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The Law of the Territories: Should It Exist?

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ABSTRACT. "The Law of the Territories" is becoming an increasingly prominent academic heading for legal scholarship concerning the liminal status of U.S. territories. This Essay argues that the incipient momentum of this "emerging field" presents an obstacle rather than a pathway to meaningful scholarly engagement, sidelining broader perspectives and more consequential inquiry. In questioning the would-be field's unwitting formation and content, this Essay offers a preliminary exploration of how scholars might redirect the Law of the Territories toward more considered approaches to the study of U.S. territories and overseas imperialism in American law.

INTRODUCTION

Over the past several years, legal scholarship on the liminal status of Puerto Rico and other U.S. territories has started to appear under a newly recognizable academic heading: "The Law of the Territories."[1] The term is attracting considerable academic interest amid a broader shift in American constitutional inquiry toward expansionism and empire—one in which scholars increasingly seek to reconcile domestic, "insider" accounts of emancipation, equality, and freedom with outward-facing realities of colonialism, conquest, and U.S. global power.[2]

1. *See* Appendix: "The Law of the Territories"—Notable Recent Usages.

2. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Constitution of Difference*, 137 HARV. L. REV. F. 133, 133 (2024) ("In the past twenty years or so, scholars have begun to raise profound and difficult questions about the Constitution's relationship with American colonialism and imperialism."). For examples of this shift in American constitutional inquiry, see generally AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010); AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM (2024); Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652 (2022); Sam Erman, *Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813 (2022); Alvin Padilla-Babilonia, *Sovereignty and Dependence in the American Empire: Native Nations, Territories, and Overseas Colonies*, 73 DUKE L.J. 943 (2024); and Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023).

Maggie Blackhawk, for instance, spotlights "the law of the territories" among the "'external' constitutional fields" that she proposes to weave together into "the law of American Colonialism."[3] In the 2022-2023 academic year, more than a dozen U.S. law-review authors identified "the Law of the Territories" as a discrete body of U.S. law or "emerging field"[4] within legal scholarship,[5] even though that term — at least as a taxonomic device — appears nowhere in U.S. law journals before 2017.[6]

Remarkably, the Law of the Territories is winning acceptance as a standalone field even though its contours and purview are essentially undefined.[7] While a growing number of articles purports to engage with this field, none has offered a considered view of what this term means or the basket of questions it might contain.[8] Various commentators have implied parallels to federal Indian law, but they have not explained why that comparison is appropriate or useful.[9] More importantly, no one has critically or extensively assessed whether this would-be new field aligns with — or diverges from — the much broader, increasingly vibrant law-and-empire discourse.

Among the few things immediately clear about the Law of the Territories is that the core conversation with which the "emerging field" is concerned is not actually new, at least in substance. From the moment the term surfaced in 2017, the Law of the Territories has claimed various strands of scholarship from a two-decade-long resurgence of scholarly interest in U.S. territories and the controversial *Insular Cases* — made visible in large measure by the work of scholars like

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3. *See* Blackhawk, *supra* note 2, at 21 (describing her Foreword as starting the conversation about a potential "new field," the law of American colonialism, that would "bring[] together seemingly disparate threads of law," one of which is the law of the territories); *see also id.* at 20 ("Federal Indian law is not alone in facing challenges. Similar constitutional challenges have been raised against the law of the territories, even this [Supreme Court] Term, calling into question the 'plenary power' of the national government to regulate these other colonized peoples.").

4. *See, e.g.*, *Special Issue on the Law of the Territories*, YALE L.J. 1 (Mar. 23, 2021), https://www.yalelawjournal.org/files/CallforPapersLawofTerritories_p6a17izo.pdf [https://perma.cc/N8L8-28B8].

5. *See* Appendix: "The Law of the Territories" — Notable Recent Usages.

6. The last notable usage of this term as an academic heading belongs to a collection of essays by Sidney George Fisher, published together under the title *The Law of the Territories* in 1859. SIDNEY GEORGE FISHER, THE LAW OF THE TERRITORIES (1859); *see infra* Section III.C.

7. In 2022, this journal dedicated an entire issue to it. *See* Rachel Valentina Sommers, *Introduction to the Special Issue on the Law of the Territories*, 131 YALE L.J. i, i-iii (2022).

8. *Cf.* James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories,"* 131 YALE L.J. 2542, 2642-43 (2022) ("'[T]he law of the territories' is a phrase without settled legal meaning.").

9. *See infra* notes 37-45, 106-117 and accompanying text.

