION AND THE CULTURE OF U.S. IMPERIALISM, 1915–1940 (2001); ERMAN, ALMOST CITIZENS, *supra* note 26, at 168 n.9, 227 n.29, 234–35 n.61, 240 n.28, 255 n.7 (collecting sources on the Caribbean); LOUIS A. PÉREZ, JR., CUBA: BETWEEN REFORM AND REVOLUTION (5th ed. 2014); DAVID A. LAKE, HIERARCHY IN INTERNATIONAL RELATIONS 63–92 (2009).

270. Alexandria Ocasio-Cortez (@AOC), TWITTER (Aug. 25, 2020, 1:28 PM), https://twitter.com/aoc/status/1298311379305132032 [https://perma.cc/V6J8-SBNL].

271. One could object that I am too pessimistic about the prospects for whipping decolonization votes in future Congresses. It is true that I am no expert in political prognostication. But members of Congress tend to have access to those who are. If they see better odds, they can discount the specter of indefinite delay accordingly. *But cf.* E-mail from Christina Ponsa-Kraus to Sam Erman (Mar. 5, 2022) (on file with the *Columbia Human Rights Law Review*) (arguing that members are primarily reluctant to offer statehood for another reason: "Many members are reluctant to offer statehood when they see both that their Hispanic colleagues are divided on the issue and that some of those colleagues even claim that an offer of statehood would somehow be an imposition upon Puerto Rico.").

C. Free Association: Constitutional Chimera or Self-Determination Incarnate

When constitutional law professors at Puerto Rico's ABA-accredited law schools contended that statehood and traditional independence were not the only nonterritorial status options, they had in mind "a third option: what may be loosely called the status of free association." [272] A majority of Puerto Ricans might favor free association, if only the United States would declare it to be an available option, they claimed. But what that option would actually mean remained unclear, as the words "loosely called" reflect. For veterans of the fight over compact theory, this all looked disturbingly familiar: a spectral sovereignty that Puerto Ricans would reject once its true form became apparent, but that would delay decolonization in the interim.[273] Once again, those on both sides opposed colonialism. Yet they ended up at odds in response to status manipulation. This time, the spectral status of free association provoked the divide.

Free association can be presented as a third non-territorial option because independence can take more than one form. The relationship long associated with independence for Puerto Rico was similar to what the Philippines achieved: an end to U.S. governance, national independence, self-responsibility for national defense, and citizens treated as alien immigrants at U.S. borders.[274] By contrast, free association is modeled on Micronesia, the Marshall Islands, and Palau. They all relate to the United States through ratified compacts of free association that lodge military defense with the United States, provide access to many domestic U.S. programs, and let their people enter the United States as nonimmigrants.[275]

---

272. Álvarez Gonzáles et al., *supra* note 4. Status as an Indian Tribe has not been advanced as a promising alternative for Puerto Rico, whose population is vastly less associated with indigeneity than is the population of American Samoa. *Compare* U.S. CENSUS BUREAU, PUERTO RICO: 2010: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2, 199 (Sept. 2012) (showing that 1% of Puerto Rico's population identifies in whole or in part as American Indian, Alaska Native, Native Hawaiian, or other Pacific Islander), *with supra* note 162.

273. *See, e.g.*, Ponsa-Kraus, *Perils of Politics*, *supra* note 240.

274. Alfred W. McCoy, *A Rupture in Philippine-U.S. Relations: Geopolitical Implications*, 75 J. ASIAN STUDS. 1049 (2016); Luis Hassan Gallardo & Jean Batalova, *Filipino Immigrants in the United States*, MIGRATION POL'Y INST. (July 15, 2020), https://www.migrationpolicy.org/article/filipino-immigrants-united-states-2020 [https://perma.cc/V8F2-4XPL].

275. Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, §§ 105(f), 141(a), 201(a), 201(b), 311(a); Palau Compact of Free Association, Pub. L. No. 99-658, §§ 141(a), 201(a), 221, 311–312 (1986).

