IVORY TOWER COLONIALISM

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INTRODUCTION

Nearly 125 years to this day, the *Harvard Law Review* laid the foundation for the Supreme Court to systematically deny many constitutional protections to the "savage," "half-civilized," "ignorant and lawless" "alien races" that inhabit the United States territories of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.[1] It did so by publishing openly racist legal "scholarship"—if it could even be called that—written by the most prominent law professors of the day, such as A. Lawrence Lowell and Christopher Columbus Langdell, that relied on the white man's burden and other theories of racial inferiority as the basis for treating these insular territories differently than those that came before.[2]

This year, the *Harvard Law Review* again repeats its mistake, opening its pages and lending its credibility to the theory of "borderlands constitutionalism."[3] This borderlands constitutionalism proposes a merger of "the law of the territories" and "federal Indian law" so that the same principles apply to "all peoples colonized by the United States."[4] While seemingly benign and relying on anti-racist theory, the ultimate result of borderlands constitutionalism is actually *worse* for the territories than what came from the racist diatribes of Langdell and Lowell: the denial of all constitutional rights to those who reside in the territories—not just *some* rights as is currently the case, but *all* rights; *each and every single one*, *without exception.*

I. THE REAL-WORLD DAMAGE TO THE TERRITORIES CAUSED BY ACADEMIA

The elite of the legal profession bear the most responsibility for the current inequities facing modern United States territories. The Supreme Court of the United States created the doctrine of territorial incorporation out of whole cloth in the *Insular Cases* because they did not want to confer the same constitutional protections on the "savage," "half-civilized," "ignorant and lawless" "alien races" that inhabited them.[5] The Supreme Court did so by relying on a line of so-called legal scholarship written by Lowell, Langdell, and other prominent figures in the academy that relied on the white man's burden and other theories

[1] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 287 (1901); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155 (1899).

[2] *See, e.g.*, Langdell, *supra* note 1; Baldwin, *supra* note 1; Thayer, *supra* note 1; Lowell, *supra* note 1.

[3] Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 66 (2023).

[4] *Id.* at 145.

[5] *See, e.g.*, *Downes*, 182 U.S. at 287.

of racial inferiority.[6] These racist diatribes were not published in some fly-by-night publications but graced the pages of the *Harvard Law Review* and the *Yale Law Journal*.[7]

We like to believe that the legal profession is different today than 125 years ago—that the phrase "Equal Justice Under Law" chiseled on the Supreme Court Building now means what it says without needing an asterisk, or that law schools professing to value diversity, equity, and inclusion truly support the fair treatment and full participation of all people. Yet we also know this is not the case—while courts and law schools certainly progressed relative to a century ago, much work remains to achieve those ideals.

But a major problem arises when these entities, and the people who comprise them, act in ways they subjectively *believe* promote those ideals but in practice makes equality much more difficult to achieve. Just two years ago, a panel of the United States Court of Appeals for the Tenth Circuit in *Fitisemanu v. United States*[8] denied the right of constitutional birthright citizenship—oft considered "the right to have rights"[9]—to those born in American Samoa. Unlike the *Insular Cases*, the court did not do this because the panel majority believed the people of American Samoa were so "savage" or "half-civilized" that they could not understand citizenship or comport with its responsibilities.[10] Rather, it denied the right to citizenship with the velvet glove of the language of empowerment and decolonization, such as by emphasizing that a court should not "impose citizenship on an unwilling people from a courthouse thousands of miles away"[11] or that denying citizenship is somehow necessary "to preserve traditional cultural practices" such as restrictions on the alienation of land.[12]

What formed the legal rationale for the Tenth Circuit to effectively recognize a cultural preservation exception to the Citizenship Clause of the United States Constitution? Like the territorial incorporation doctrine discovered by the United States Supreme Court in the *Insular Cases*, the Tenth Circuit panel majority invented this exception out of whole cloth, elevating scholarship recently published in the *Harvard Law Review* and the *New York University Law Review* over the plain text of the Constitution.[13] This and similar scholarship,[14]

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[6] *See, e.g.*, sources cited *supra* note 1.

[7] *See* sources cited *supra* note 1.

[8] 1 F.4th 862, 864-65 (10th Cir. 2021).

[9] *See, e.g.*, Gonzalez-Alarcon v. Macias, 884 F.3d 1266, 1277 (10th Cir. 2018) (quoting Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting)).

[10] *See Downes*, 182 U.S. at 287.

[11] *Fitisemanu*, 1 F.4th at 865.

[12] *Id.* at 870–71.

[13] *See Developments in the Law – U.S. Territories*, 130 HARV. L. REV. 1616 (2017) [hereinafter *Developments*]; Russell Rennie, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. REV. 1683 (2017).

[14] *See, e.g.*, Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1259, 1264 (2019); *Developments*, *supra* note 13, at 1637 n. 41.

while purporting to reject the racism of the likes of Lowell and Langdell, nevertheless provided the Tenth Circuit panel majority with the roadmap and moral authority to arrive at the same ultimate result as the *Insular Cases*: the Indigenous culture of American Samoa is so frail that it cannot possibly survive without the intervention of enlightened Westerners in the form of *withholding birthright citizenship* despite the plain and unambiguous language of the Constitution.

