Toward Self-Determination in the U.S. Territories: The Restorative Justice Implications of Rejecting the *Insular Cases*

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TOWARD SELF-DETERMINATION IN THE U.S. TERRITORIES: THE RESTORATIVE JUSTICE IMPLICATIONS OF REJECTING THE INSULAR CASES

Sarah M. Kelly*

ABSTRACT

Conservatives and liberals alike are increasingly calling for condemnation of the Insular Cases—a series of U.S. Supreme Court cases from the early 1900s, in which the Court developed the doctrine of territorial incorporation to license the United States' indefinite holding of overseas colonial possessions. In March 2021, members of the U.S. House of Representatives introduced House Resolution 279, which declares that the Insular Cases should be rejected as having no place in U.S. constitutional law. Moreover, in 2022, Justice Gorsuch called for the Supreme Court to squarely overrule the cases.

For many, rejecting the Insular Cases is a long-overdue reckoning for U.S. colonialism. Nonetheless, some representatives and scholars from the U.S. territories have raised concerns about potential implications for existing local laws in the territories. Many of these local laws protect Indigenous territorial peoples from further colonial harms. If the proposed bill or Supreme Court’s overruling of the cases functioned to extend the U.S. Constitution in full to the territories, these laws may be found invalid under current constitutional jurisprudence.

This Article employs a contextual framework for Indigenous peoples to explore the nuanced restorative-justice implications of rejecting the Insular Cases. It emphasizes the varying perspectives of Indigenous peoples of the present-day U.S. territories, who would be most impacted by the measure. Finally, flowing from this restorative justice framework, this Article demands that any resolution to the Insular Cases forward the human rights principle of self-determination for Indigenous peoples—not mere equality.

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“[R]eckoning must be done with great care, and with an eye toward doing no further harm to the territories, particularly to the indigenous peoples therein.”

INTRODUCTION

The Insular Cases, a series of opinions issued by the U.S. Supreme Court beginning in 1901, are widely denounced as creating a “separate and unequal” doctrine for the peoples of the U.S. territories. In 2021, representatives from four of the five U.S. territories—Guam, the Commonwealth of the Northern Mariana Islands (“CNMI”), the U.S. Virgin Islands (“USVI”), and Puerto Rico—“called on the U.S. House of Representatives to pass a resolution condemning the Insular Cases, largely because of their markedly racist underpinnings and their sharp constriction of U.S. territorial rights.” In an “exciting time[]” in U.S. history, powerful U.S. legal advocacy organizations joined in to support the proposed bill, House Resolution 279 (“H.R. 279”), in “a quest to reckon with this particular chapter [of U.S.] history.” Moreover, in 2022, calls to “squarely overrule” the Insular Cases resounded in the U.S. Supreme Court itself.

Some legal scholars, representatives, and advocates, however, particularly those with roots in the U.S. territories, have expressed reservations

6. Guam Hearing, supra note 1; see, e.g., Hearing, supra note 5 (statements of the American Civil Liberties Union and Equally American Legal Defense & Education Fund).
about rejecting the Insular Cases. Indeed, Indigenous human rights lawyer and writer from Guam, Julian Aguon, among others, submitted testimony offering only “qualified support” of H.R. 279. Aguon denounced the racist and colonial roots of the Insular Cases but recognized that federal courts have since repurposed them to benefit the peoples of the U.S. territories. For Aguon, “the only real remaining import of the Insular Cases today is that they contemplate the ability of unincorporated territories to ‘break out’ of the Union[,]” and thus provide a conceivable path toward political self-determination for the Indigenous peoples of the territories. Similarly, when the U.S. Supreme Court declined to consider a case in October 2022 through which it could have overruled the Insular Cases, American Samoan Congresswoman Aumua Amata Radewagen declared the decision a show of respect for territorial self-determination.

Legal scholars have just begun examining how an eradication of the Insular Cases could impact self-determination for the Indigenous peoples of the U.S. territories. In light of the complexities of these contrasting viewpoints, this Article explores whether rejecting the Insular Cases through H.R. 279—or a direct Supreme Court overruling of the cases—is an appropriate restorative response to the harms of U.S. colonization on the present-day territories. It intentionally emphasizes the perspectives.

8. E.g., Guam Hearing, supra note 1 (written testimony of Julian Aguon); Hearing, supra note 5, at 36 (statement of Professor Rose Cuson-Villazor, Rutgers L. Sch.) (“While Congress would be correct in condemning the Insular Cases for their racism, it should also be mindful that the alternative here—equal protection law—might not also be as helpful in protecting the rights of certain indigenous peoples.”); Hearing, supra note 5, at 16-17 (statement of Hon. Talauega Eleasalo Va’alele Ale, Lt. Governor, Am. Samoa) (opposing the “wholesale rejection” of the Insular Cases due to concerns that such action would undermine the self-determination of the people of American Samoa).


10. Id. See infra Section I.D. (summarizing how federal courts have repurposed the Insular Cases).


of the Indigenous peoples\textsuperscript{15} of the U.S. territories, who would be most impacted by these measures.\textsuperscript{16}

To meaningfully grapple with the potential impacts of condemning the \textit{Insular Cases}, this Article employs a contextual framework proposed by Kānaka Maoli (Native Hawaiian)\textsuperscript{17} legal scholar D. Kapua‘ala Sproat, through which she sought to refine existing legal frameworks to more wholly take into account the particular interests and values of Indigenous peoples.\textsuperscript{18} A contextual legal approach embraces a goal of restorative justice, which is “grounded in notions of ‘social healing through justice.’”\textsuperscript{19} As further developed \textit{infra}, Sproat intimated that “tailoring this contextual legal framework for Native Peoples requires attention to four realms (or ‘values’) of restorative justice embodied in the human rights principle of self-determination: (1) cultural integrity; (2) lands and natural resources; (3) social welfare and development; and (4) self-government.”\textsuperscript{20} Applied
to H.R. 279, these four realms capture the intricacies and delicacies of rejecting the Insular Cases and ultimately suggest that while advocates are justified in repudiating the roots of the Insular Cases, something more is needed to decolonize the United States’ relationship with the territories.

Painting with a broad brush, Part I reviews the context and history of the United States’ “acquisition” of its present-day territories, the development of the Insular Cases, the harmful on-the-ground impacts of the Insular Cases, and how the peoples of the U.S. territories have begun to retool the Insular Cases to create a cultural and political safe-space in the constitutional void carved out by the Insular Cases’ territorial incorporation doctrine. Part II sketches the outlines of Sproat’s contextual legal framework, developed from the earlier insights of legal realism, critical legal analysis, and critical race theory with the particular interests and values of Indigenous peoples in mind. Part III employs this framework to investigate the potential impacts of H.R. 279 in the four delineated areas of cultural integrity, lands and other natural resources, social welfare and development, and self-government. Finally, using the resultant insights, Part IV concludes by highlighting the necessity for “something more” alongside H.R. 279 to ensure that it does not impose further colonization in the name of equality, but rather advances the ultimate goal of self-determination for the Indigenous peoples of the U.S. territories.

I. THE INSULAR CASES IN CONTEXT

House Resolution 279 seeks to reject the continued application of the Insular Cases, a series of cases firmly rooted in the political and economic reality of U.S. colonialism. Legal scholars Ediberto Román and Theron Simmons define colonialism broadly to include the “oppression, humiliation, or exploitation of indigenous peoples.” To provide the necessary history and context for a meaningful analysis of the bill, this Part briefly describes the United States’ colonial “acquisition” of the U.S. territories, how the Insular Cases developed out of this historical context, the harmful impacts of the Insular Cases, and how federal courts have, in some cases, recently repurposed the Insular Cases to further cultural preservation and self-determination for the Indigenous peoples of the territories.

22. Román & Simmons, supra note 21, at 445 (quoting IMPERIALISM AND COLONIALISM 3 (George H. Nadel & Perry Curtis eds., 1964)).
A. A Brief History of the United States’ “Acquisition” of the U.S. Territories

The story of the Insular Cases begins with the U.S. territories themselves. Today, the United States claims five permanently inhabited territories: Puerto Rico, Guam, American Samoa, the USVI, and the CNMI. The United States’ domination of these islands grew out of a national ideology and practice of expansionism. Settlers gradually took possession of the lands that constitute the present-day contiguous U.S. states through genocide, war, and other tools. Expansionists then began looking toward economic and military interests in the Caribbean and Pacific.