Christina Ponsa-Kraus and the late Judge Juan R. Torruella.[10] That preceding conversation, while not explicitly employing the term "the Law of the Territories," nonetheless decisively framed and inflected ensuing scholarly efforts.

That work's practical relevance surged at the turn of the millennium amid the Global War on Terror,[11] and again in the late 2010s as key developments in U.S. territories gained prominence in national political discourse. Among these were the devastating aftermath of Hurricanes Irma and Maria in 2017; widespread public opposition to Congress imposing an unelected oversight board over Puerto Rico's government through the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) in 2016; and the ongoing reorientation of U.S. national-defense strategy toward Chinese influence in the so-called Indo-Pacific.[12] During this period, a 2017 *Harvard Law Review* special collection helped launch the term "Law of the Territories" into today's legal-academic vernacular.[13] Scholarly interest in the Law of the Territories has accelerated since then, bolstered by recent indications from Justices Gorsuch and Sotomayor that the Supreme Court may be prepared to overturn the *Insular Cases* — the doctrinal foundation of today's U.S. territories' uncertain relationship to the U.S. constitutional system.[14] It is against this backdrop that the U.S. territories have returned to the foreground of U.S. law journals whose very first volumes theorized the *Insular Cases* nearly 130 years ago.[15]

In view of the U.S. territories' apparent (if enigmatic) importance to contemporary legal thought,[16] this Essay explores the early formation and trajectory

10. Other major figures of the late 1990s-early 2000s *Insular Cases* renaissance include Bartholomew H. Sparrow, Sanford Levinson, T. Alexander Aleinikoff, Akhil Reed Amar, Gerald L. Neuman, Efren Rivera Ramos, Natsu Taylor Saito, Sarah H. Cleveland, Owen M. Fiss, Pedro A. Malavet, Gary Lawson, Kal Raustiala, Andrew Kent, and José Cabranes, among many others. *See infra* notes 34, 37, 46; *see also* Martha Minow, *Preface* to RECONSIDERING THE *INSULAR CASES*: THE PAST AND FUTURE OF AMERICAN EMPIRE vii (2015) ("Never during my three years as a law student or two years as a law clerk at federal courts did I hear of the 'Insular Cases.'").

11. *See, e.g.*, Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 5-14 (2004).

12. *See, e.g.*, Ben Kesling, *U.S. Military Refocuses on Pacific to Counter Chinese Ambitions*, WALL ST. J. (Apr. 3, 2019, 8:02 AM ET), https://www.wsj.com/articles/u-s-military-refocuses-on-pacific-to-counter-chinese-ambitions-11554292920 [https://perma.cc/S3TW-V7HP].

13. *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616 (2017).

14. *See* United States v. Vaello Madero, 596 U.S. 159, 188 (2022) (Gorsuch, J., concurring); *id.* at 194 n.4 (Sotomayor, J., dissenting). How it is that the two Justices converge on this point while reaching opposite outcomes in *Vaello Madero* merits deeper inquiry.

15. *See, e.g.*, Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105, 112 (2018) (noting that "the *Harvard Law Review* was host to a wide-ranging debate among legal scholars over the constitutional impact of the 1899 U.S. turn toward empire," which the *Harvard Law Review*'s editorial board has recently called a "time this journal might rather forget").

16. While this Essay deals primarily with U.S. public-law scholarship, contemporary interest in the U.S. territories and overseas imperialism extends to many other fields within or adjacent

of the so-called Law of the Territories, sketching the contours of the field from assumptions underlying the term's contemporary usage. Insofar as it is used to describe an academic space, today's Law of the Territories points generally to public-law conversation about "the complex and often-fraught relationship"[17] between the U.S. government and its five permanently inhabited overseas colonies,[18] or, in a different normative register, "the implications of the relationship between the U.S. and its territories" in the contemporary constitutional landscape.[19] In 2021, this law journal characterized it as "an emerging field that explores novel legal questions" facing "[m]ore than 3.5 million people—98% of whom are racial or ethnic minorities—liv[ing] in American Samoa, Guam,

to law. *See, e.g.*, K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1102-23 (2022); Jose Argueta Funes, *The Civilization Canon*, 71 UCLA L. REV. 128, 130-40 (2023); JULIAN GO, POLICING EMPIRES: MILITARIZATION, RACE, AND THE IMPERIAL BOOMERANG IN BRITAIN AND THE US 1-30 (2023).

17. *See* Sommers, *supra* note 7, at i.