But perhaps one of the most tragic aspects of this judicial reliance on this scholarship is that the authors likely did not intend for their writings to form the basis for withholding the right of constitutional birthright citizenship from the inhabitants of American Samoa. While the author of the *New York University Law Review* article did propose reimagining the *Insular Cases* to protect indigenous cultures, his article expressly *rejected* the idea that American Samoans must choose between citizenship and cultural preservation and proposed this reimagining as a way for courts to *simultaneously* confer birthright citizenship and other "basic freedoms" on a territory while also respecting "bargained for" accommodations such as restrictions on the alienation of land.[15] The same is true of the *Harvard Law Review* article, whose anonymous authors did not advocate for repurposing the *Insular Cases* as a means to justify withholding birthright citizenship, but likewise proposed it as a mechanism to avoid "the constitutional invalidation of territorial land laws" in American Samoa.[16] Thus, these authors likely did not intend to become modern-day accomplices of Lowell and Langdell, but to establish a theoretical framework for fixing the "shameful history" of prior legal scholars and the law journal editors who published their work.[17] Despite what were likely good intentions, the words they selected, the theories they proposed, ultimately harmed the territories.

Yet another unfortunate aspect is that those theories ultimately were solutions in search of a problem. The problem these authors sought to solve through reimagining of the *Insular Cases* seems legitimate: somehow reconciling the land alienation laws in effect in American Samoa with the Fourteenth Amendment to the United States Constitution. But what went uncited and presumably unnoticed by the authors—and, not surprisingly, the Tenth Circuit—is that this problem *had already been decisively resolved* by the High Court of American Samoa in its opinion in *Banks v. American Samoa*,[18] in which it held both that (1) the Fourteenth Amendment applied to American Samoa; and, more importantly, (2) the territory's land alienation laws were constitutional and did not run afoul of the Fourteenth Amendment. The High Court did so by applying existing doctrine, without the need to rely on the *Insular Cases* or create a new

[15] *See* Rennie, *supra* note 13, at 1713.

[16] *Developments*, *supra* note 13, at 1629.

[17] *See* Sam Erman, *Accomplices of Abbot Lawrence Lowell*, 131 HARV. L. REV. F. 105 (2018).

[18] 4 Am. Samoa 2d 113 (1987).

theory of constitutional interpretation to reach that result.[19] In other words, the very premise of the theory espoused by these articles—that existing jurisprudence meant that extending constitutional birthright citizenship under the Fourteenth Amendment to American Samoa required striking down American Samoa's land alienation laws under the Equal Protection Clause of the Fourteenth Amendment—was false, and reimaging or repurposing the *Insular Cases* became necessary only due to the authors' unfamiliarity with well-established territorial law.

The theories published by these legal scholars in these elite law journals and later adopted—often in distorted form—by the federal courts perpetuate a system of Ivory Tower Colonialism over United States territories. Of course, not all or even most legal scholarship related to the territories falls within this category; in recent years, many law reviews have published extraordinarily impactful articles from law professors and others that provide much-needed theoretical or practical analysis relevant to the territories.[20] The factors that distinguish scholarship of the Ivory Tower Colonialism variety from genuinely helpful scholarship generally include (1) explicit or implicit reliance on harmful stereotypes pertaining to the territories or the people who inhabit them, often without realizing that they are stereotypes or recognizing that they are harmful; (2) treatment of the territories as some sort of academic curiosity or oddity, divorced from the fact that real people make the territories their home; (3) proposals that courts impose on the territories a grand, new, and untested theory of constitutional interpretation unconnected to precedent or the plain text of the United States Constitution; (4) ignorance of relevant laws, judicial decisions, historical facts, or other materials generally known to those who practice law in a territory that, if known to the author and disclosed to the reader, casts doubt on or even outright disproves the author's thesis; and, perhaps most unfortunately, (5) inclusion of language and ideas that, often unintentionally, provide courts with support to continue the second-class treatment of one or more territories.

The *Harvard Law Review* now provides a platform to the newest entrant in the Ivory Tower Colonialism genre: the theory of "borderlands constitutionalism," [21] which proposes "[w]edding together the territories and Native nations" because while these groups "do have meaningful distinctions from each other . . . the legal and constitutional bases for these categories do not necessarily hold."[22] This proposed merger or wedding, however, more closely

[19] *Id.*

[20] *See, e.g.*, Dolace McLean, *Cultural Identity and Territorial Autonomy: U.S. Virgin Islands Jurisprudence and the* Insular Cases, 91 FORDHAM L. REV. 1763, 1766 (2023); Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J. FORUM 284, 286-87 (2020); Joseph T. Gasper II, *Too Big to Fail:* Banks *and the Reception of the Common Law in the U.S. Virgin Islands*, 46 STETSON L. REV. 295, 299-300 (2017).