The Spanish-American War emerged as a culmination of this expansionism. Through the war, in 1898, the United States took as colonies, and labeled as territories, Puerto Rico, the Philippines, and Guam. It annexed Hawai’i that same year, five years after the illegal overthrow of the Kingdom of Hawai’i. American Samoa became a U.S. territory by treaty of cession beginning in 1900, following significant


25. Torruella, supra note 24, at 4. The United States also purchased Alaska from Russia in 1867. Id. at 5.

26. See id. at 5; Román & Simmons, supra note 21, at 452–56.

27. Torruella, supra note 24, at 4.

28. Colonies are “new political organization[s] created by invasion and cultural domination” where “the ruled are dependent upon a geographically remote ‘mother country’ or imperial center, which claims exclusive rights of possession.” Román & Simmons, supra note 21, at 445.

29. Torruella, supra note 24, at 4.


colonial interference by Germany, Britain, and the United States, who each fought for power over the islands.32

In 1917, the United States purchased the islands that now constitute the USVI from another colonial power, Denmark.33 Finally, in 1947, the United States entered a Trusteeship Agreement with the United Nations (“UN”).34 Under the agreement, the United States became the administrator of the Trust Territory of the Pacific Islands, including the islands that now constitute the CNMI.35 In 1975, through a covenant with the United States, the CNMI’s status shifted to a commonwealth.36 The American empire was thus established. But the future of the islands was unclear.

Before the United States’ imperialist expansion into the Caribbean and Pacific, it was assumed that every U.S. territory would eventually become a state.37 The Territorial Clause of the U.S. Constitution granted Congress powers to admit new states and govern territories.38 Although the Constitution contained no express guarantee that these territories would become states,39 early federal case law held that the United States only has the power to acquire territories with a path to eventual statehood.40 For the territories in the present-day contiguous states, Hawai’i,
and Alaska, it was understood that they would become states once enough white men had settled in the territories.\textsuperscript{41}

But with the acquisition of the post-Spanish American War territories came shifted motivations for expansion and racist objections to extending U.S. citizenship to the peoples of Puerto Rico, Guam, and the Philippines.\textsuperscript{42} The new territories were geographically removed, had almost no white U.S. settlers living within, and their inhabitants were Indigenous peoples of color.\textsuperscript{43} Rather than conquer these lands for settlement, the United States planned to use the islands for economic exploitation and to establish strategic naval bases.\textsuperscript{44}

Congress initially planned to impose U.S. citizenship on Puerto Ricans through the Foraker Act.\textsuperscript{45} Politicians, however, expressed concern that if the United States pursued statehood for Puerto Rico, it would establish a precedent of statehood for the Philippines as well.\textsuperscript{46} One Congressman, for example, declared that Filipinos are "whole different races of people from us. Asiatics, Malays, Negroes and mixed blood. They have nothing in common with us and we cannot assimilate them. They can never be clothed with the rights of American citizenship nor their territory admitted as a State[.]"\textsuperscript{47} Instead, the congressmen proposed to "establish a precedent for the Filipinos, the unruly and disobedient; by disciplining and punishing Puerto Rico, the well-behaved[.]"\textsuperscript{48} For the first time in U.S. history, the new territories would not proceed toward statehood.

Because of its own revolutionary history and professed liberal ideals, however, it was not in the domestic or international political interests of the United States to expressly label itself as a colonial power ruling over geographically distant, non-citizen peoples without constitutional constraints.\textsuperscript{49} Thus the United States began to develop legal fictions "to allow

\begin{footnotesize}
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\item \textsuperscript{41} Id. at 450–51 ("The three steps for eventual incorporation as a state relied on successive increases in population of free male inhabitants and increasing self-governing power until reaching 60,000 free inhabitants with a governor, judges, and representatives with power to make laws for the territory . . . .").
\item \textsuperscript{42} Torruella, \textit{supra} note 24, at 5–7, 12–14.
\item \textsuperscript{43} Id. at 5–7.
\item \textsuperscript{44} Id. at 6.
\item \textsuperscript{45} Id. at 12 (citing S. 2264, 56th Cong. 1st Sess., 33 \textit{Cong. Rec.} 702 (1900)).
\item \textsuperscript{46} Id. at 12–14.
\item \textsuperscript{47} Id. at 13 (quoting \textit{33 Cong. Rec.} 1994, at 2162 (1900) (quoting Congressman Thomas Spight of Mississippi)).
\item \textsuperscript{48} Id. (quoting \textit{33 Cong. Rec.} 1994, at 2067 (1900) (quoting Congressman Jacob H. Bromwell)).
\item \textsuperscript{49} Román & Simmons, \textit{supra} note 21, at 448–49.
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United States global influence without fully accepting the people of color that inhabited the newly acquired territories.50

B. Crafting of the Insular Cases’ Doctrine of Territorial Incorporation

Early versions of the Insular Cases’ central legal fiction, what would eventually become known as the “doctrine of territorial incorporation,” were developed by legal scholars and think tanks.51 A series of articles published in the Harvard Law Review debated whether the U.S. Constitution applied to the new territories.52 The most influential of these articles was written by Abbott Lawrence Lowell, who argued that the U.S. Constitution does not automatically apply to the territories; rather, the treaties by which they were annexed determined their relationship with the United States, and this relationship determined what constitutional rights were possessed by inhabitants.53

When cases challenging the relationship between the United States and the new territories were appealed to the U.S. Supreme Court, the justices employed these academic fictions to navigate their analyses.54 The justices largely ignored earlier federal case law requiring territories to have a path to eventual statehood because it did not fit the new political vision for the territories.55 The first nine Insular Cases were issued on May 27, 1901.56 In a central case establishing the territories’ status within the American polity,57 Downes v. Bidwell,58 Justice Brown upheld the constitutionality of Puerto Rico’s Organic Act, reasoning that Puerto Rico “is a territory appurtenant and belonging to the United States, but not a part

50. Id. at 453.
51. Torruella, supra note 24, at 6–7.
53. Id. at 11 (citing Lowell, supra note 52, at 170).
54. See id. at 15–24.
55. See id.; supra note 40 and accompanying text.
57. Torruella, supra note 24, at 19.
58. 182 U.S. 244 (1901).
of the United States[.]” In doing so, “the Supreme Court sanctioned a colonial regime that has existed for over one hundred years to the present day[.]”

Justice White’s Downes concurrence proposed the doctrine of territorial incorporation that eventually prevailed in U.S. jurisprudence. Relying on the earlier academic articles, Justice White suggested that whether a particular constitutional provision applies in a territory is determined by the kind of territory involved, and the kind of territory is determined by its treaty of acquisition. Justice White distinguished between territories that are “incorporated,” or destined for statehood, where the Constitution applies in full, and those that are “unincorporated,” or not expressly destined for statehood, where only “fundamental rights” apply. White determined Congress did not incorporate Puerto Rico into the United States, so it “is not subject to all the restrictions of the Constitution.” All five present-day permanently inhabited territories are now deemed “unincorporated,” rendering them indefinitely-held colonial possessions.

Although the Supreme Court made clear that the Constitution did not apply in full to unincorporated territories, it did not initially define what it meant by “fundamental rights[.]” The Court vaguely stated that fundamental rights are those “fundamental limitations in favor of personal rights” that “form the basis of all free government.” In determining whether specific rights are fundamental, the Court has since examined

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59. Id. at 287.
60. Torruella, supra note 24, at 19.
61. Id. at 21 (citing Downes, 182 U.S. at 287–344 (White, J., concurring)).
62. Id. (citing Downes, 182 U.S. at 339 (White, J., concurring)).
63. See Downes, 182 U.S. at 339–47 (White, J., concurring). For a further discussion regarding the constitutional significance of incorporated versus unincorporated territorial status, see Anthony Ciolli, The Power of United States Territories to Tax Interstate and Foreign Commerce: Why the Commerce and Import-Export Clauses Do Not Apply, 63 THE TAX LAW. 1223, 1225–27 (2010). “In addition to being deemed incorporated or unincorporated, United States territorial possessions may also be classified as organized or unorganized.” Id. at 1226. Organized territories are those that have “established a civil government under an Organic Act passed by Congress[.]” whereas unorganized territories are “usually under the direct control of the President and his designee.” Id. at 1226–27.
64. Downes, 182 U.S. at 346–47 (White, J., concurring).
67. Id.
the practical implications of governmental actions. A constitutional right is deemed “fundamental” if extending that constitutional provision to a territory would not be “impracticable and anomalous.”

Under the flexible “impracticable and anomalous” test, lower courts are left with significant leeway in interpreting what rights are “fundamental” such that they restrict governmental action in relation to the territories. As this Article will show, this flexible framework has allowed courts to both: (1) perpetuate harms to the peoples of the U.S. territories by refusing to restrict Congress’s plenary power over the territories; and, (2) at times, benefit the peoples of the territories by upholding local laws designed to further cultural preservation and self-determination.