18. The five remaining "unincorporated" territories are Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa. For a comprehensive historical account of the United States's past and present overseas colonies, see generally DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019). As Joseph Blocher and Mitu Gulati have noted, this orientation does not capture all of the United States's current territories. *See* Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2401 (2022) ("Law-of-the-territories scholarship understandably tends to focus on inhabited territories like Puerto Rico, where millions of American citizens still lack full voting rights. But to fully understand U.S. imperialism—and the conceptual confusion that enabled it and continues to haunt the people of the territories—we have to start fifty years earlier than the *Insular Cases* [with the United States's acquisition of Guano Islands]."). As the Ninth Circuit recently observed, "there are at least fourteen territories" that the United States governs, which include a group of Pacific territories without acknowledged permanent residents sometimes referred to as the United States Minor Outlying Islands. This number does not include the "Freely Associated States"—Federated States of Micronesia, Republic of Marshall Islands, or Republic of Palau—which were once part of a U.S.-administered Trust Territory of the Pacific Islands, which no longer exists. The Freely Associated States are presently not considered to fall within the purview of the Law of the Territories. In rare instances, courts and commentators have counted Washington D.C. as a U.S. territory even though the District Clause and Territories Clause appear in separate articles of the Constitution. *See, e.g.*, Olson v. V.I. Water & Power Auth., No. ST-2019-CV-00602, 2024 WL 1794417, at *15 n.4 (D.V.I. Apr. 24, 2024).

19. Justin Burnworth, *The Curious Case of Justice Neil Gorsuch*, 44 PACE L. REV. 1, 31 (2023); *see also* Jennifer M. Chacón, *Legal Borderlands and Imperial Legacies: A Response to Maggie Blackhawk's* The Constitution of American Colonialism, 137 HARV. L. REV. F. 1, 9 (2023) (suggesting that "[t]he visible doctrinal thread that connects immigration law with the law of the territories and Indian law is the plenary power doctrine"); Blocher & Gulati, *supra* note 18, at 1401 (noting that the Law of the Territories "tends to focus on inhabited territories," which is an "understandable" but incomplete lens for studying the "efforts to use law to justify the acquisition" of U.S. territories).

Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands."[20] At a more granular level, this body of scholarship — along with other academic work employing related terms like "Territorial Law"[21] — has produced a budding but persistently narrow constitutional conversation dominated by a specific set of doctrinal problems born of the *Insular Cases*.

One central focus of this discourse is the Supreme Court's categorization of "unincorporated" territories — that is, those territories the Court has said are inhabited by "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought . . . according to Anglo-Saxon principles."[22] Another is the Court's cryptic pronouncement that those territories can be held as colonies deemed "foreign to the United States in a domestic sense," at least "for a time."[23] This scholarship is held together loosely by a shared recognition of a persistent liminal condition rooted in those decisions,[24] and a general consensus that the racialized and developmentalist logics underpinning the overseas colonies' supposedly temporary constitutional limbo are, after 125 years, no longer defensible.[25]

The *Yale Law Journal Forum* Collection to which this Essay belongs is an auspicious invitation to consider the stakes of embracing an incipient Law of the Territories on those terms — and to ask whether this would-be new field ought to exist in the first place. Insofar as it contains work that approaches the mired status of U.S. territories by mapping various institutional realities from the ground up, this Collection suggests some readily imaginable alternatives to the way that most Law of the Territories scholarship presently conceives its core questions, objects, and principles.

This Essay foresees that the present heading of the new field will pose an obstacle — not a pathway — to a sustained scholarly conversation of enduring practical or theoretical value. Building on existing pockets of commentary

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20. *See Special Issue on the Law of the Territories*, *supra* note 4.

21. *See Spring 2024 Symposium: Territorial Law Across the Curriculum*, STETSON L. REV. (Mar. 22, 2024), https://www2.stetson.edu/law-review/symposia [https://perma.cc/E85P-8HVA].

22. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

23. *Id.* at 341 (White, J., concurring).

24. *Cf.* Andrew Kent, *The Jury and Empire: The* Insular Cases *and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 381 (2018) ("Most contemporary scholarship about the *Insular Cases* and the doctrine of territorial incorporation sees them as examples of discrimination, domination, and denial of rights. Scholarship charges that the Supreme Court allowed the U.S. government to 'totally disregard the Constitution in governing the newly acquired territory.'" (citation omitted)).

25. *See, e.g.*, Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1146 (2009) ("[N]o current scholar, from any methodological perspective, defends the *Insular Cases* . . . .").

criticizing legal scholars' fixation on the *Insular Cases*' contemporary doctrinal application, this Essay observes that the dominant threads in today's Law of the Territories scholarship are becoming increasingly detached from the lived realities and pressing concerns of the communities for whom they prescribe change. Moreover, they have turned away from important antecedent questions of sovereignty and political membership that have been bound up in the uncertain legality of U.S. territorial expansion and Native conquest from the very beginning. In doing so, this scholarship is constructing a frame that portrays those communities predominantly (if not exclusively) as common participants in a modern civil-rights struggle for political inclusion, rather than as constituents of distinct nations seeking to self-determine their relationship to another sovereign.