[21] Blackhawk, *supra* note 3, at 89-90.

[22] *Id.* at 146.

resembles an acquisition or an adoption. Effectively, borderlands constitutionalism throws out the law of the territories and instead applies federal Indian law (or some close variant thereof) to the territories—which is rather ironic since the elimination of local law in favor of foreign law is perhaps a textbook example of colonization.

This radical proposal denies *all* federal constitutional rights to the people of the territories, and in doing so disregards the plain text of the Constitution as well as the original intent of the Founders and relies on false and harmful stereotypes about the territories. To paraphrase the late Judge Juan Torruella, the notion of a so-called borderlands constitutionalism as a solution to the unequal treatment of the United States territories is exactly the kind of inopportune experimentation which, notwithstanding any good intentions, is misguided, and "[i]t is perhaps with a modicum of déjà vu and historical irony that the birth of this latest proposal draws its breath from within the annals of the same legal journal that initially promoted the first of the experiments regarding [the territories] that eventually became the doctrine of the *Insular Cases*."[23]

II. BORDERLANDS CONSTITUTIONALISM: DENYING *ALL* CONSTITUTIONAL RIGHTS TO *ALL* U.S. TERRITORIES

Law professors have been justifiably criticized from all corners of the legal profession as largely "out of touch" and often failing to recognize the real-world implications that would arise if their esoteric theories were adopted by courts or legislatures.[24] Legal academics often fail "to look, feel, see, and hear the voices, emotions, and thoughts of real people in real communities."[25] Part of this is that law journals, whose student editors are typically lacking in both subject-matter expertise and real-world experience with a topic, often "unrealistically require excessive citations to prove well-known facts," but fail "to weed out ridiculous assertions" because they are satisfied with citations to "*any* authority" as opposed to "the best possible authorities."[26] The result, of course, is that law journals publish scholarship without "fully consider[ing] the feasibility and practical application of their theories in the real world,"[27] with law students and even fellow law professors often being reluctant to critically analyze the writings

[23] Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 69 (2018).

[24] *See* Richard E. Redding, *The Legal Academy Under Erasure*, 64 CATH. U. L. REV. 359, 404-05 (2015); Will Rhee, *Law and Practice*, 9 LEGAL COMMC'N & RHETORIC: JALWD 273, 290-91 (2011).

[25] Rebecca R. French, *Of Narrative in Law and Anthropology*, 30 L. & SOC'Y REV. 417, 433 (1996).

[26] Colin P.A. Jones, *Unusual Citings: Some Thoughts on Legal Scholarship*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 377, 382-83 (2005) (emphasis in original).

[27] Redding, *supra* note 24, at 410.

of their peers because "'go along to get along' is the motto that most law professors, as well as most students, are inclined to follow."[28]

Let me be clear: I cannot conceive of any field or subfield that is governed by a body of law as incoherent, inconsistent, and intellectually bankrupt as the law of United States territories. As outlined in greater detail earlier, this state of affairs is, in large part, the fault of the legal academy and in particular the *Harvard Law Review* and the *Yale Law Journal* for giving a platform to the racist theories that the Supreme Court would shortly thereafter adopt as law in the *Insular Cases*.[29] To quote Justice Gorsuch,

> The flaws in the *Insular Cases* are as fundamental as they are shameful. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter, only certain supposedly "fundamental" constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.[30]

There is no question in my mind that we must reform the law of the territories by dismantling the ad hoc framework established by the *Insular Cases* and replacing it with a new doctrine that does right by the people of the territories while remaining faithful to the text of the Constitution.

But that does not mean that any theory will do. Despite their many faults, the *Insular Cases* and their progeny arrived at the t result in certain cases, even if not for the right reasons. In one of the *Insular Cases*, the Supreme Court extended the Due Process Clause to the unincorporated territory of Puerto Rico;[31] in another, it applied the Double Jeopardy Clause to the unincorporated territory of the Philippine Islands.[32]

While *the Swiss-cheese approach to the application of the Bill of Rights endorsed by the Insular Cases* is unjustifiable both doctrinally and morally, even under the *Insular Cases* framework, there are at least *some* individual rights and liberties extended to the territories by virtue of the Constitution rather than by the grace of Congress.

And here is where the theory of borderlands constitutionalism crosses the threshold from well-intentioned yet flawed to outright dangerous: borderlands constitutionalism, if extended to United States territories, would deny all constitutional rights to those who reside in the territories—not just *some* rights as is currently the case under the *Insular Cases* regime, but *all* rights; *each and every single one*, *without exception*. Other than only mentioning it on page 119 of a 152-page article, the author makes no attempt to hide this: "the United States

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[28] Marijan Pavcnik & Louis E. Wolcher, *A Dialogue on Legal Theory Between a European Legal Philosopher and His American Friend*, 35 TEX. INT'L L J. 335, 383 (2000).

[29] *See* discussion *supra* Part **Error! Reference source not found.**.