C. Continuing Material Harms of the Insular Cases

As the academic and Congressional debates and the cases themselves demonstrate, the Insular Cases are steeped in racist justifications for the subordination of the peoples of the territories. Albert Memmi defined racism within the imperial context as “the generalized and final assigning of values to real or imaginary differences, to the accuser’s benefit and at his victim’s expense, in order to justify the former’s own privileges or aggression.” This assigning of differences is evident in the history of the

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68. See Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result); see also Serrano, supra note 16, at 410 & n.112 (describing the development of the impracticable and anomalous test).

69. See Reid, 354 U.S. at 74; see also Serrano, supra note 16, at 410 & n.112.

70. The Tenth Circuit recently described this flexibility as “giv[ing] 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.” Fitisemanu v. United States, 1 F.4th 862, 870–71 (10th Cir. 2021).

71. See, e.g., supra text accompanying notes 42–48 (describing the racist objections raised in Congress to imposing U.S. citizenship on territorial peoples); Downes v. Bidwell, 182 U.S. 244, 287 (1901) (“If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible . . . .”); De Lima v. Bidwell, 182 U.S. 1, 219 (1901) (McKenna, J., dissenting) (concluding that “the danger of the nationalization of savage tribes cannot arise” from construction of the U.S. Constitution or treaties).

72. Albert Memmi, Attempt at a Definition, in DOMINATED MAN: NOTES TOWARD A PORTRAIT 185 (1968). Memmi catalogs four strategies of European racist-imperial discourse:

1) Stressing the real or imaginary differences between the racist and his victim.

2) Assigning value to these differences, to the advantage of the racist and the detriment of his victim.
**Insular Cases**, which, at the expense of the sovereignty of the Indigenous peoples of the territories and to the economic and political benefit of the United States, purported to provide a “neutral” legal justification for the colonial conquest and exploitation of the territories.\(^73\)

The *Insular Cases* are not just relics of a colonial and racist past—they continue to have concrete, human impacts on the peoples of the territories today.\(^74\) Legal scholar Susan K. Serrano describes how the *Insular Cases*’ “discourse of exclusion . . . frame[s] territorial peoples as perpetual ‘foreigners,’ ‘outsiders,’ and ‘others,’” and thereby facilitates their continued marginalization and subordination “in far-reaching ways—from the political to the economic, and the social to the cultural.”\(^75\) For example, in the political realm, the *Insular Cases* legitimize withholding political power from the peoples of the territories, who are U.S. citizens and nationals\(^76\) but have no right to vote for the U.S. president and have no voting representative in Congress.\(^77\) In the economic realm, the U.S. Supreme Court has used the framework of the *Insular Cases* to legitimize providing lesser federal benefits to the peoples of the U.S. territories, even where there is more economic need.\(^78\) Julian Aguon further describes the psychological impacts of the *Insular Cases* as “real violence in-

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3) Trying to make them absolutes by generalizing from them and claiming that they are final.

4) Justifying any present or possible aggression or privilege.

*Id.*

73. For a brief explanation of legal formalism and subsequent legal movements challenging the notion that the law is “neutral,” see *infra* notes 97–98 and accompanying text.


75. Id. at 411–12.


78. See *infra* Section III.C.
flicted on the psyches of folks who must find our way in a country that neither wants us nor wants to let us go."79

Ultimately, the *Insular Cases*’ interpretation of the Territorial Clause licenses Congress’s indefinite plenary power over the U.S. territories, meaning that the U.S. federal government has few restrictions over how it can impose its will in the territories.80 Scholar Efren Rivera Ramos argues:

The conceptual scheme of the *Insular Cases* is entirely incompatible with any notion of self-determination . . . . [Self-determination,] at a minimum [,] . . . implies the right . . . of a people or group . . . to determine its own status and associations with other peoples or groups and to fashion for itself the organizing principles of its social existence. The logic of the Court’s discourse, however, presupposes the plenary power of the metropolitan state to determine the political condition and the civil and political rights of the people of the acquired territory.81

In these ways, the harms of the *Insular Cases* include the ongoing denial of self-determination for the peoples of the U.S. territories.

D. Repurposing of the Insular Cases toward Self-Determination

Yet in some cases, the flexible framework of the *Insular Cases* has permitted federal courts to uphold local territorial laws intended to benefit the peoples of the U.S. territories where the U.S. Constitution may have otherwise rendered them invalid.82 Some scholars describe this use of the *Insular Cases* as a shield, in contrast to the U.S. courts’ earlier weaponizing.83 A recent Harvard Law Review *Developments in Law* chap-

79. AGUON, Reflections, supra note 11, at 66.
82. See, e.g., Guam Hearing, supra note 1.
83. See, e.g., Ian Falefusi Tapu, Who Really is a Noble? The Constitutionality of American Samoa’s Matai System, 24 ASIAN PAC. AM. L.J. 61, 65 (2020) [hereinafter Tapu, Who Really is a Noble?].
ter “contend[ed] that the Insular Cases, which have long been associated with colonialism and racism, have now become ‘bulwarks for cultural preservation.’”84

For example, in the CNMI, article XII of the Northern Mariana Islands (“NMI”) Constitution restricts the acquisition of interests in land to persons of Northern Mariana descent,85 defined by blood quantum.86 For Indigenous groups other than federally-recognized tribes, such restrictions are typically struck down as racially discriminatory in violation of the equal protection guarantee of the U.S. Constitution.87 However, in Wabol v. Villacrusis, the United States Court of Appeals for the Ninth Circuit upheld the CNMI’s land alienation restriction laws.88 The court employed the Insular Cases’ framework, determining that since the CNMI is unincorporated, only “fundamental” constitutional rights apply in the territory, and although the general guarantee of equal protection applies in the CNMI, the specific right to acquire permanent or long-

84. Rose Cuison Villazor, Problematizing the Protection of Culture and the Insular Cases, 131 HARV. L. REV. F. 127, 129–30 (2018) (quoting Developments, supra note 65, at 1681). For a criticism of the “cultural preservation” argument, see Cuison Villazor, supra (contending that cultural preservation arguments must consider the fluid nature of culture and should be positioned within the broader right to Indigenous self-determination). This Article expressly positions cultural preservation within the broader right to self-determination pursuant to Sproat’s restorative justice framework. See infra text accompanying notes 103–04.

85. NMI CONST. art. XII, § 1 (“The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Mariana descent.”).

86. Section 4 of article XII defines “Persons of Northern Marianas Descent” as follows:

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands before 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

NMI CONST. art. XII, § 4.

For the purposes of brevity, this Article does not discuss the normative implications of blood quantum laws. For an in-depth discussion of blood quantum land laws, see generally Rose Cuison Villazor, Blood Quantum Land Laws and the Race Versus Political Identity Dilemma, 96(3) CAL. L. REV. 801 (2008).

87. Cuison Villazor, supra note 84, at 140–42 (describing the racial-versus-political indigeneity binary employed by courts); see, e.g., Rice v. Cayetano, 528 U.S. 495, 523 (2000).

88. Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992).
term interests in land in the NMI is not a “fundamental right” for the purposes of the Territorial Clause. The court reasoned that “construing the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property” would be “impracticable and anomalous.”

Similarly, the Harvard Developments in Law chapter describes *Tuaua v. United States*, a case employing the same framework to examine whether the U.S. Constitution guarantees birthright citizenship to persons born in American Samoa, as “representing ‘an important shift in the federal courts’ use of the doctrine [of territorial incorporation].’” Unlike in the other U.S. territories, people born in American Samoa are not U.S. citizens, but U.S. nationals, meaning that although they can reside in the states, they cannot hold many federal jobs, vote in federal elections, and more. In *Tuaua*, the U.S. Court of Appeals for the District of Columbia determined that since the text of the Citizenship Clause is ambiguous as to whether American Samoa is “in the United States,” the *Insular Cases*’ analytical framework applied. Acknowledging that the people of American Samoa “have not yet formed a collective consensus in favor of United States citizenship[,]” the court found that it would be “anomalous to impose citizenship over the objections of the American Samoan people themselves[.]”

II. A RESTORATIVE JUSTICE FRAMEWORK FOR INDIGENOUS PEOPLES

The manufacturing of the territorial incorporation doctrine through the *Insular Cases* and its subsequent repurposing by the peoples of the U.S. territories demonstrates that the law is not neutral, but rather a tool influenced by political winds that can be used either to hinder or further justice. Early legal theory in the 1800s known as legal formalism framed the law as “a neutral tool that produced justice by mechanically applying legal rules to cases.” Progressive legal movements in the 1900s, includ-

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89. Id. at 1459–62.
90. Id. at 1461–62.
91. See 788 F.3d 300, 307–12 (D.C. Cir. 2015).
95. *Tuaua*, 788 F.3d at 302.
96. Id. at 309–10.
ing legal realism, critical legal studies, and then critical race theory, criticized this formalist notion as failing to explain and predict “how the legal process actually works.”