The case against offering statehood prior to offering free association is that a majority of Puerto Ricans might prefer free association if it were offered.[276] The evidence, however, is equivocal. One key piece is Puerto Rico's 2012 plebiscite.[277] It asked two questions: (1) Should the current territorial status be continued; and (2) Which of statehood, free association, or independence is preferable. Like all recent referendums in Puerto Rico—including the most recent, in which a majority of those voting chose statehood—this one was imperfect and controversial.[278] The Island's pro-Commonwealth party objected to the omission of a Commonwealth plus option and recommended that voters leave the second question blank. The terms were also potentially confusing because the Spanish term used on the ballot for free association ("Estado Libre Asociado Soberano")[279] closely resembled the term currently used for Commonwealth status ("Estado Libre Asociado"). The final results showed 52% for abandoning Puerto Rico's current territorial status, 44% for keeping it, and 4% having submitted blank or otherwise invalid responses.[280] As among the options on question two, 44% favored statehood, 27% submitted blank

276. Rafael Hernandez Colon, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK UNIV. L. REV. 587, 587–620 (2017) (predicting just such a result given recent results of such decisions by other one-time colonies).

277. I draw the argument that follows from Colón-Ríos, *Scholars*, *supra* note 266; Colón-Ríos, *Of Colonies and Empires*, *supra* note 243. *But cf.* Ponsa Kraus, *Perils of Politics*, *supra* note 240 (arguing that "earlier plebiscites" have "little bearing on [whether] the November 2020 referendum was a legitimate and accurate indication that a majority of voting Puerto Ricans favor statehood. The validity of a yes-no vote does not depend on whether the option on the ballot won an earlier vote").

278. *See* R. SAM GARRETT, CONG. RSCH. SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 13–15 (2011), https://sgp.fas.org/crs/row/RL32933.pdf [https://perma.cc/6Q8Z-XFRP] (discussing controversy over 1967, 1991, 1993, and 1998 status plebiscites in Puerto Rico); R. SAM GARRETT, CONG. RSCH. SERV., R42765, PUERTO RICO'S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS 5–12 (2013), https://sgp.fas.org/crs/row/R42765.pdf [https://perma.cc/4MCF-TLP9] (discussing controversy over 2012 plebiscite in Puerto Rico); R. SAM GARRETT, CONG. RSCH. SERV., R44721, POLITICAL STATUS OF PUERTO RICO: BRIEF BACKGROUND AND RECENT DEVELOPMENTS FOR CONGRESS 7–15 (2017), https://sgp.fas.org/crs/row/R44721.pdf [https://perma.cc/9NYK-PEYG] (discussing controversy over the 2012 and 2017 plebiscites in Puerto Rico).

279. *Papleta Oficial (Modelo): Consulta Sobre el Estatus Politico de Puerto Rico*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO (Nov. 6, 2012), https://ww2.ceepur.org/sites/ComisionEE/espr/Documents/PapeletaModeloPlebiscito12.pdf. [https://perma.cc/Q4P2-C8BF].

280. Colón-Ríos, *Scholars*, *supra* note 266.

or otherwise invalid responses, 24% preferred free association, and 4% opted for independence.[281]

Another piece of evidence is the 2020 gubernatorial election, where a candidate who had expressed support for Puerto Rican independence ran on a platform of holding a constitutional status assembly.[282] Despite running a distant third to candidates from the parties associated with statehood and Commonwealth, she did better than most prior pro-independence candidates.[283] Her final tally of around 14% of the vote brought her within twenty percentage points of victory.[284] Combining her total with that of the traditional independence party's candidate would result in 27.5% of the vote, still a third-place finish, but one that would have been just six percentage points shy of victory.[285]

If the prophesied support for a concrete offer of free association were to coalesce, it would be in anticipation of a compact of free association that would be more desirable than what traditional independence offers. The danger is that ships at a distance may have every Islander's wish on board.[286] Congress and the White House are unlikely to negotiate an agreement until Puerto Ricans vote to pursue free association. But in the absence of such negotiations, voters will be left to their imaginations and the many desirable-but-unlikely terms that may spring to their minds. It is thus possible that a plebiscite would favor free association in the abstract, that negotiations would produce all the usual compromises and disappointments, and then that a second plebiscite would reject the proposed compact. If so, entertaining free association would have only served to foster disillusionment and prolong colonial governance.

Experience counsels an expectation that negotiations over the details of any compact of free association will result in slim offerings

---

281. *Home*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, *supra* note 234.

282. Gloria Ruiz Kuilan, *Bernier Pide el Voto a Seguidores de Cidre y Lúgaro*, EL NUEVO DÍA (Oct. 30, 2016), https://www.elnuevodia.com/noticias/politica/notas/bernier-pide-el-voto-a-seguidores-de-cidre-y-lugaro/ [https://perma.cc/U6G5-XZVU]; *Lucha por las Descolonizacion*, *supra* note 259.