[30] United States v. Vaello Madero, 596 U.S. 159, 184-85 (2022) (Gorsuch, J., concurring).

[31] *See* Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913).

[32] *See* Kepner v. United States, 195 U.S. 100 (1904).

Constitution does not apply to tribal governments."[33] Not only that, the author does not view this as a bad thing: in literally the next sentence, the author bemoans that the Supreme Court of the United States "held that Native nations lack recognition, self-determination, and territorial sovereignty in areas that might involve the rights of non-Indians," and that "[w]hat these cases have meant in practice is that Native nations can no longer apply their criminal and civil laws to punish and deter wrongdoing by non-Indians within Indian Country"[34]—failing to disclose, however, that the "laws" in question include provisions such as the authorization to restrict jury membership based on race.[35]

That tribal lands may permissibly serve as constitution-free zones is not a radical idea by any means. In fact, it is fully consistent with the plain text of the United States Constitution. Only three provisions of the United States Constitution contain any express reference to the tribes—all pertaining to the organization or powers of Congress. Two of these provisions are exclusionary in nature: Clause 3 of Section 2 of Article I requires apportionment of direct taxes and members of the House of Representatives according to state population, "excluding Indians not taxed,"[36] while the Apportionment Clause of the Fourteenth Amendment likewise provides for apportionment of the House of Representatives by state population while also "excluding Indians not taxed."[37] The other reference is in what is commonly known as the "Indian Commerce Clause," listed among the enumerated powers of Congress, which affirmatively grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[38]

"The limited references to Indians or Indian tribes make plain not only that they were not parties to the Constitutional Convention but also that they neither received nor surrendered any rights under the Constitution."[39] Because the tribes pre-date the United States Constitution, were not part of the United States, had no say in the Constitution's drafting, and did not ratify the Constitution, it makes perfect sense—both as a matter of textualism and normative values—to exclude them from the Constitution's application.

Yet the question here is not whether the United States Constitution applies (or should apply) to these tribes. Rather, it is whether United States territories should join the tribes as part of a sort of constitution-free zone. Unlike the tribes, there is no basis whatsoever in either the plain text of the Constitution or any basic notions of fairness to justify denying federal constitutional rights to every one of the territories. The word "Territory" only appears three times in the entire Constitution: the Territorial Clause, the Eighteenth Amendment enacting a

[33] Blackhawk, *supra* note 3, at 119.

[34] *Id.* at 119-20.

[35] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978).

[36] U.S. CONST. art. I, § 2, cl. 3.

[37] U.S. CONST. amend. XIV, § 2.

[38] U.S. CONST. art. I, § 8.

[39] Clay R. Smith, *American Indian Tribes and the Constitution*, 48 ADVOC. 19, 19 (2005).

nationwide prohibition on alcohol, and the Twenty-First Amendment repealing the Eighteenth Amendment and returning regulation of alcohol to local authorities.[40] Of these, the Territorial Clause is a natural starting point to determine the constitutional status of the territories. It reads, in its entirety, as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[41]

Much has been written about this language and its meaning.[42] There is no need to summarize those lengthy arguments here; suffice it to say, an analysis of the language's original meaning using Founding-era sources simply cannot support the premise of the *Insular Cases* that Congress possesses completely unrestricted plenary authority over the territories.

But one aspect of the Territorial Clause is certainly clear: it pertains to "the Territory or other Property *belonging to the United States*."[43] Unlike in other provisions pertaining to the tribes, the words used in the Territorial Clause are words of inclusion rather than exclusion; while the tribes are separate from the United States, the territories belong to the United States. The end result of borderlands constitutionalism, then, would be to establish constitution-free zones in land belonging to the United States rather than contiguous land belonging to separate sovereigns such as the tribes.

Borderlands constitutionalism thus essentially supports the result of the *Insular Cases*: that the Constitution does not follow the flag. But while the territorial incorporation doctrine endorsed by the *Insular Cases* still recognizes that so-called "fundamental" rights must extend to the territories regardless of the will of Congress,[44] there is no fundamental rights exception that applies with respect to the tribes: because the tribes are separate from the United States, *none* of the rights and liberties codified in the Constitution are self-executing on tribal lands, including the rights unquestionably fundamental such as those set forth in the First Amendment[45] and the Fifth Amendment.[46]

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[40] U.S. CONST. art. IV, § 3, cl. 2; *id.* amend. XVIII (repealed 1933); *id.* amend. XXI.

[41] U.S. CONST. art. IV, § 3, cl. 2.

[42] *See* Anthony M. Ciolli, *Needful Rules and Regulations: Originalist Reflections on the Territorial Clause*, 77 VAND. L. REV. 1263 (2024).

[43] U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

[44] United States v. Vaello Madero, 596 U.S. 159, 183-84 (2022) (Gorsuch, J., concurring).

[45] Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (holding First Amendment not applicable to tribes).

[46] Talton v. Mayes, 163 U.S. 376 (1896) (holding Fifth Amendment not applicable to tribes).