Flowing from these earlier intellectual genealogies and while grappling with environmental justice claims for the waters of East Maui, Professor D. Kapua’ala Sproat proposed a new developing contextual framework in her article *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, tailored to take into account the unique interests and values of Indigenous peoples.

Sproat identified that for Indigenous peoples, history has shown that the legal formalist approach has “legitimized colonialism, the confiscation of land, the destruction of culture, and the destabilization of self-government.” This is exemplified in part by the *Insular Cases*. In contrast, a contextual approach to the law “assesses both how the law operates and should operate[,]” and in doing so, embraces a goal of restorative justice. For Indigenous peoples, Sproat opined that restorative justice does not entail “equal treatment,” but rather forwarding self-determination in recognition of the unique harms of colonization.

“[S]pecifically, tailoring this contextual legal framework for Native Peoples requires attention to four realms (or ‘values’) of restorative justice embodied in the human rights principle of self-determination: (1) cultural integrity; (2) lands and natural resources; (3) social welfare and development; and (4) self-government.”

These four realms are attentive to colonization’s significant harms to Indigenous peoples. In the first step, an appropriate contextual analysis

98. See id. at 160–66.
100. Sproat, supra note 15.
101. Id. at 154.
102. Id. at 172. Indigenous peoples have applied practices that “embody the restorative justice philosophy.” Lorenn Walker, *Restorative Justice: Definition and Purpose*, in RESTORATIVE JUST. TODAY: PRAC. APPLICATIONS 3, 5 (Katherine S. van Wormer & Lorenn Walker eds., 2013). In the 1970s, Howard Zehr framed restorative justice as centering on three central questions: (1) Who has been harmed?; (2) What are the needs of those who have been harmed?; and (3) Who has the obligation to address needs, repair harms, and restore relationships? Id. at 11–12. Similarly, Rebecca Tsosie emphasizes that a restorative justice approach to reparations includes both a “material” and “intangible, psychological component.” Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT’L L. 203, 250–51 (2015) [hereinafter Tsosie, *Ethics of Remediation*].
103. Sproat, supra note 15, at 172.
104. Id. at 173.
105. Id. at 173–74.
“must explicitly analyze . . . whether actions or decisions support and re-
store cultural integrity as a partial remedy for past harms, or perpetuate
conditions that continue to undermine cultural survival.”106 Second, it
“must directly analyze . . . whether a particular action perpetuates the
subjugation of ancestral lands, resources, and rights, or attempts to redress
historical injustices in a significant way.”107 Third, the framework seeks to
“expose whether a given action or decision improves social welfare con-
ditions or perpetuates the status quo of Natives bringing up the bottom
of most, if not all, socio-economic indicators.”108 Finally, the analysis
“consider[s] whether a decision perpetuates historical conditions imposed
by colonizers or will attempt to redress the loss of self-governance.”109

Sproat recognized that these four values are “inextricably inter-
twined.”110 For Indigenous peoples: cultural integrity inherently depends
upon access to lands and natural resources; social welfare depends upon
both cultural integrity and access to (and the health of) natural resources;
and cultural and political sovereignty dictate who has control over the
lands and resources that shape social welfare and cultural integrity.111
“Together, these four realms . . . inform the contextual legal analysis of
history and current socio-economic conditions necessary to discern the
true impacts of actions or decisions on Native Peoples.”112

The Indigenous peoples of territories have many commonalities in
their histories, including similar experiences with colonialism arising from
the United States’ military and economic interests in the Pacific and Car-
ibbean.113 Further, because U.S. courts apply the same legal framework to
each of the territories, they experience many similar present-day impacts.
Restorative justice for all “U.S. territorial peoples may entail repairing
long-standing imbalances of power and agency, and redressing multiple
political, economic, cultural, and social harms. For Indigenous inhabitants
of the territories in particular, the preservation of their deep connections
to the environment (including, where applicable, the return of land), the
reclaiming of knowledge systems, language, and life ways, and the regen-
eration of self-government, are also central to their self-determination
and reparative justice.”114

106. Id. at 179.
107. Id. at 181.
108. Id. at 182–83.
109. Id. at 185.
110. Id. at 173.
111. Id.
112. Id. at 185.
113. But see Hearing, supra note 5, at 14–17 (statement of Hon. Talauega Eleasalo
Va’alele Ale, Lt. Governor, Am. Samoa) (describing the unique historical relationship of
American Samoa with the United States).
114. Serrano & Tapu, supra note 3, at 1303.
Given the tailoring of Sproat’s framework to the values and interests of Indigenous peoples and its recognition of colonial harms, the framework is a useful tool to examine the restorative justice implications of actions or decisions relating to the U.S. territories. Yet legal scholars have acknowledged that “no single theory of reparative justice [(or restorative justice)] ‘can fit all cultures, all nations, and all peoples.’ Instead, the ‘theory will differ depending on the particular historical context and cultural framework that applies.’” 115 Indeed, even among the five permanently inhabited U.S. territories, their differential contexts may require distinct actions or decisions to achieve restorative justice.116 Acknowledging that the bill’s impacts, and thus conclusions about how well it furthers restorative justice, may vary among the five territories, this Article provides specific localized examples to begin to explore the potential impacts of rejecting the Insular Cases.

III. THE RESTORATIVE JUSTICE IMPLICATIONS OF REJECTING THE INSULAR CASES FOR THE INDIGENOUS PEOPLES OF THE U.S. TERRITORIES

This Part employs Sproat’s contextual framework to illuminate the justice-impacts of proposed bill H.R. 279 for the Indigenous peoples of the U.S. territories. The professed purpose of H.R. 279 is to repudiate the Insular Cases and their territorial incorporation doctrine as: (1) “contrary to the text and history of the United States Constitution”; (2) “rest[ing] on racial views and stereotypes from the era of Plessy v. Ferguson”; and (3) contrary to the United States’ “most basic constitutional and democratic principles[.]”117 The Insular Cases have been in place since 1901, and legal scholars and politicians are just beginning to re-envision a new jurisprudential framework for the territories.118 The impacts of the bill, therefore, are in large part unknown. As Justice Gorsuch indicated in his recent call for the U.S. Supreme Court to overrule the Insular Cases,

115. Id. at 1304 (quoting Tsosie, Ethics of Remediation, supra note 102, at 253–54).
116. See id. at 1304–05 (“For the peoples of the U.S. territories, differing status, power, and access to resources shape U.S. territorial groups’ distinct efforts to mitigate and adapt to climate change impacts . . . Climate repair efforts thus should closely assess the environmental injuries to specific communities and work to rectify harms in ways that prioritize the peoples’ self-determination and account for the lasting impacts of U.S. colonization in the particular setting.”).
117. Hearing, supra note 5 (emphasis added).
118. For arguments for the application of international human rights law, see, e.g., Saito, Asserting Plenary Power, supra note 80; Julian Aguon, Comment, Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in the U.S. Courts, 31 U. HAW. L. REV. 113 (2008) [hereinafter Aguon, Other Arms].
“settling this question right would raise difficult new ones. Cases would no longer turn on the fictions of the *Insular Cases* but on the terms of the Constitution itself.”

If the import of H.R. 279—or directly overruling the cases—is simply to call for the U.S. Constitution to apply in full to the territories, its passage may mean that the territories will soon face insurmountable legal challenges to local laws designed to further cultural preservation and self-determination. These dangers are exemplified by legal challenges faced by Indigenous peoples elsewhere in the Pacific, in the so-called state of Hawai‘i. In *Rice v. Cayetano*, the U.S. Supreme Court struck down a provision in the Hawai‘i Constitution that limited the right to vote for the trustees of a state agency designed to administer programs for the benefit of Hawaiians and Native Hawaiians, the Office of Hawaiian Affairs (“OHA”), to qualified Hawaiians. The provision recognized Hawai‘i’s “history of subjugation at the hands of colonial forces” and, accordingly, sought to further Hawaiian self-governance. However, since Native Hawaiians are not a federally-recognized tribe (and because the

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120. See, e.g., Serrano & Tapu, supra note 3, at 1311–12.

121. See Cuison Villazor, supra note 84, at 131–33 ("Such a narrow race-versus political binary suggests that traditional frameworks may be inhospitable to territorial indigenous peoples’ cultural or political claims because they are not federally recognized tribes."). Many Kānaka Maoli affirm that Hawai‘i is not legally a state of the United States because “[t]he statehood vote, both in terms of the question asked and the people who were allowed to vote, was in no way a valid act of self-determination, and did not legitimize the occupation.” Is Hawaii Really a State of the Union?, NATION HAWAII, https://www.hawaiination.org/statehood.html (last visited Apr. 9, 2022).

122. 528 U.S. 495 (2000). “Hawaiians” are defined by statute as “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.” Haw. Rev. Stat. § 10-2.