That this emerging field is headed down an unduly limiting path is further reflected in the striking disconnect between current scholarship and an almost entirely ignored body of nineteenth-century academic commentaries published under the very same moniker: "The Law of the Territories." By exploring lost continuities between these two conversations, we can appreciate how today's Law of the Territories privileges inquiry about the five "unincorporated" territories that strips away broader but deeply contested questions about the nature of our constitutional community; the relationship between and among rights, citizenship, and sovereignty; and the scope of the Constitution's territorial reach—questions that came to a head in *Dred Scott*[26] and catalyzed the U.S. Civil War. Reconnecting the two conversations offers a starting point for considering how to channel this current wave of academic interest in U.S. territories into broader public-law understanding after a prolonged period of neglect. The work of field formation in this area should be to nurture, not cauterize, the tissue connecting the territories to American law's theoretical and pedagogical mainstream.

To be sure, the Law of the Territories—even in its current, highly nebulous form—has served some useful functions. It has cast a spotlight on the *Insular Cases*' troubled legacy and overtly racist methodologies. It has brought much-needed attention to the U.S. territories' disenfranchisement, at least within elite academic circles that have long regarded them as an inconsequential backwater. It has spawned symposia, special collections, and new course offerings at institutions like Harvard, Yale, and Columbia, yielding work that federal judges are citing to voice an increasingly explicit skepticism about the *Insular Cases*' continued viability. Much of that success is attributable to advocacy groups that have leveraged quite adeptly various trends in constitutional-law inquiry to link the *Insular Cases*' historical and doctrinal content to other controversial decisions of the *Plessy* era, in academic and nonacademic settings alike. But those successes

26. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857).

have also come at a high (and unnecessary) academic price, marginalizing other approaches and voices that would open doors to more consequential inquiry.

This Essay sees little value in speculating about whether the Law of the Territories will germinate into a lasting academic field with its own casebooks or scholarly canon. The Law of the Territories (or whatever better-fitting term may yet emerge for the thing it contemplates[27]) is just one of many new putative fields that have flirted with more durable inclusion in the catalog of American legal scholarship and pedagogy over the years. Be it the Law of the Territories, the law of the police,[28] the law of American colonialism,[29] or the law of the horse,[30] asking whether a new line of particularized inquiry should exist takes us inevitably into an enduring thicket of questions surrounding the purpose and identity of *all* legal scholarship — questions from which this Essay takes a wide berth. This Essay simply proposes that this recent move in legal scholarship on U.S. territories is worth redirecting before it treads too far down the wrong path.

What follows proceeds in three Parts. Part I surveys the core body of scholarship — largely early-twenty-first-century critiques of the *Insular Cases* — that the Law of the Territories attempts to consolidate beneath its banner. Part II describes the surging contemporary interest in the "emerging field" since 2017 and defines its basic contours. It makes particular note of the field's persistent narrowness and its development into a shorthand for conversations about the status of five inhabited overseas colonies under the troubled *Insular Cases* framework, a feature attributable, in large part, to the field's origins. Part III begins the work of questioning the field's unwitting formation and content, offering a preliminary exploration of how scholars might redirect the improvident momentum of the Law of the Territories toward more considered approaches to the study of U.S. territories and overseas imperialism in American law.

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27. Numerous commentators have viewed the prevailing nomenclature of "territories" as a euphemism for "colonies." *See, e.g.*, José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 458 (1986) (reviewing Juan R. Torruella, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985)). A similar dynamic hovers above the naming of the field presently known as "federal Indian law." *See, e.g.*, Robert B. Porter, *A Proposal to the* Hanodaganyas *to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 903 (1998) (referring to "federal Indian control law"); Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 563 (2021) (noting that federal Indian Law is "primarily the law of conquest").

28. RACHEL HARMON, THE LAW OF THE POLICE (2023).

29. *See supra* note 3.

30. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207-08.