III. BORDERLANDS CONSTITUTIONALISM: MARGINALIZING THE INDIGENOUS PEOPLE OF THE TERRITORIES

What, however, of the claim that the remaining five so-called "unincorporated" United States territories—American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands—seem to more closely resemble tribes than the incorporated territories that eventually achieved statehood? As Justice Gorsuch has observed, "[n]othing in the Constitution speaks of 'incorporated' and 'unincorporated' territories"—in terms of the Constitution, a territory is a territory.[47]

Unquestionably, "[t]he United States has a colonies problem."[48] But this does not mean that *every* United States territory is a colony, or that *each* aspect of the federal-territorial relationship mirrors the relationship between a colony and its colonizing nation. Even putting aside the plain text of the Constitution, the historical and contemporary relationship between the United States and each of its territories is distinct from that of the tribes and the United States. Most ironically, the attempts to homogenize these relationships—both those of individual territories with the United States and of the territories collectively—to justify the theory of borderlands constitutionalism rely on one of the most versatile tools of a colonizer's handbook: erasing the identity and agency of the indigenous peoples of the territories.

Perhaps the most appropriate place to begin is the relationship between each territory and the United States. It has been alleged that "[a]t present, the fields of federal Indian law and territorial law treat all Native nations alike and all territories alike."[49] Whatever may be the case with federal Indian law, that is certainly not true of the law of the territories. On the contrary, the disparate treatment of the territories, not just with respect to the fifty states, *but even relative to each other*, is one of the core areas of study within the field. As a recent article has briefly summarized,

> A jury trial in a criminal prosecution is a right in the U.S. Virgin Islands, but not in the Northern Mariana Islands. The border between the mainland United States and Puerto Rico is a domestic border to which the full protections of the Fourth Amendment apply, but the border between the U.S. Virgin Islands and the rest of the United States is an international border subject to the border-search exception. The territorial government of Guam is an instrumentality of the federal government and thus is not precluded under the Dormant Commerce Clause from enacting tax laws that discriminate against non-residents, but the territorial government of the U.S. Virgin Islands is treated as a state government for Dormant Commerce Clause purposes and may not. The Northern Mariana Islands may enact laws that limit otherwise fundamental rights, such as the right to

[47] *Vaello Madero*, 596 U.S. at 185-86 (Gorsuch, J., concurring).

[48] Anthony M. Ciolli, *Judicial Antifederalism*, 91 FORDHAM L. REV. 1695, 1696 (2023).

[49] Blackhawk, *supra* note 3, at 146.

> own land, only to the indigenous Chamorro people, but Guam may not, even though it is located 100 miles away and its indigenous population is also Chamorro.[50]

In addition, an entire subgenre of territorial law scholarship—which has even been embraced by some jurists such as Justice Sonia Sotomayor—is "what may be best described as a theory of Puerto Rico exceptionalism" that elevates Puerto Rico to a higher status than its fellow territories by effectively treating Puerto Rico as something other than a territory due to its "Commonwealth" status.[51]

This does not mean that sound legal reasoning supports all the actual and proposed differences in how the law treats the territories. It is unfortunately not hyperbole to acknowledge the reason the U.S. Virgin Islands, but not Guam, are bound by the Dormant Commerce Clause. It seems to be a combination of sheer prejudice and ignorance of binding Supreme Court precedent on the part of the Third Circuit panel that decided the case.[52] But other distinctions between the territories are supported by obvious differences between them. For instance, the reason courts repeatedly affirm the constitutionality of the Northern Mariana Islands and American Samoa's land alienation laws is that those now-territories voluntarily joined the United States through negotiated treaties between the federal government and the government of the islands' Indigenous peoples that contained provisions mandating the preservation of local customs.[53]

That American Samoa and the Northern Mariana Islands expressly sought and negotiated the terms of their annexation by the United States is seemingly completely overlooked by this so-called theory of "borderlands constitutionalism." The "people of American Samoa" are referred to as "colonized people,"[54] but how can this possibly be the case when American Samoa voluntarily elected to join the United States pursuant to a treaty whose terms remain honored to this day?[55] Certainly, "American Samoans have long resisted United States citizenship as a form of assimilation."[56] However, it is not the United States seeking to impose that citizenship, but fellow American

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[50] Ciolli, *supra* note 42, at 1270 (collecting cases).

[51] *See* Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 246-47 (2022).

[52] *Compare* Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985), *with* JDS Realty Corp. v. Gov't of the V.I., 824 F.2d 256 (3d Cir. 1987). The Third Circuit did not mention the *Sakamoto* decision or acknowledge *Farmers' & Mechanics' Savings Bank v. Minnesota*, 232 U.S. 516 (1914), where the Supreme Court held that a territorial government is an instrumentality of the federal government. Rather, it seemingly premised its holding on it being somehow improper "that an unincorporated territory would have more power over commerce than the states possess." *JDS Realty Corp*., 824 F.2d at 260.

[53] *See* Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (1980).

[54] Blackhawk, *supra* note 3, at 101.