283. *Governor*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, *supra* note 199; *see also supra* note 261 and accompany text.

284. *Governor*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, *supra* note 199.

285. *Id.*

286. ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD 1 (1937).

for Puerto Rico.[287] Relevant areas of potential negotiation include integration into existing domestic U.S. institutions, U.S. economic transfers to the Island, and the relationship of the Puerto Rican people to the United States. As a matter of constitutional law, near-total integration, increased federal transfers, and statutory *jus soli* U.S. citizenship are permissible. But they would also be unprecedented. Existing compacts of free association provide the signatory islands with access to disaster relief, postal service, and economic aid, but not entitlements programs.[288] Their citizens are able to work and live in the United States as nonimmigrant aliens.[289] Until recently, that status did not bring stateside residents eligibility for Medicaid.[290] It remains true that nonimmigrant aliens may be deported for a variety of reasons, such as committing a crime.[291] If entitlements, economic aid, or grants of *jus soli* citizenship were negotiated, their durability would be a matter of politics, not constitutional law.

Puerto Rico has reason to be skeptical of provisions backed by politics. It is not that such compact provisions have no value. They can interlock to discourage rescissions and violations,[292] provide up-front

287. *Cf.* Shannon Marcoux, Note, *Trust Issues: Militarization, Destruction, and the Search for a Remedy in the Marshall Islands*, 4 COLUM. HUM. RTS. L. REV. ONLINE 98, 102 (2021) ("[T]he Compact of Free Association . . . between the United States and the Marshall Islands . . . deprived the Marshallese of a meaningful remedy for" harms caused by the United States).

288. Compact of Free Association Act of 1985, Pub. L. No. 99-239 § 99 Stat. 1770, 1816–18 (1986); Howard Loomis Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583, 584 (1984); Kevin Morris, *Navigating the Compact of Free Association: Three Decades of Supervised Self-Governance*, 41 U. HAW. L. REV. 384, 398–402 (2019).

289. Morris, *supra* note 288, at 402–03.

290. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 412(a), 110 Stat. 2105, 2269 (1996); Morris, *supra* note 288, at 403–04; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 208(a), 134 Stat. 1182, 2985 (2020).

291. Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 141(f)(1), 117 Stat. 2720, 2762 (2003); Morris, *supra* note 288, at 403; Natalia Pereira, *Pacific Island Nations, Criminal Deportees, and Reintegration Challenges*, MIGRATION POL'Y INST. (Nov. 7, 2014), https://www.migrationpolicy.org/article/pacific-island-nations-criminal-deportees-and-reintegration-challenges [https://perma.cc/8ABW-Y8WR].

292. *See*, *e.g.*, Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat 1770, 1816–1818, 1822–1827 (1986) (featuring assistance and military access within a single compact of free association).

gains,[293] or rest on mutually beneficial relationships.[294] And the United States suffers reputational costs when it reneges on its international agreements.[295] But the last seventy years of United States–Puerto Rico relations testify to the dangers of reliance on the good will and good faith of the United States. Recently, all three branches of the U.S. government have participated in the wanton neglect of the Island that has included explicit renunciations of U.S. commitments to Puerto Rico.

In response to such objections, advocates of free association often pivot to international law. The joint letter by constitutional law professors in Puerto Rico, for instance, questions the "extent to which the political status of Puerto Rico should be addressed merely as a matter of U.S. domestic law or as a question governed by well-established norms of international law concerning self-determination and decolonization."[296] After all, international-law "norms are part of the law of the United States, either as international customary law, or as treaty law since the International Covenant on Civil and Political Human Rights entered into force for the United States in 1992."[297]

United Nations General Assembly Resolution 1541 figures prominently in such advocacy for free association. The resolution recognizes that self-determination may be achieved by free association, which commentators note is a "distinct and separated political status from independence."[298] As they elaborate: There is "no fixed approach

---

293. Tommy E. Remengesau, Jr., President of the Republic of Palau, State of the Republic Address (Apr. 25, 2019), https://www.palaugov.pw/wp-content/uploads/2019/04/2019-State-of-the-Republic-Address-by-H.E.-President-Tommy-E.-Remengesau-Jr.pdf [https://perma.cc/AD3X-Q7DC] (proposing to use U.S. payments under Palau's Compact of Free Association to create a permanent trust fund to provide revenue for the Palau government in perpetuity).