I. TERRITORIES AT THE TURN OF THE TWENTY-FIRST CENTURY

This Part surveys briefly the preexisting body of scholarship that the Law of the Territories envisions as its intellectual foundation and point of departure. Although frequently touted as substantively novel and newly emerging, the Law of the Territories is, in large measure, a header for assembling some two decades of legal scholarship on the historical and doctrinal significance of the *Insular Cases*.[31] Conceptualized as a field "built on . . . the *Insular Cases*" and the "discriminatory doctrine of 'incorporation,'"[32] the Law of the Territories mobilizes that scholarship in its mission to "provide judges useful advice as to how to clean up the mess."[33]

Accordingly, sketching the Law of the Territories in its present form requires us to return first to the late 1990s and early 2000s—a moment in which the *Insular Cases* and American overseas expansionism caught fire in U.S. constitutional-law scholarship. Notwithstanding an even earlier assortment of deeply important scholarly work on the territories and the *Insular Cases*,[34] the turn of

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31. *See, e.g.*, Anthony M. Ciolli, *Needful Rules and Regulations*, 77 VAND. L. REV. 1263, 1267-69 (2024) (framing "the law of the territories" as "the ad hoc legal framework established by the *Insular Cases*").

32. Tom C.W. Lin, *Americans, Beyond States and Territories*, 107 MINN. L. REV. 1183, 1187 (2023).

33. *See* Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 269 (2022) (quoting William F. Fisher III, *The Significance of Public Perception of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1791 (1988)).

34. For examples of these scholarly works, see generally JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853 (1990); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986 (1990); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991); José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391 (1978); JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO (1980); RAYMOND CARR, PUERTO RICO: A COLONIAL EXPERIMENT (1984); Walter Lafeber, *The "Lion in the Path": The U.S. Emergence as a World Power*, 101 POL. SCI. Q. 705 (1986); WILLIAM BOYER, THE U.S. VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS (1971); RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946 (1972); 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 430 (1922); JAMES EDWARD KERR, *INSULAR CASES*: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM (1982); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992); T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15 (1994); and Jon M. Van Dyke, Carmen Di

the twenty-first century inaugurated a new era in the study of the legal and constitutional condition of U.S. overseas possessions.[35] Between 1996 and 2002, a number of now-classic works began to converge on the notion that the *Insular Cases*, despite their near-total obscurity in the theoretical and pedagogical canon of the day, were centrally important to constitutional development and deserving of much closer study.[36] An influential 1998 symposium of constitutional-law

Amore-Siah & Gerald W. Berkley-Coats, *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 624-25 (1996).

35. Although it is difficult to pinpoint which of several converging sparks ignited that flame, the one most widely credited is an influential March 1998 Yale Law School conference (and resulting volume of essays) on Puerto Rico. That symposium collection — organized and edited by then-law-student Christina Duffy Burnett (Ponsa-Kraus) and Burke Marshall — brought together a wide range of prominent law professors, federal judges, political scientists, and even the Governor of Puerto Rico to discuss various constitutional problems involving "the world's largest remaining colony," awakening some of the legal academy's most prominent figures to the contemporary relevance of the *Insular Cases*. *See generally* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) (featuring works by Sanford Levinson, Efren Rivera Ramos, José Cabranes, José Trias Monge, Juan Torruella, Juan F. Perea, Angel Ricardo Orquendo, Mark S. Weiner, E. Robert Statham, Jr., Gerald L. Neuman, Mark Tushnet, Richard Thornburgh, José Julián Alvarez González, Brook Thomas, and Rogers M. Smith). Sanford Levinson said of the symposium:

> I think it is relevant to note that my new-found interest had its genesis almost two years ago at a Yale Law School conference on Puerto Rico organized by a remarkable third-year law student *from* Puerto Rico. She was determined to "bring to the mainland," as it were, the issues that so passionately concerned her. Not only were the issues brought to the mainland, she also was able to bring to New Haven a number of representatives of the decidedly different points of view, including the Governor. These views ranged from the Governor's desire for statehood to those advocating for independence, with those wishing to maintain the present "commonwealth" status in between.
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> As a direct result of my introduction to the issue, I now assign one of the central 1901 *Insular Cases* addressing the status of Puerto Rico to my introductory courses on constitutional law and have added long excerpts from that case to a casebook on constitutional law that I co-edit.

Sanford Levinson, *1999 Owen J. Roberts Memorial Lecture: Diversity*, 2 U. PA. J. CONST. L. 573, 595 (2000) (citations omitted). Levinson would later be credited for much of the resurgent academic interest in the territories and the *Insular Cases*. *See* Christine Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 974, 1040-41 (2009) (describing Levinson's contribution to raising the profile of this issue). A full accounting of the rise of law-and-empire scholarship at the new millennium is beyond the scope of this Essay. Such an undertaking would surely require a careful examination of impactful scholarship in American Studies and other disciplines. *See generally, e.g.*, CULTURES OF UNITED STATES IMPERIALISM (Donald Pease & Amy Kaplan eds., 1993) (confronting the denial of empire to challenge foundational premises embedded in American Studies).