[55] *See Craddick*, 1 Am. Samoa 2d.

[56] Blackhawk, *supra* note 3, at 98.

Samoans bringing private lawsuits in their individual capacities to force it over the objections of both the American Samoa and the United States.[57]

This is further illustrated by perhaps one of the most shockingly factually inaccurate statements found in the article: that "American Samoans have not been wronged because they have been denied birthright citizenship; they have been wronged because the United States invaded their country and continues to establish its structure of, admittedly now republican, government unilaterally."[58] But there was no invasion by the United States; the military did not swoop in and conquer American Samoa as a "spoil of war." Rather, the matai of the islands comprising the non-territory voluntarily entered deeds of cession.[59] Nor did the United States impose a government on American Samoa; on the contrary, "[e]ven without an organic act or other explicit Congressional directive on governance, the people of American Samoa adopted their own constitution in 1967 and first constitutional elections were in 1977."[60]

The same is true of the people of the Northern Mariana Islands, who the author also refers to as a United States colony.[61] While it is stated that "the Northern Mariana Islands, organized instead as a commonwealth of the United States, similar to Puerto Rico,"[62] conspicuously absent is any acknowledgement that the people of the Northern Mariana Islands chose this status in lieu of independence or free association, by a popular vote of 78.8% in favor of annexation by the United States.[63] And as with American Samoa, the United States continues to honor the terms of the covenant that it entered into with the now-territory, including permitting enforcement of its race-based land alienation laws.[64]

The relationship between the United States and the American Samoa and the Northern Mariana Islands is thus essentially the opposite of colonialism. The United States did not invade those lands, dissolve their indigenous governments, and impose its own rule. The United States did not import tens of thousands of its own citizens into those territories and give them land that it confiscated from the indigenous population. Nor did it make promises to the indigenous peoples of either territory to induce them into signing the respective treaties that it later

[57] *See* Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015); *see also* Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021).

[58] Blackhawk, *supra* note 3, at 133-34.

[59] *See Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN (1929), https://history.state.gov/historicaldocuments/frus1929v01/d853 [https://perma.cc/BSN3-HV5G].

[60] *American Samoa, Political Status*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oia/islands/american-samoa [https://perma.cc/3597-6YZX] (last visited Dec. 28, 2024).

[61] Blackhawk, *supra* note 3, at 76.

[62] *Id.* at 75.

[63] *See* U.S. *ex rel.* Richards v. De Leon Guerrero, Misc. No. 92-00001, 1992 WL 321010, at *23 & n.32 (D. N. Mar. I. July 24, 1992) (summarizing the history of the relationship between the Northern Mariana Islands and the United States).

[64] Wabol v. Villacrusis, 958 F.2d 1450, 1461–62 (9th Cir. 1990).

disregarded. It is not clear what more—other than simply saying "No" to the requests for annexation—that the United States should have done when faced with these circumstances.

Yet what of the other three territories? The U.S. Virgin Islands, for example, had been purchased by the United States from Denmark for $25,000,000 in gold coins.[65] But does that make the people of the U.S. Virgin Islands a "colonized people"?[66] The answer, perhaps counterintuitively, is a resounding no. As the Virgin Islands Supreme Court recently explained in rejecting the contention that the U.S. Virgin Islands had become part of the United States against the will of its people:

> Although several other insular territories became part of the United States involuntarily as spoils of war, the population of the Virgin Islands supported becoming part of the United States. While the Virgin Islands officially became part of the United States upon their purchase from Denmark on March 31, 1917, an unofficial referendum on the sale of the islands to the United States passed with a vote of 4,727 in favor and only seven against. And on August 24 and 28, 1916, respectively, the elected Colonial Councils of St. Thomas-St. John and St. Croix unanimously passed resolutions in support of annexation of the islands by the United States. Thus, the people of the Virgin Islands—whether directly through the unofficial referendum, or indirectly through their duly-elected local government—had in fact overwhelmingly supported their change in political status.[67]

Even after the transfer, the United States repeatedly acceded to the wishes of the indigenous population of the territory. Similar to American Samoa and the Northern Mariana Islands, Congress did not impose American law on the U.S. Virgin Islands—rather, it expressly provided that the Danish laws already in effect at the time of the transfer would continue indefinitely unless amended by the territory's democratically-elected colonial councils.[68] What has thus far often gone unrecognized is that these elected councils then voluntarily chose to discard Danish law in favor of American law, believing it far superior to the laws of the Danish regime that they had overwhelmingly voted to leave.[69]

The political status of the U.S. Virgin Islands, as well as the internal organization of its territorial government, has also been an area in which Congress has repeatedly deferred to the indigenous population through their elected leaders. Here, too, the Virgin Islands Supreme Court provided a summary of this often-overlooked history:

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[65] Treaty for Cession of the Danish West Indies, Den-U.S., Aug. 4, 1916, T.S. No. 629.

[66] Blackhawk, *supra* note 3, at 101.

[67] Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048, 1088 n.34 (2019) (internal citations omitted).