124. The Court distinguished the OHA voting restrictions from an earlier case, *Morton v. Mancari*, in which the Court upheld federal employment preferences for qualified American-Indians because they furthered the self-government of a federally-recognized tribe and thus had a legitimate political purpose. *Rice*, 528 U.S at 496–97 (citing Morton v. Macari, 417 U.S. 535 (1974)). In contrast, the OHA voting restrictions had no legitimate political purpose because Native Hawaiians are not a federally-recognized tribe. See *id.*; see also Cuison Villazor, supra note 84, at 140–41 (discussing *Rice* and *Morton*).

In February 2022, the U.S. Supreme Court agreed to hear *Brackeen v. Haaland*, which addresses the continuity of the Indian Welfare Child Act (ICWA). 142 S. Ct. 1205 (2022), granting cert. to 994 F.3d 249 (2021). *Brackeen* could significantly change existing federal Indian law, including the racial-versus-political purpose framework. See *Brackeen v. Haaland*, 994 F.3d 249 (2021); Lucy Dempsey, *Equity Over Equality: Equal Protection and the
doctrine of territorial incorporation does not apply to Hawai‘i), the Court determined that the provision violated the Fifteenth Amendment because it used ancestry as a proxy for race and thus created an impermissible race-based voting qualification.125 Scholars have denounced Rice as “put[ting] at risk not only OHA, but all federal and state programs designed to repair continuing harms to the Hawaiian people[.]”126

Like Native Hawaiians, the Indigenous peoples of the U.S. territories are not federally recognized tribes. Where courts have determined that specific constitutional provisions apply to the territories (and thus the Insular Cases’ framework does not apply), they have sometimes struck down laws like that at issue in Rice.127 If H.R. 279 removes the flexible legal framework of the Insular Cases in their entirety, local laws across the territories designed to further Indigenous self-determination and cultural preservation may be at risk of constitutional invalidation.

In light of these pressing concerns, this Part employs Sproat’s contextual framework to analyze H.R. 279. It addresses each of the four interrelated values of self-determination in turn to ultimately assess whether the bill furthers or hinders restorative justice for the Indigenous peoples of the U.S. territories.128

**A. Impacts on Cultural Integrity**

Within the first realm of restorative justice, Sproat’s contextual analysis explores whether H.R. 279 “support[s] and restore[s] cultural integrity as a partial remedy for past harms, or perpetuate[s] conditions that continue to undermine culture survival.”129 Building on working definitions developed by anthropologists and sociologists, legal scholar Rose Cuison Villazor describes culture as a dynamic “set of ‘learned traits shared by a group of people’ including beliefs, values, language, and reli-

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125. Rice, 528 U.S at 496.
126. Hom & Yamamoto, supra note 123, at 1766.
127. See, e.g., Davis v. Guam, 932 F.3d 822 (9th Cir. 2019); Davis v. Commonwealth Election Comm’n, 844 F.3d 1087 (9th Cir. 2016). But see Craddick v. Territorial Registrar, 1 Am. Samoa 2d 11 (1980) (employing the traditional constitutional legal framework to hold that American Samoa’s statutory land alienation restrictions did create racial classifications, but survived strict scrutiny because preserving the lands for Samoans was a compelling state interest and the statute was narrowly tailored).
129. Id. at 179.
The United Nations Declaration on the Rights of Indigenous Peoples affirms the rights of Indigenous peoples to “practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures.”

Historical and ongoing practices have “treated indigenous cultures as inferior to the dominant cultures.” Sproat describes the “constant struggle” that Indigenous people face “to maintain culture and traditional lifestyles due to a myriad of factors, including colonization and other pressures of a quickly changing world.” These cultural harms are apparent for the Indigenous peoples of the U.S. territories, who have faced threats to their ways of life through, for example, climate change. Cultural integrity is thus a necessary component of restorative justice because as legal scholars Rebecca Tsosie and Wallace Coffey contend, “[t]radition provides the critical constructive material upon which a community rebuilds itself.”

The Insular Cases themselves “employed . . . damaging cultural representations.” In Downes v. Bidwell, Justice Henry Billings Brown, also the author of the 1896 U.S. Supreme Court “separate but equal” case Plessy v. Ferguson, depicted Puerto Ricans as “peoples of different ‘race[s], habits, laws, and customs’” who “threatened the very heart of white Anglo-Saxon dominance.” Since H.R. 279 denounces these damaging racist and culturally-offensive representations, the bill may fur-
ther restorative justice for the U.S. territorial peoples by condemning
harmful judicially-sanctioned opinions and thus providing some measure
of healing.139

In another material sense, however, the flexible framework of the
Insular Cases “gives federal courts significant latitude to preserve tradi-
tional cultural practices that might otherwise run afoul of the individual rights
enshrined in the Constitution[.]”140 For example, in American Samoa,
the traditional Samoan way of life known as faʻa Samoa—also understood
as the “essence of being Samoan”—could be at risk of constitutional invalid-
ification if the Insular Cases are rejected.141 Central tenants of faʻa Samoa
“remain central to the Samoan experience and identity” today, including the
“ʻaiga (family unit), matai system (system of chiefs and leaders), and
communal lands.”142 Households are organized by ʻaiga, who are under
the authority of matai, who in turn organize the resources to benefit the
entire community.143

Samoan cultural practices at particular risk of constitutional invalida-
tion include social structures, religious customs, and traditional land prac-
tices.144 American Samoa limits eligibility to serve in the upper house of its
territorial legislature to registered matai.145 In addition, religious observance
is enforced by matai through, for example, religious curfews.146 The
American Samoan Constitution makes it the policy to, in part, “protect
persons of Samoan ancestry against alienation of their lands and the de-
struction of the Samoan way of life and language[,]”147 and local statutes

Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Ini-
tiatives, 16 ASIAN AM. L.J. 5 (2009) (describing the “cathartic” effects of Japanese Ameri-
can incarceration redress on individuals).
140. Fitisemanu v. United States, 1 F.4th 862, 870–71 (10th Cir. 2021); see also Serrano
& Tapu, supra note 3, at 1311.
141. Tapu, Who Really is a Noble?, supra note 83, at 64 n.12 (quoting Jeffrey B.
Teichert, Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom
in the Law of American Samoa, 3 GONZ. J. INT’L L. 35, 41–42 (2000)). Faʻa Samoa has also
been described as a “unique attitude toward fellow human beings, unique perceptions of
right and wrong, the Samoan heritage, and fundamentally the aggregation of everything
that the Samoans have learned during their experience as a distinct race.” Teichert, supra, at 41–42.
142. Tapu, Who Really is a Noble?, supra note 83, at 64.
143. Proposed Intervenors’ Motion to Dismiss, Or, In the Alternative, Cross-Motion
for Summary Judgment at 6, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021)
(Nos. 20–4017 & 20–4019) [hereinafter Proposed Intervenors’].
144. Id. at 10–11.
145. Id. at 12 (citing REVISED CONST. OF AM. SAMOA art. II, § 3).
146. Id. at 14 (citing Daniel E. Hall, Curfews, Culture, and Custom in American Samoa: An
Analytical Map for Applying the U.S. Constitution to U.S. Territories, 21 ASIAN-PAC. L. &
POL’Y J. 69, 97).
147. REVISED CONST. OF AM. SAMOA art. I, § 3.
explicitly preserve “[t]he customs of the Samoan people not in conflict with [other laws.]” 148 These traditions may be subject to scrutiny under the Equal Protection Clause, Establishment Clause, and Nobility Clause if the Insular Cases are condemned. 149

In October 2022, the U.S. Supreme Court declined to hear Fitisemanu v. United States. 150 Fitisemanu—like the earlier Tuaua 151—raised the issue of whether the Citizenship Clause requires imposing birthright citizenship on American Samoans. 152 The Supreme Court could have used Fitisemanu to overrule the Insular Cases. 153 Tapaau Dr. Dan Ag, director of the American Samoa Office of Political Status and Constitutional Review, called Fitisimanu “an existential threat to [the American Samoan] way of life.” 154 Similarly, American Samoa’s non-voting House delegate Congresswoman Aumua Amata Radewagen declared the Supreme Court’s denial of certiorari “a tremendous victory for American Samoa.” 155 She dubbed the decision a show of “respect [for] the self-determination of the people of American Samoa, and the emphasis our people place on preserving our Fa’a Samoa (the Samoan way).” 156 Some legal scholars contend these cultural practices should be upheld even under traditional constitutional frameworks. 157 Ian Falefuafua Tapu, for example, argues that even if the United States imposes the Nobility Clauses on American Samoa, the matai system is nonetheless constitutional. 158 Tapu asserts that because “the matai are elected by consensus of the ‘aiga or village,” the system satisfies the two underlying principles of the Nobility Clauses—“equality and a representative government that is rooted in a meritocracy.” 159