294. *See*, *e.g.*, Derek Grossman, *America Is Betting Big on the Second Island Chain*, RAND BLOG (Sept. 8, 2020), https://www.rand.org/blog/2020/09/america-is-betting-big-on-the-second-island-chain.html [https://perma.cc/MS7X-7B63] (reporting interest by both the United States and Palau in countering China by increasing the U.S. military presence in Palau).

295. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1861–64 (2002).

296. Álvarez Gonzáles et al., *supra* note 4.

297. *Id.*

298. Julio Ortiz-Luquis, *Opinion: What Americans and Puerto Ricans Need to Know About a Compact of Free Association*, LATINO REBELS (June 7, 2021), https://www.latinorebels.com/2021/06/07/usprfreeassociation/?utm_source=rss&utm_medium=rss&utm_campaign=usprfreeassociation [https://perma.cc/8UCX-65BB].

to free association nor is there a fixed model,"[299] so it is "left to the parties to negotiate" the "exact form"[300] of any "new constitutional order"[301] into which Puerto Rico and the United States might enter. Proposed models include the relationships between Denmark and Greenland, Finland and Åland, Great Britain and its mid-twentieth-century "dominions," and the Netherlands and its constituent countries.[302]

Tellingly, proponents of the international-law turn never specify the constitutional alchemy by which international law and foreign models could bind future U.S. Congresses. True, "[i]nternational law is part of our law."[303] But Congress may contravene non-constitutional U.S. law, including treaties, statutes, and binding international norms, and thereby change U.S. law. That is the power by which the United States currently holds Puerto Rico as a colony, international law notwithstanding. Similarly, international law could come to characterize a potential form of free association between Puerto Rico and the United States as a political status embedded in a new constitutional order. But any such shift would not cause the U.S. Constitution to endow the contemplated arrangement the fixity of existing constitutional statuses. International law is not constitutional law. For similar reasons, even if Congress agreed to a relationship with Puerto Rico similar to those that have proved enduring between other nations and their foreign colonies, Congress could still renege at any time.

The discussion above reveals that quite a bit can be said about free association even before any compact negotiations begin. Additionally, free association would involve consequences that are common to all forms of independence. A freely associated Puerto Rico would be a wholly sovereign, independent country with a national identity distinct from that of the United States. It would be entitled to

---

299. *On Puerto Rico's Options for a Non-Territory Status and What Should Happen After November's Plebiscite: Hearing Before the H. Comm. on Natural Resources*, 116th Cong. 20 (2020) (hearing postponed) (statement of Rafael Cox Alomar, Professor of Law, David A. Clarke School of Law Washington, D.C.), https://law.udc.edu/wpcontent/uploads/2021/05/coxalomar_congresstest_200925.pdf [https://perma.cc/U9C5-TADW].

300. Efraín Vázquez-Vera & Juan López-Bauzá, *Free Association: The Political Option that Can Save Puerto Rico*, GLOBE POST (Dec. 31, 2019), https://theglobepost.com/2019/12/31/puerto-rico-free-association/ [https://perma.cc/AC2G-VNWB].

301. Cox Alomar, *supra* note 299, at 19.

302. *Id.* at 22.

303. The Paquete Habana, 175 U.S. 677, 700 (1900).

self-government and subject to the sorts of pressures that the United States has brought to bear on other lands it formerly governed. Puerto Ricans would have no representation in Congress, no presidential electors, and thus no vote on such matters as U.S. foreign policy and U.S. aid to Puerto Rico.

Additionally, some observations can be made about the relationship between statehood, free association, and the lack of any enduring U.S. commitment to decolonization. A key aspect of the dilemma that free association raises is uncertainty. Whenever a potential congressional majority and like-minded president favor decolonization, the resultant opportunity may be fleeting, as was true in 2021. On the other hand, rejecting such an opportunity at one time may lead to an (improved) offer later—if the necessary political stars realign.