[68] 48 U.S.C. § 1392.

[69] *See* Joseph T. Gasper II, *Too Big to Fail:* Banks *and the Reception of the Common Law*, 46 STETSON L. REV. 295, 314–17 (2017).

> But perhaps even more importantly, the Organic Act of 1936 and the Revised Organic Act were not unilaterally imposed on the Virgin Islands by Congress. When Congress first considered establishing a permanent government for the Virgin Islands, the Chair of the Senate Committee on Territories and Insular Possessions—Senator Millard E. Tydings—rejected a draft organic act that had been prepared by the Presidentially-appointed governor, and instead demanded that another bill be drafted "which would meet with approval of the local people." In response, the two democratically-elected Virgin Islands legislatures existing at that time drafted the bill that would, with only minor changes, eventually become the Virgin Islands Organic Act of 1936. In other words, the first charter and *de facto* constitution of the Virgin Islands, which includes the Bill of Rights provisions at issue in this case, was not solely drafted by Congress, but was—like the Constitution of Puerto Rico and the CNMI Constitution—drafted by representatives elected directly by the people of the Virgin Islands, and then subsequently approved by Congress. Likewise, the adoption of the Revised Organic Act and the subsequent amendments thereto had also not been initiated unilaterally by Congress. Rather, those enactments were spurred by local referendums on several subjects, including a desire to combine the two legislatures into a single legislature. In other words, like the Constitution of Puerto Rico, both the Virgin Islands Organic Act of 1936 and the Revised Organic Act of 1954 were adopted with the consent of the people of the Virgin Islands either directly or through their democratically-elected representatives and then made official through the acquiesce of Congress.[70]

None of the above is in any way consistent with any traditional notion of colonialism. To characterize the people of the U.S. Virgin Islands, American Samoa, or the Northern Mariana Islands as "colonized peoples," given the overwhelming support of both their local indigenous populations and elected leaders for the transfer of sovereignty to the United States, is to completely deprive them of any agency. It is that invalidation, and not the United States's actual treatment of those three territories, that perpetuates the colonial mindset, assuming that these indigenous peoples are too ignorant to voluntarily choose to become part of the United States or were somehow tricked into doing so. This is essentially the same reasoning as the white man's burden and "reinforces the subtle and normalized marginalization of the territories."[71]

But what about Puerto Rico and Guam? Those territories were certainly "spoils of war," having been ceded by Spain to the United States in 1898 as part of the treaty that ended the Spanish-American War.[72] But whatever may have

[70] *Balboni*, 70 V.I. at 1089 n.34 (internal citations omitted).

[71] Anthony M. Ciolli, *Microaggressions Against United States Territories and Their People*, 50 S. U. L. REV. 54, 61 (2022).

[72] Treaty of Peace between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

been the case 125 years ago, an overwhelming majority of the population in both of those territories today support being part of the United States either as a territory or a state. For instance, a clear majority—often exceeding 95 percent or more—of all voters who voted for an option on the ballot at every political status referendum in Puerto Rico have voted for either statehood, commonwealth status, or some other formalized relationship with the United States, with only 5 percent—and often less—voting in favor of independence.[73] The same is true with Guam, where in its January 1982 status referendum, only 3.82 percent of voters supported independence, and more than 95 percent supported statehood, commonwealth status, the status quo, or some other relationship with the United States.[74] How can we say, on the one hand, that we wish to empower the indigenous populations of the territories, yet at the same time simply ignore or disregard how those people have already spoken?

The marginalization of these indigenous people that permeates the theory of borderlands constitutionalism flows from the very name of the theory: why are Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands considered the "borderlands" of the United States, but not the other parts of the United States that border an ocean or another country, such as Alaska, Hawaii, the ten mainland states that border Canada, the four mainland states that border Mexico, or all the states on the East and West Coasts that border the Atlantic and Pacific Oceans?

The underlying assumption that *these* five territories and *only* these five territories constitute the "borderlands," and not any of the 50 states with an international border, is reflective of the colonial mindset towards the territories that has permeated in legal academia for more than a century: that the territories are some "exotic" places that "conjur[] up images of pirates and brigands, people operating on the edge of the continent and on the edge of the law"[75] and which need saving from enlightened "white saviors."[76] Certainly, the territories differ

[73] BALLOTPEDIA, *Puerto Rico Statehood, Independence, or Free Association Referendum,* https://ballotpedia.org/Puerto_Rico_Statehood,_Independence,_or_Free_Association_Referendum_(2024) [https://perma.cc/LAC5-6XGQ] (last visited Dec. 28, 2024)..

[74] *Guam, 30. January 1982: Status*, DIRECT DEMOCRACY, https://www.sudd.ch/event.php?lang=en&id=gu011982 [https://perma.cc/S8A6-DH7U] (last visited Dec. 28, 2024).

[75] Stanley K. Laughlin, Jr., *U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?*, 37 OHIO N.U. L. REV. 429, 431 (2011).