148. AM. SAMOA CODE ANN. § 1.0202.
149. See Proposed Intervenors’, supra note 143, at 12, 14; Tapu, Who Really is a Noble?, supra note 83, at 79–82 (explaining how the Nobility Clauses may be implicated by the matai system).
151. See supra text accompanying notes 91–96.
152. See Fitisemanu, 1 F.4th 862; Fitisemanu, SCOTUSBLOG, supra note 12.
153. Fitisemanu, SCOTUSBLOG, supra note 12.
155. Id.
156. Id.
157. See Tapu, Who Really is a Noble?, supra note 83; Hofschneider, supra note 13 (describing the view of American Samoan attorney Charles Ala’i’ima that American Samoan cultural practices can be “justified under the U.S. Constitution”).
158. See id. (arguing first, that the matai system should not be invalidated under Insular Cases’ legal framework because application of the Nobility Clauses to American Samoa would be impracticable and anomalous, and second, that even if the United States extended the Nobility Clauses to American Samoa, the matai system is constitutional).
159. Id. at 86–89.
While these arguments hold merit, H.R. 279 does not acknowledge or account for the possibility that federal courts may invalidate local laws under the traditional constitutional framework. It thus places at risk the cultural survival of American Samoans and other territorial peoples. Indeed, in testifying before the U.S. House of Representatives about H.R. 279, Lieutenant Governor of American Samoa Talauega Eleasalo Va’alele Ale declared, “[t]his measure, while well-intended and perhaps, in some circumstances justified, is a blunt instrument that will not only hasten the destruction of unique cultures within U.S. territories and Insular Areas, it will destroy the right of the people of American Samoa to democratic self-determination.”

While the Insular Cases themselves furthered racism and cultural imperialism, if their legal framework is removed from U.S. jurisprudence without creating an alternative avenue for territorial cultural preservation, Indigenous cultural practices in the territories may be left exposed to constitutional invalidation. H.R. 279, without additional political action to ensure the political and cultural self-determination of the territories, may not further restorative justice in the realm of cultural integrity, particularly for American Samoans.

B. Impacts on Lands and Other Natural Resources

For Indigenous peoples, cultural integrity is also inherently dependent upon access to land and resources. Indigenous self-determination fundamentally requires that Indigenous relationships with lands and other natural resources not be controlled by colonizing groups who have historically employed violence and legal tools, like western property concepts, to seize and exploit lands and natural resources. A restorative approach to the law must acknowledge this history of land subjugation and seek to restore the relationship of Indigenous peoples to land and other natural resources. Accordingly, Sproat’s second realm of restorative justice analyzes “whether a particular action perpetuates the subjugation of...”

161. Iris Marion Young defines cultural imperialism as “the universalization of one group’s experience & culture, and its establishment as the norm.” Iris M. Young, Five Faces of Oppression, 19(4) THE PHIL. F. 270, 285 (1988).
163. See Serrano, supra note 16, at 426 (citing Tsosie, Ethics of Remediation, supra note 102, at 236 (“For Indigenous inhabitants of the territories, the preservation of their deep connections to land (and where applicable, the return of land) is also central to their self-determination.”)).
ancestral lands, resources, and rights, or attempts to redress historical in-
justices in a significant way.\textsuperscript{165}

In the U.S. territories, these colonial harms to lands and natural re-
sources have largely taken the form of military occupation, environmen-
tal exploitation, and climate change.\textsuperscript{166} In Guam, for example, roughly a
third of the land is occupied by the U.S. military,\textsuperscript{167} and the United States
is in the process of further expanding its military presence.\textsuperscript{168} Julian
Aguon describes this buildup as “the latest wave of unilateral action by
the United States . . . in a long and steady diet of dispossession” over five
centuries of colonization.\textsuperscript{169} The people of Puerto Rico, on the other
hand, successfully ousted the U.S. Navy from its control of land in
Vieques and Culebra,\textsuperscript{170} but continue to be subject to the United States’
environmental and economic exploitation, such as through fossil-fuel de-
pendent electricity plants and genetically modified organisms (“GMO”)
experimentation.\textsuperscript{171}

The U.S. territories’ status as unincorporated, however, has also
meant that unlike in previously “incorporated” territories like Hawai‘i,
which were destined for statehood, the present-day territories have not
suffered as much settler colonialism.\textsuperscript{172} The goal of acquiring these terri-
tories was not for settlement, but to bolster the United States’ interna-
tional political status as a world power.\textsuperscript{173} Indeed, several U.S. territories
have successfully implemented restrictions to land alienation such that
only Indigenous peoples or those with other roots in the territories can

\textsuperscript{165} Id.
\textsuperscript{166} See, e.g., Serrano & Tapu, supra note 3, at 1290–1300, 1310 (describing the impacts
of climate change on the territories and the United States’ “continued militarism and en-
vironmental exploitation” of the territories).
\textsuperscript{167} Frances Nguyen, Guam won’t give up more land to the U.S. military without a fight,
PRISM (June 4, 2021), https://prismreports.org/2021/06/04/guam-wont-give-up-more-
land-to-the-u-s-military-without-a-fight/.
\textsuperscript{168} AGUON, Reflections, supra note 11, at 8.
\textsuperscript{169} Id. at 9.
\textsuperscript{170} José M. Atiles-Osoria, Environmental Colonialism, Criminalization and Resistance:
Puerto Rican Mobilizations for Environmental Justice in the 21st Century, 6 RCCS ANN. REV.
3, 12 (2014).
\textsuperscript{171} Hilda Llorêns & Mariza Stanchich, Water is Life, but the Colony is a Necropolis: En-
vironmental Terrains of Struggle in Puerto Rico, 31 CULTURAL DYNAMICS 81, 84–85 (2019).
\textsuperscript{172} See Natsu Taylor Saito, Tales of Color and Colonialism: Racial Realism and Settler Co-
lonial Theory, 10 FLA. A & M U. L. REV. 1, 25–26 (2014) (“Settler colonialism can be seen as . . . a triangulated structure in which the colonizers reject the hegemony of the metropolitan center or colonial ‘motherland,’ and directly assert control over Indigenous peoples as well as those who are neither indigenous to the land nor part of the settler class. The settlers arrive with a presumption of sovereign entitlement, an unshakeable belief in their right to establish a state under their exclusive control. Their primary purpose is to establish a territorial base . . . .” (footnotes omitted)).
\textsuperscript{173} Torruella, supra note 24, at 6.
own or lease lands. In the CNMI, for example, the territory’s constitution restricts the “acquisition of permanent and long-term interests in real property . . . to persons of Northern Marianas descent.”174 In American Samoa, a similar blood quantum law restricts the alienation of lands by requiring that individuals have at least 50% American Samoan blood to own property or lease it for more than fifty-five years.175

As described supra, the Ninth Circuit Court of Appeals deployed the Insular Cases to uphold CNMI’s land alienation restrictions in Wabol v. Villacrusis.176 Although the equal protection guarantee applies to the CNMI generally, the court determined that the specific right to acquire permanent or long-term interests in Northern Marianas Island land is not a “fundamental right,” so it should not be imposed in the territory.177 The court reasoned that application of that right to the CNMI would be “impracticable and anomalous” because “land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives’ social system. The land alienation restrictions are properly viewed as . . . preventing exploitation[.]”178

Legal scholars Susan K. Serrano and Ian Faleufa’u Tapu pose a critical question for the future of the territories: “In the absence of the Insular Cases, would a court, as the Ninth Circuit did in Wabol v. Villacrusis, hold that ancestry-based restrictions on certain acquisitions of land are lawful restorative measures to promote the economic advancement and self-sufficiency of Native peoples?”179 The answer to this question is not entirely clear because the traditional constitutional framework is generally unfriendly to ancestry-based classifications.180 However, the high court in American Samoa employed the traditional equal protection framework to uphold the territory’s land alienation restrictions.181 The court found that the restrictions do create racial classifications, but held that they survive strict scrutiny because preserving the lands for Samoans is a compelling

174. N. Mar. I. Const., art. XII, § 1; see supra note 83 (defining “persons of Northern Marianas descent”).
175. A M. SAMOA CODE ANN. § 37.0204(b).
176. Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1992). See also supra notes 85–90 and accompanying text.
177. Id. at 1460–62 (citing Commonwealth of Northern Marianas Islands v. Atalig, 723 F.2d 682 (9th Cir.), cert. denied, 467 U.S. 1244 (1984)) (reasoning that since “Atalig held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories[,] [] the same must be true of the equal protection clause”).
178. Id. at 1461 (quotations added).
179. Serrano & Tapu, supra note 3, at 1312 (citation omitted).
state interest and the statute is narrowly tailored.\textsuperscript{182} While it is unclear whether overruling the \textit{Insular Cases} would necessarily invalidate these laws, since H.R. 279 does not account for the possibility, the bill may further land dispossession in the territories rather than redress the historical injustices of environmental exploitation and more. In this realm of the restorative justice framework too, then, H.R. 279 raises legitimate concerns.