The wealth of existing knowledge about free association points a way forward: inform Puerto Ricans about the option and then let them decide whether to pursue negotiations. Indeed, this is the solution proposed by Christina Ponsa-Kraus, the legal historian, constitutional scholar, and Puerto Rico expert who organized the original constitutional law professors' letter in favor of an immediate offer of statehood. Rather than accept delay or bulldoze statehood through, Ponsa-Kraus has since suggested offering free association alongside statehood while arming Puerto Ricans with "clear, accurate, and federally sanctioned descriptions of the options."[304] Specifically, voters should know that free association "could not, under international and domestic law, provide the same guarantee of perpetual birthright U.S. citizenship that statehood would provide."[305] Since then, she has been joined in the effort by the prominent free association advocate and constitutional scholar Rafael Cox Alomar.[306]

---

304. Hearing on H.R. 1522, *supra* note 237 (testimony of Christina Ponsa-Kraus, Professor of Law, Columbia Law School New York, N.Y.).

305. *Id.* at 2.

306. Rafael Cox Alomar & Christina Duffy Ponsa-Kraus, *Two Bills Aim to Fix Puerto Rico's Status. Here's How Congress Can End the Deadlock*, MIAMI HERALD (Aug. 2, 2021), https://www.miamiherald.com/opinion/op-ed/article 253149988.html (on file with the *Columbia Human Rights Law Review*); *Proposed Compromise Status Legislation for Puerto Rico and Companion Memorandum with Background & Commentary*, *supra* note 86. I am skeptical about two aspects of their most recent proposal. First, they envision Congress settling key terms of a compact of free association in advance of a vote. But given the difficult choices involved, I worry that the result will be further delays that threaten Congress' ability to act the next time a political opportunity arises. Second, Christina Ponsa-Kraus and Rafael Cox Alomar proposed to exclude the status quo from the vote:

Such an approach would not eliminate the possibility that dreams of a spectral sovereignty would lead Puerto Ricans to accept colonial governance in the interim. But it would ensure that any such outcome was a choice rather than the default.

IV. Law, Politics, and the Role of the Stateside Academic

This Essay began with a question: Should a metropole scholar seek to influence colonial law and policy when many people in the colonies prefer different outcomes? Experience teaches that the answer cannot be that good intentions guarantee good results. I and other academics may want to be allies of those in the colonies, opponents of colonial governance, and advocates for democracy. But such aims are no guarantee that any of us would have the better of arguments with those holding opposing views in the colonies. Overconfidence has led plenty of prior stateside scholars astray.

To gain traction on its animating inquiry, the Essay turned to the legal-political structures that have caused disagreements among people otherwise united by commitments to democracy and anti-colonialism. Those conflicts have not broken down along neat lines of metropole academics versus colonized population. Divides run through and between colonies, their diasporas, and metropole scholars. There is no unified colonized voice to which deference could be extended because those subject to colonial governance have experienced, navigated, and theorized their subjection in multiple ways.

To explain these divisions, the Essay invoked a status manipulation that I term "spectral sovereignty," the holding out of a novel, beneficial sovereign status that never quite arrives. American Samoa and Puerto Rico have been plagued by a surplus of such prophesied utopian statuses and a dearth of genuine alternatives. People within and beyond the colonies have divided over whether to nurture these spectral statuses or to denounce them.

It would be convenient if constitutional expertise could clear the fog around spectral statuses by providing doctrinal clarity as to the bona fides of each. That would provide metropole legal-academics with

---

"Territorial status should not be included in any form because it defeats the purpose of self-determination, which is to put an unambiguous end, once and for all, to Puerto Rico's territorial status." *Id.* at 3. But one can also understand a vote in favor of the status quo as a vote to see whether better options emerge later (or to demand that they do). To require Puerto Ricans to choose between relatively permanent status options that are pre-selected by the metropole is to deprive them of the opportunity to fight for better, less colonial outcomes.

a helpful, neutral way to facilitate the dismantling of colonial governance. But it is not to be.

No clear line separates law from politics. Consider once-outlandish arguments that a national health insurance program could be beyond Congress' power to "regulate Commerce . . . among the several States,"[307] or that the Constitution contained a right to marry someone of the same sex.[308] As one contemporary wit wrote (in ostensible Irish dialect)[309] after the Court broke with the Reconstruction Constitution in its decisions in the 1901 *Insular Cases*, "No matter whether th' Constitution follows th' flag or not, 'th Supreme Coort follows th' iliction returns."[310] The constitutional innovation that inspired that quip—territorial nonincorporation doctrine—was especially rapid. It took shape in mere months, albeit with many years then needed before it solidified into somewhat settled doctrine and conventional legal wisdom.