36. For examples of this scholarly attention, see generally FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 35; Sanford Levinson, *Why*

casebook authors questioned the field's failure to interrogate the reach of governmental power beyond territorial borders and, more fundamentally, "how territory was acquired."[37] Sanford Levinson—who had recently admitted his unfamiliarity with the *Insular Cases* prior to that gathering, despite decades of teaching and studying the Constitution[38]—made an impassioned appeal for study of the *Insular Cases* in particular, declaring them "central documents in the history of American racism" and integral to contemporary understanding of the U.S. constitutional system.[39] Meanwhile, Akhil Reed Amar, in one of the most-cited articles of the decade, remarked that the 1901 *Insular Cases*—along with the early law-review articles that theorized their prevailing approaches—were "receiv[ing] less attention than they deserve" in view of their methodological value

the Canon Should Be Expanded to Include the Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002); T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Akhil Reed Amar, *The Supreme Court 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter *Foreword*]; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (1996); Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923 (2000); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); William H. Rehnquist, The Supreme Court in the Nineteenth Century, Annual Lecture at the Supreme Court Historical Society 13 (June 4, 2001); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1 (2001); Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437 (2002); and Ediberto Román, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369 (2002).

37. T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197, 198 (2000) (calling for an emphasis on "sovereignty studies," to include, among other things, "Indian cases" and "territories cases"); *see also* Sanford Levinson & Bartholomew H. Sparrow, *Introduction*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898, at 1-12 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) (attributing the lack of attention to the constitutional questions born of American expansion to a "professional deformation" among legal academics and overemphasis on the role of courts).

38. *See* Levinson, *supra* note 35, at 574; Levinson, *supra* note 36, at 243.

39. Levinson, *supra* note 36, at 245, 241.

for appreciating "the way that early legal scholars debated constitutional questions."[40]

This renewed academic interest in the *Insular Cases* and U.S. territories surged with the onset of the so-called Global War on Terror. Although the five unincorporated territories had limited tactical or operational relevance in that conflict, the history of U.S. overseas imperialism at the turn of the twentieth century became an analytical substrate for the uncertain legality of new military and intelligence activities overseas. In particular, the United States's nation-building endeavors in Iraq and detention of terrorism suspects at Guantanamo Bay, Cuba, spawned new legal questions concerning the extraterritorial availability of constitutional rights, the relationship of citizenship to territorial sovereignty, and the limits on U.S. authority to project power across the globe. In this context, the *Insular Cases* and the history of U.S. imperialism became both a source of justification and an axis of critique.

It is worth noting that there is considerable uncertainty as to which Supreme Court decisions actually comprise the *Insular Cases*.[41] Despite this, the scholarship of the early aughts evinced widespread agreement about what, in substance, the *Insular Cases* raised for debate: a question reliably posed as "Does the Constitution follow the flag?"[42] The moniker "*Insular Cases*" became a shorthand for

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40. Amar, *Intratextualism*, *supra* note 36, at 782-83; *see also* Amar, *Foreword*, *supra* note 36, at 88-89 ("[Constitutional law casebooks] highlight current case law—an economic boon to publishers who profit from supplements and new editions—but few give students an accurate picture of just how problematic Supreme Court doctrine has been over the last two centuries. For example, of the seven leading constitutional law casebooks published by Aspen, Foundation, and West, only one even mentions . . . the *Insular Cases*.").

41. On this point, today's conversation has progressed very little since the early 2000s. Without a doubt, the task of sorting which of potentially dozens of horizontally inconsistent and potentially conflicting Supreme Court decisions properly "count" as the *Insular Cases* is centrally important to any work aiming to explore what it might mean for the Supreme Court to formally "overturn" the *Insular Cases*. A few scholars have proposed more specific theories about how to classify the *Insular Cases*, such as by sorting a set of "canonical" *Insular Cases* from "noncanonical" ones, *see* Andrew Kent, Boumediene*,* Munaf*, and the Supreme Court's Misreading of the* Insular Cases, 97 IOWA L. REV. 101, 103 (2011), and—more often—by emphasizing common omissions that serve to complicate the "standard" account of what they are thought to hold. *See, e.g.*, Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 836-37 (2005) (discussing the common omission of *Binns v. United States*, which "has not generally been included in the literature on the *Insular Cases*"). This is an underappreciated stumbling block clouding the prospect for practical and sustained scholarly engagement on the *Insular Cases. See* Campbell, *supra* note 8, at 2548 n.8, 2584 n.187 (commenting on the "many possible ways of understanding the *Insular Cases*" and electing to focus, for the limited purpose of interrogating whether and how to overturn them, on what the modern Supreme Court has told us they stand for in aggregate).