\textbf{C. Impacts on Social Welfare and Development}

While condemning the \textit{Insular Cases} may cause harm in the realms of cultural integrity and lands and natural resources, the action may also provide some economic relief to territorial peoples. If the U.S. Constitution applied in full to the territories, the United States would have to offer the full measure of federal welfare benefits to territorial residents.\textsuperscript{183} The poverty rates in the territories are high, due largely to the United States exploiting their natural resources and fostering economic dependency in order to retain control.\textsuperscript{184} In 2020, for example, nearly 44% of residents of Puerto Rico lived below the poverty line, compared to only about 11% of residents of the states.\textsuperscript{185} Yet Congress has often chosen to withhold federal benefits from the U.S. territories.\textsuperscript{186} And relying on the \textit{Insular Cases}, federal courts have largely refused to check this power.\textsuperscript{187}

Legal scholar Stephen James Anaya articulates these economic and human harms to Indigenous peoples as resulting from “two distinct but related historical phenomena”: first, “the progressive plundering of indigenous peoples’ lands and resources over time, processes that have impaired or . . . devastated indigenous economies and subsistence life and left indigenous people among the poorest of the poor”; and second, “patterns of discrimination that have tended to exclude members of indigenous communities from enjoyment of the social welfare benefits generally

\begin{itemize}
\item \textsuperscript{182} Id.
\item \textsuperscript{183} See Serrano & Tapu, \textit{supra} note 3, at 1311.
\item \textsuperscript{184} See Román & Simmonds, \textit{supra} note 21, at 477–82 (describing the United States’ intentional fostering of economic dependency as one realm of its colonial conquest).
\item \textsuperscript{186} See \textit{infra} notes 190–96 and accompanying text.
\item \textsuperscript{187} See \textit{infra} notes 197–201 and accompanying text.
\end{itemize}
available in the states within which they live.” Since restorative justice by definition entails repairing wrongdoing, the third realm of Sproat’s developing framework acknowledges these harms and, accordingly, seeks to “expose whether a given action or decision improves social welfare conditions or perpetuates the status quo of Natives bringing up the bottom of most, if not all, socio-economic indicators.”

In exercising its plenary powers under the Territorial Clause, Congress has frequently denied the territories the full measure of federal benefits that it provides to the states, even though residents pay billions of dollars in taxes. For example, for Medicaid funding, the federal government reimburses local territorial governments at a lower rate than it offers to the fifty states and the District of Columbia. Moreover, Congress extended the Supplemental Security Income (“SSI”) program to the CNMI in 1976, but does not offer it to Guam, the USVI, Puerto Rico, or American Samoa.

In a line of federal benefits cases, federal courts have largely refused to check Congress’s plenary power in this realm. For example: in Califano v. Gautier Torres, the U.S. Supreme Court held that the denial of SSI benefits to residents of Puerto Rico did not unconstitutionally violate the plaintiffs’ right to travel; and in Harris v. Rosario, the Court determined that providing lower levels of financial assistance through the Aid to

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193. See Staff, supra note 190, at 274.
196. See Staff, supra note 190, at 274.
198. Torres, 435 U.S. at 1.
Families with Dependent Children ("AFDC") program to families residing in Puerto Rico than to those in the states did not violate the equal protection guarantee. In 2022, the U.S. Supreme Court again blocked challenges to these benefit schemes in United States v. Vaello Madero, holding that the denial of SSI benefits to residents of Puerto Rico did not violate equal protection. Legal challenges to federal benefit schemes have so far changed little on-the-ground for families in the territories with financial need.

In this socio-economic realm, therefore, H.R. 279 appears to more appropriately further restorative justice because it may force the United States to extend the full measure of federal benefits to the territories. It may thus have positive human impacts in the areas of health, education, standards of living, and the survival of peoples in the territories. Equalizing federal benefits between the states and territories is a significant action for families in financial need. It may further provide the choice to some Indigenous peoples and peoples with roots in the territories to remain in the islands rather than follow others to the mainland United States.

On the other hand, solely extending existing federal benefits to the U.S. territories is not sufficient to restore the islands’ socio-economic well-being. Adequate restoration for the harms of intentional U.S. economic exploitation and colonialism would require much larger economic and social reparations. Moreover, some may argue that extending federal benefits does not further economic and social self-determination, particularly considering the United States’ history of intentionally foster-

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199. The AFDC program provides financial assistance to families with needy dependent children. See 42 U.S.C. § 601.
200. Harris, 446 U.S. 651.
201. Vaello-Madero, 142 S. Ct. 1539.
202. See Sproat, supra note 15, at 182 (“Given the importance of ‘health, education, an adequate standard of living,’ and other social welfare measures to the continued survival of any group, contextual inquiry into Native claims must examine history and socio-economic considerations.” (quoting Anaya, Native Hawaiians and International Human Rights, supra note 188, at 351)).
203. See Amelia Cheatham, Puerto Rico: A U.S. Territory in Crisis, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/puerto-rico-us-territory-crisis (Nov. 25, 2020, 7:00 AM) (stating that Puerto Rico’s economic crisis has “driven a mass exodus from the territory,” to the extent that “[m]ore people of Puerto Rican descent now live on the mainland than on the island”). This Article also acknowledges, however, that current federal benefits schemes are often sorely insufficient for families in financial need, even where they are fully implemented.
204. See Yamamoto & Obrey, supra note 139, at 8 (integrating Yamamoto’s developing Social Healing Through Justice framework into “human rights principles to deepen the dimensions of reparatory justice for systemic harms—the psychological, economic, cultural, and institutional”).
ing the economic dependence of the territories in order to continue realizing their exploitation.\(^{205}\)

Finally, as acknowledged by Professor Sproat, social welfare is also deeply tied to Indigenous peoples’ cultural veracity and access to lands and natural resources.\(^{206}\) Thus, if condemning the *Insular Cases* has the potential to harm the other realms of restorative justice, social welfare may in turn also be harmed.\(^{207}\) True restorative justice for the Indigenous peoples of the territories in this realm would require far more expansive monetary compensation, as well as other types of structural changes, including restoring and maintaining their access to lands and resources, *on the terms* of the peoples of the territories.

**D. Impacts on Self-Government**

Key to the human rights principle of self-determination is the ability of Indigenous peoples “to manage their political and cultural sovereignty.”\(^{208}\) “Years and generations of colonization” has facilitated the “non-dominant positions [of Indigenous peoples] within the states where they live” such that today, Indigenous peoples are typically “denied full and equal participation in the political processes that have sought to govern them.”\(^{209}\) In recognition of this loss of self-governance and political power, the final realm of Sproat’s restorative justice framework “consider[s] whether a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance.”\(^{210}\)

In the U.S. territories, while residents are subject to the plenary power of Congress, their political representatives cannot vote on the measures that deeply affect them.\(^{211}\) Indeed, one of the great ironies of

\(^{205}\) Román & Simmons, *supra* note 21, at 479–80 (“Through economic incentives, the United States ensures that the island territories cannot afford a drastic charge for independence. Some have argued that any United States ‘material aid to the colonies is an extension of exploitation, given to strengthen the economic dependency that binds colony to colonizer.’” (quoting Haunani-Kay Trask, *Politics in the Pacific Islands: Imperialism and Native Self-Determination*, 16 Amerasia J. 1, 2 (1990))).

\(^{206}\) Sproat, *supra* note 15, at 173 (“Native communities’ social welfare is defined by cultural veracity and access to, and the health of, natural resources.”).

\(^{207}\) See id.

\(^{208}\) Id.

\(^{209}\) Id. (quoting Anaya, *Native Hawaiians and International Human Rights, supra* note 188, at 356).

\(^{210}\) Id. at 185.

H.R. 279 is that the peoples of the U.S. territories (or their representatives) are not able to vote on it. Moreover, although the laws governing the relationship between the United States and several of the territories explicitly state that the peoples therein have a right to self-government, the same documents require United States approval for nearly all significant political matters, including the adoption of local constitutions. In several of the territories, these laws originally mandated that the U.S. president appoint the local governors, rather than providing for democratic elections by the residents themselves. And all U.S. territorial residents are today still denied the right to vote in U.S. presidential elections.

Even with the Insular Cases in place, the Ninth Circuit has struck down local voting qualifications in Guam and the CNMI as unconstitutional. The voting qualifications were designed to determine the political wishes of the colonized Chamorro and Carolinian peoples and their descendants. In both Davis v. Guam and Davis v. Commonwealth Election Commission, the Ninth Circuit relied on the earlier Hawai’i case, Rice v. Cayetano, to determine that the voter qualifications were impermissible

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212. See Serrano & Tapu, supra note 3, at 1309 (noting the parallel irony that no U.S. territory delegate can vote on the Insular Areas Climate Act).