It is this tension between the seeming fixity of constitutional status and its self-evident changeability that makes the spectral statuses that U.S. empire dangles so enticing. Sometimes the statuses do materialize, and if a particularly beneficial one were to be attained, it would offer enduring advantages.

My initial response to these complexities was to tread lightly. When I did intervene, it was initially to vindicate a democratic principle rather than to promote one path out of colonial governance over another. To that end, I began submitting amicus briefs relevant to the operation of the Citizenship Clause in American Samoa. I was motivated by my commitment to the democratic principle that it is corrosive for a democracy not to have all of its people be citizens. At the same time, I felt confident that citizenship would not have legal

307. U.S. CONST., art. I, § 8, cl. 3; *see also* Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, LEGAL SOLS. HEALTH REFORM 5–6 (2009), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1020&context=ois_papers [https://perma.cc/VJ2J-XKKL] ("[I]t is clear and well-settled that Congress has the power to mandate the purchase of health insurance."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (registering five votes for the view that the Patient Protection and Affordable Care Act's individual mandate fell outside of Congress' power under the Commerce Clause).

308. Obergefell v. Hodges, 576 U.S. 644 (2015) (overruling Baker v. Nelson, 409 U.S. 810 (1972) and holding that states must recognize same-sex marriages performed in other states).

309. Walter R. Mears, *Supreme Court and Election Returns*, AP (Dec. 4, 2000), https://apnews.com/article/15e6aa984543681dbd5c482ea3f23ce8 [https://perma.cc/F6V4-KP7R].

310. FINLEY PETER DUNNE, MR. DOOLEY AT HIS BEST 77 (1938).

consequences in American Samoa that would reduce self-government, threaten Indigenous culture, or prejudice any status option.

Nonetheless, I hesitated to weigh in on contemporary status questions in Puerto Rico in deference to the principle that Puerto Ricans should decide Puerto Rico's fate. In essence, I equated inaction with neutrality. But as colonial governance and the suffering that accompanied it wore on, I came to see my silence as an abdication.[311] A key way that status manipulation sustains empire is by complicating matters so much that people feel powerless to act without making mistakes. To decline to act out of fear in such circumstances is to let status manipulation succeed.

Rather than throw one's hands up in the face of status manipulation and colonial governance, the better approach for the constitutional expert within the imperial structure may be to do more. This partly means being willing at the outset to speak up even as one seeks to be an active listener and learner. It also means being ready to account for one's mistakes, which status manipulation makes more likely.

I undertook this Essay in part as a means of reflection and potential course correction in the face of opposition to my amicus brief from prominent voices in American Samoa. As Part II reflects, I am not convinced by the intimations of judges and elected officials that American Samoa is on the brink of achieving a status akin to Native sovereignty if only *jus soli* Fourteenth Amendment U.S. citizenship can be held at bay. I cannot rule out the possibility that such citizenship might draw further and unwelcome Supreme Court attention to American Samoa. But I judge the democratic imperative of universal citizenship to outweigh this risk, at least for now.

The Essay has also been an opportunity to take stock of my entry into debates over Puerto Rico's status options. Here, I identified a consequential oversight in my initial foray. My op-ed demanded that Puerto Rico be offered statehood because it saw no other viable alternative to the status quo. But as Part III details, that view overlooks the possibility that Puerto Ricans might opt for free association if it were offered. Nonetheless, I do not think that silence would have been preferable to speaking out. Indeed, it was the dialogue between proponents of statehood and free association that led to a joint

311. *Cf.* Issacharoff et al., *supra* note 195 ("We remain committed to the proposition that the choice among options must, in the first instance, rest with the people of Puerto Rico. But this is no answer to the question we were first retained to engage in 2015: what exactly are the options available?").

proposal that would give Puerto Ricans a clearer and fuller choice than either side in the debate had been supporting up to that point.

Colonialism has been a cancer on U.S. democracy from the nation's outset. At the same time, the United States was founded through a revolution against colonial rule. Ever since, it has stood before the world as a bold, ongoing experiment in democracy. In the fight between the nation's higher and baser angels, the silence of the faithful is no virtue. It is better to speak carefully, listen hard, recognize one's errors and fallibility, and acknowledge and correct one's mistakes.