42. Whether the Constitution "follows the flag" has been an enduring question regarding the uncertain powers of the federal government to acquire and administer new territory, featuring

two basic doctrinal propositions: (1) that the U.S. Constitution "applies" fully in places deemed "incorporated" into the United States, while (2) only "fundamental" provisions apply in so-called "unincorporated" territories, which the Court viewed as populated by culturally inferior "alien races."[43] Only one leading scholar from this period, Christina Duffy Burnett (Ponsa-Kraus), resisted this "traditional story" of the *Insular Cases*—that they stand principally for the proposition that the U.S. Constitution does not "follow the flag" to unincorporated territories.[44] In her view, the standard account was a "familiar misunderstanding" that elided the "most important" doctrinal consequence of the *Insular Cases*: "establish[ing] that [unincorporated] territories could be separated from the United States"—that is, "deannexed."[45]

Nonetheless, the consensus core question—whether the Constitution "follows the flag"—would take on a new life during the 2007 Supreme Court Term.[46] In the blockbuster Guantanamo-detention case *Boumediene v. Bush*, a narrow 5-4 majority turned to the *Insular Cases* for answers to the slippery question of

prominently not only in public discourse around overseas imperialism but also debates over the expansion of slavery to new territories. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 151-83 (1978); Cleveland, *supra* note 36, at 231; FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1906); KERR, *supra* note 34, at 1-23.

43. Downes v. Bidwell, 182 U.S. 244, 286-87 (1901).

44. Burnett, *supra* note 41, at 797, 820 n.40 (adding that the "follow the flag" understanding of the *Insular Cases*' doctrinal import was "so ubiquitous in the scholarship on these cases that a comprehensive list of examples would take up too much space"); Christina Duffy Burnett, *The Constitution and Deconstitution of the United States*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898, *supra* note 37, at 201 (suggesting that the "deannexationist content of the doctrine of territorial incorporation has been overlooked").

45. Burnett, *supra* note 41, at 797, 820 n.40. Her intervention continues to complicate the prospect of sustained scholarly engagement about the stakes of overturning the *Insular Cases*. *See, e.g.*, Emmanuel Hiram Arnaud, *A More Perfect Union for Whom?*, 123 COLUM. L. REV. F. 84, 109 n.133 (2023) (reviewing JOHN F. KOWAL & WILFRED U. CODRINGTON III, THE PEOPLE'S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION (2021)) (noting continued contestation over the supposed "standard account" of the *Insular Cases*).

46. This question attracted new attention from numerous legal angles, most notably from the immigration- and national-security-law spaces. For examples of this scholarly attention, see generally Amy Kaplan, *Where Is Guantanamo?*, 57 AM. Q. 831 (2005); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003); Rasul v. Bush, 542 U.S. 466 (2004); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1 (2004); and T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365 (2002).

when and whether the constitutional guarantee of habeas corpus operates beyond the territorial borders of the nation.[47] Justice Kennedy's opinion in *Boumediene* grafted the *Insular Cases* onto the Court's extraterritoriality jurisprudence as support for the novel "impractical and anomalous"[48] standard governing whether a given constitutional protection ought to apply abroad.

Scholars have critiqued *Boumediene*'s invocation of the *Insular Cases* on various grounds.[49] But perhaps even more significant than the legal legitimacy of their invocation was Justice Kennedy's dramatic revision of the *Insular Cases*' jurisprudential origins and purpose. Erasing the Court's explicit rationale for inventing the incorporation doctrine—its anxiety about guaranteeing constitutional rights and protections to newly acquired "savage" peoples of an