213. See, e.g., Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, §§ 101, 103, 90 Stat. 263, 268 (1976) (stating in part that CNMI will become a “self-governing commonwealth” but also “under sovereignty of the United States”); An Act to Provide for the Establishment of Constitutions for the Virgin Islands and Guam, Pub. L. No. 94-584, §§ 1–2, 5, 90 Stat. 2899, 2899–2900 (1976) (“recognizing the basic democratic principle of government by the consent of the governed[,]” but also requiring that local constitutions in the Virgin Islands and Guam be “consistent with” U.S. sovereignty over them and requiring their approval by Congress).

214. See 1900 Foraker Act Pub. L. No. 1-191, § 17, 31 Stat. 77 (1900) (providing for the appointment of “The Governor of Porto Rico” by the U.S. President). See also Organic Act of Guam, 48 U.S.C. §§ 1422, 1424b (providing that the Governor of Guam shall be elected by the majority of qualified voters, but the U.S. President shall appoint the judge for the District Court of Guam as well as the U.S. attorney and U.S. marshal for Guam).

215. See, e.g., Att’y Gen. of Guam v. United States, 78 F.2d 1017 (9th Cir. 1984) (holding that prohibiting U.S. citizens residing in Guam from voting in U.S. presidential elections does not violate the Privileges and Immunities Clause).

216. See Davis v. Guam, 932 F.3d 822 (9th Cir. 2019); Davis v. Commonwealth Election Comm’n, 844 F.3d 1087 (9th Cir. 2016).

217. Guam’s Plebiscite Law restricted voters to “Native Inhabitants of Guam” for a non-binding plebiscite to determine the group’s wishes regarding its political relationship with the United States. Davis v. Guam, 932 F.3d at 824. The CNMI’s constitutional provision restricted voting in certain elections to “persons of Northern Marianas descent.” Davis v. Commonwealth Election Comm’n, 844 F.3d at 1089–90 (citing CNMI Const. art. XVIII, §§ 4–5).
racial classifications in violation of the Fifteenth Amendment.218 Rather than repurposing the Insular Cases to promote Indigenous groups’ rights, the Ninth Circuit employed the Rice framework.219 The Ninth Circuit determined that “courts must apply the traditional constitutional analysis where Congress has specifically extended a constitutional right” to an unincorporated territory.220

Julian Aguon, who served as the lead litigator for Guam in Davis v. Guam, describes the impacts of the courts’ Davis and Rice decisions on self-determination:

It will now be even harder for colonized people to exercise any measure of self-determination (at least where an act of voting is involved) because the mere act of designating who constitutes the colonized class could collapse, in a court’s eyes, into an act of racial categorization. It will now be even more difficult to determine the collective desire of a colonized people because we cannot even name those people in order to ask them.221

The Davis cases demonstrate that even the modest protection provided by the Insular Cases is tenuous and not always effectuated.222 If H.R. 279 is one step towards a more comprehensive, stable jurisprudence that prioritizes the self-determination of the Indigenous peoples of the territories, it may forward restorative justice in this realm of self-governance. If, however, H.R. 279 stops at denouncing the Insular Cases, local territorial laws intended to further self-governance will remain at the mercy of U.S. courts’ hostile constitutional jurisprudence.

218. See Davis v. Guam, 932 F.3d at 825 (citing Rice v. Cayetano, 528 U.S. 495 (2000); Davis v. Commonwealth Election Comm’n, 844 F.3d 1087); Davis v. Commonwealth Election Comm’n, 844 F.3d at 1091 (citing Rice, 528 U.S. 495).
219. See Davis v. Guam, 932 F.3d at 825 (citing Rice, 528 U.S. 495); Davis v. Commonwealth Election Comm’n, 844 F.3d at 1091 (citing Rice, 528 U.S. 495).
220. Cuison Villazor, supra note 84, at 144.
221. Aguon, Reflections, supra note 11, at 65.
222. See Tapu, Who Really is a Noble?, supra note 83, at 64–65 (“While American Samoa’s culturally distinct structure may have the appearance of self-determination, it is built on the unstable foundation of the Insular Cases. Under the Insular Cases framework, legal challenges are not only possible, but to be expected.”); Cuison Villazor, supra note 84, at 144 (“[C]ourts . . . have not always taken a consistent approach.”).
IV. CONCLUSION

While discussing reparations legislation and court rulings, path-breaking legal scholar Eric K. Yamamoto has contended that these measures:

\[\text{do not necessarily or inevitably lead to a restructuring of governmental institutions, a changing of societal attitudes or a transformation of social relationships, and the dangers of illusory progress and co-optation are real. At the same time they can and should be appreciated as intensely powerful and calculated political acts that . . . bear potential for contributing to institutional and attitudinal restructuring.}\]223

Similarly, H.R. 279's condemnation of the *Insular Cases* bears the risk of making the U.S. polity feel better about the United States' colonial relationships with its territories without sufficiently changing their power dynamics or providing adequate redress for past and present harms.224 In addition, as described in this Article and as other scholars have noted, the bill may bear the risk of exposing local laws intended to benefit the Indigenous peoples of the territories to potential constitutional invalidation and, thus, may not further restorative justice in many of the territories, especially in the realms of cultural integrity, lands and natural resources, and self-government.225

H.R. 279 can nonetheless be a meaningful symbolic step, so long as it is not the only step.226 “For many, the *Cases*’ rejection would communicate at least a desire to reconstruct and build new productive political relationships.”227 It is imperative to narrate the story of the colonial and racist *Insular Cases* in the public eye to shift public consciousness and generate continued political movements.228 Moreover, federal case law demonstrates that the *Insular Cases*’ framework, even when repurposed,

224. See id.
225. See supra Part III.
226. See id.
227. Serrano & Tapu, supra note 3, at 1310.
228. See Serrano, supra note 16 (arguing that the *Insular Cases* should be taught in school in order to combat territorial peoples’ continued invisibility and forward movements for self-determination). Cf. Aguon, *Other Arms*, supra note 118 (describing the political value of reframing the rights narrative to include international human rights law); Eric K. Yamamoto et al., *Counts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994) (arguing that litigation can be used to inject counter-narratives into the public consciousness and thus forward larger political movements).
is not a stable foundation for consistently accomplishing Indigenous self-determination in the territories. Indeed, one legal scholar recently contended that repurposing the *Insular Cases* rather than outright rejecting them will merely “entrench federal power while prolonging the subordination of territorial inhabitants.” Crucially, many representatives, lawyers, scholars, and advocates from the territories do support the bill, even if with reservations, although others argue that ending the application of the *Insular Cases* is not the correct course of action, particularly for American Samoa.

Professor Sproat’s developing contextual framework is a powerful reminder that the true test of whether H.R. 279 and related measures further restorative justice for the Indigenous peoples of the territories will be whether they further the human rights principle of self-determination, not simply equality. The United States must be receptive to the possibility that territorial self-determination may result in the restructuring of its relationships with the five territories in different ways. To meaningfully provide restoration for the harms of U.S. colonialism and the related *Insular Cases*, discourse about H.R. 279 must acknowledge the legitimate concerns raised by peoples of the U.S. territories and begin “a serious process and conversation about self-determination for the territories, such as a path to statehood or independence, or even a constitutional amendment[].” Indeed, we must continue beyond the narrow binary frame-

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229. See supra note 222 and accompanying text.


231. See supra notes 3–11 and accompanying text.

232. See *Hearing*, supra note 5, at 14–17 (statement of Hon. Talauega Eleasalo Va’alele Ale, Lt. Governor, Am. Samoa) (arguing that ending application of the *Insular Cases* is not the correct course of action for American Samoa, although it may be for some of the territories).

233. See *Sproat*, *supra* note 15, at 172.

234. See supra note 116 and accompanying text; *Hearing*, *supra* note 5, at 16 (statement of Hon. Talauega Eleasalo Va’alele Ale, Lt. Governor, Am. Samoa) (“Each territory is unique, and any new legislation should recognize the history of the individual territories and their relationship with the U.S. and Congress. A ‘one size fits all’ approach will not work.”).

235. See sources cited *supra* note 16 (discussing the importance of listening to the voices of those most harmed).


In December 2022, the House passed the Puerto Rico Status Act, which would establish a plebiscite for the people of Puerto Rico to vote on the territory’s political status. *See Puerto Rico Status Act, H.R. 8393, 117th Cong. (2021–2022).* The plebiscite would be held on November 5, 2023, and provide the following three options on the ballot: (1)
work of asking only whether or not we should reject the Insular Cases and dig into the “very real work to be done . . . of creating the conditions whereby [Indigenous peoples] can live powerfully and live well.”

Id. § 5(a).