[76] Ciolli, *supra* note 48, at 252 & n.271. The fallacy and offensiveness white savior mentality that permeates borderlands constitutionalism and similar theories is perhaps best illustrated by the following scene from the pilot episode of Star Trek Deep Space Nine:

BASHIR: This'll be perfect . . . real . . . frontier medicine . . .

KIRA: Frontier medicine?

BASHIR: Major . . . I had my choice of any job in the fleet. . .

KIRA: Did you . . .

BASHIR: I didn't want some cushy job . . . or a research grant . . . I wanted this. The furthest reaches of the galaxy. One of the most remote outposts available. This is where the adventure is. This is where heroes are made. Right here. In the wilderness.

from the fifty states in several very important respects that deserve recognition and analysis. However, to conclude that the territories somehow constitute the "borderlands" of the United States is certainly not one of them.

CONCLUSION

The law of the territories had long been dismissed by legal academia as "a marginal debate about marginal places."[77] Today, we can safely say this is no longer the case, with an explosion of published scholarship over the past ten years—including in special issues of the *Harvard Law Review* and *Yale Law Journal* and symposia at the *Fordham Law Review* and the *Stetson Law Review*—and even the establishment of the first-ever LL.M. in Territorial Law at St. Mary's University School of Law.[78]

Unfortunately, this newfound recognition and popularity comes with the challenge of defending the very existence of the field. The five inhabited United States territories are not like Native American tribes. While the territories could surely learn from the tribes, and vice versa, the fact remains that the five territories have their own unique relationships and histories with the United States that must be respected rather than overlooked in the name of solidarity. Most importantly, while some of the territories may have coalesced around different views as to what that relationship should look like moving forward, the people of the territories have demonstrated, time after time again, that they are proud to be part of the United States and desire more, rather than less, constitutional rights.[79]

Borderlands constitutionalism, if ever implemented by the courts, would undo all the strides that the territories have made over the last 125 years, and render further progress impossible. I close by reminding readers of the words of the late Judge Juan Torruella, who two years before his death felt similarly compelled to respond to another misguided grand theory of the territories published in the *Harvard Law Review*:

This is why I believe that the promotion of one more experiment regarding Puerto Rico's place within the constitutional and political polis of the United

KIRA: This wilderness is my home.

BASHIR: I didn't mean . . .

KIRA:The Cardassians left behind a lot of injured people, Doctor . . . you can make yourself useful by bringing some of your Federation Medicine to the "natives" . . . you'll find them a friendly, simple folk . . .

STAR TREK DEEP SPACE NINE: EMISSARY (Paramount Pictures 1993).

[77] Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1040-41 (2009).

[78] *See Territorial Law Concentration*, ST. MARY'S U. SCH. L., https://law.stmarytx.edu/academics/programs/ll-m-degrees/territorial-law-llm/ [https://perma.cc/Y7QV-6CTG] (last visited Dec. 28, 2024).

[79] *See* cases cited *supra* note 57; *see also About PR51st*, PR51ST, https://www.pr51st.com/pr51st/ [https://perma.cc/Q28P-DWTA] (last visited Dec. 28, 2024).

States . . . is not an acceptable solution to that pervasive issue. At this point in history, further experimentation by substituting one unequal framework for another, rather than one that puts Puerto Rico's citizens on equal footing with the rest of the nation, is no more acceptable than the concept of "separate but equal"—the constitutional remedy once considered valid in resolving racial discrimination and inequality that the Court struck down in *Brown v. Board of Education*. Continued conjectural exploration with new and untried governance formulas, 119 years after the annexation of Puerto Rico by the United States, 100 years since the granting of United States citizenship to its inhabitants, and after more than a century of their being subjected to diverse shades of colonial control and bias, all during which a common thread has been the basic premise of inequality vis-à-vis the rest of the nation—although perhaps providing academic entertainment for some and political cover for others bent on maintaining colonial control over Puerto Rico—are simply put, not acceptable in this twenty-first century. The United States cannot continue its state of denial by failing to accept that its relationship with its citizens who reside in Puerto Rico is an egregious violation of their civil rights. The democratic deficits inherent in this relationship cast doubt on its legitimacy and require that it be frontally attacked and corrected with "all deliberate speed." I strongly believe that this is exactly the kind of inopportune experimentation with Puerto Rico's U.S. citizens to which I have been referring, and which, notwithstanding good intentions, is "misguided." It is perhaps a modicum of déjà vu and historical irony that the birth of this latest proposal draws its breath from within the annals of the same legal journal that initially promoted the first of the experiments regarding Puerto Rico that eventually became the doctrine of the Insular Cases, the noxious condition that continues to the present day allowing the citizens of the United States who reside in Puerto Rico to be treated unequally from those in the rest of the nation solely by reason of their geographical residence.[80]

It is my sincere hope that those fortunate enough to teach and write about the law, as well as the editors of the *Harvard Law Review* and other law journals, will heed these words and give voice to the territories rather than support efforts to marginalize them.

[80] Torruella, *supra* note 23, at 68–69.