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47. Scholars of the territories do not agree on how to properly read *Boumediene* on this point. Burnett has argued that *Boumediene v. Bush*, 553 U.S. 723 (2007), did away with the notion that the *Insular Cases* stand for the proposition that the Constitution "does not follow the flag" to the unincorporated territories, as the Court announced that "the Constitution ha[d] independent force in [the] territories, a force not contingent upon acts of legislative grace." Burnett, *supra* note 35, at 984 (quoting *Boumediene*, 553 U.S. at 757). *But see* Charles & Fuentes-Rohwer, *supra* note 2, at 166 (questioning whether today's Supreme Court would overrule the *Insular Cases* to hold "that the full Constitution, *tout court*, applies to the residents of the Territories"). *Boumediene*'s pronouncement about the Constitution's "independent force" is immediately followed by a description of the doctrine of territorial incorporation as one "under which the Constitution applies in full in incorporated Territories surely destined for statehood but only *in part* in unincorporated Territories." *Boumediene*, 553 U.S. at 726 (emphasis added). It therefore is possible to read *Boumediene* as consistent with the proposition that while the Constitution has at least *some* "independent force," some parts of the document do not apply to unincorporated territories irrespective of their textual content. This adds yet another longstanding point of confusion surrounding the *Insular Cases*—to those who read this labyrinthine doctrine as holding that the Constitution "follows the flag," there is often posed a second question: does the Constitution fully catch up to it? *See* PHILIP C. JESSUP, ELIHU ROOT 348 (1938) ("[A]s near as I can make out the Constitution follows the flag—but doesn't quite catch up with it."); Pedro A. Malavet, *The Inconvenience of a "Constitution (That) Follows the Flag . . . But Doesn't Quite Catch Up with It": From* Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181, 186 (2010).

48. Confusingly, this test is at times articulated as the "impracticable and anomalous" test and at others phrased as the "impractical and anomalous" test or "impractical or anomalous" test, which has resulted in considerable uncertainty as to the precise legal standard. *See generally* Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331 (2005) (discussing varying articulations of the test). The original articulation of the test (from the second Justice Harlan's concurring opinion in *Reid v. Covert*) *itself* uses "impractical and anomalous" in one place but "impracticable and anomalous" in another. *See* Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring); *see also* Tuaua v. United States, 788 F.3d 300, 309 (D.C. Cir. 2015) (using "impracticable and anomalous"). The phrase "impractical and anomalous" appears nowhere in any of the 1901 *Insular Cases*, which did not even address the application of any U.S. constitutional provisions in places like Guantanamo Bay where the United States has disclaimed de jure sovereignty.

49. *See, e.g.*, Kent, *supra* note 41, at 103; Malavet, *supra* note 47, at 182-84, 256.

"uncivilized race"—Justice Kennedy reframed that imperial moment as one motivated principally by *respect* for the peoples and legal traditions of the places the United States was determined to acquire.[50] At a time when commentators of all shades appeared to accept that the *Insular Cases* had "nary a friend in the world,"[51] Justice Kennedy claimed that "it was never the intention of the people of the United States in the incipiency of the War with Spain to make it a war of conquest or for territorial aggrandizement," and that permitting a "transformation of the [Philippines'] prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence."[52] On this account, the *Plessy*-era Court had declined to treat the residents of these new territorial acquisitions equally under the Constitution not because of racial concerns, but because the Supreme Court "was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories."[53] To compound the confusion, Justice Kennedy added a cryptic, tantalizing piece of dictum that called into question the durability of the *Insular Cases*, even as he relied on them: "It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."[54]

Boumediene therefore sparked a new wave of scholarship about the *Insular Cases*, this time folding into the conversation scholars from other substantive areas who wished to interrogate the sea change in extraterritoriality jurisprudence and the real-world implications for War on Terror detainees.[55] In

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50. United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

51. Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008); Lawson & Sloane, *supra* note 25, at 1146.

52. *Boumediene*, 553 U.S. at 758.

53. *Id.* at 757.

54. *Id.* at 758.

55. For excellent discussions on the *Insular Cases*' role in the evolution of twenty-first-century extraterritoriality doctrine, see KAL RAUSTIA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 223-47 (2009); Burnett, *supra* note 35, at 1046; Kent, *supra* note 41, at 103; Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 285 (2009); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 433 (2009); Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 377-82 (2009); José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1691-96 (2009); Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the* Insular Cases, 77 U. CHI. L. REV. 781, 783 (2010); Malavet, *supra* note 47, at 186; David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2294 (2010); Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 447 (2010); Lawson & Sloane, *supra* note 25, at 1147;

Boumediene's wake, scholars waded deeper into the *Insular Cases*' contested morass of precedents to unpack the Court's reliance on them in determining the Constitution's extraterritorial reach, and to further challenge the assumed scholarly consensus that the *Insular Cases* stand principally for the proposition that the Constitution does not follow the flag.[56] The Court's decision to inject the *Insular Cases* into the "impractical and anomalous" standard would not only "increas[e] . . . interest of a number of first-rate legal scholars" in "the status of the Constitution in the territories," but it would also fundamentally transform the nature of "scholarship and commentary concerned with the future trajectory of the Supreme Court's judicial doctrine." The *Insular Cases* would now be understood primarily "through the lens of *Boumediene*'s interpretation."[57]

By the early 2010s, scholarly interest in the *Insular Cases* began to migrate from U.S. detention activities at Guantanamo to the long-running questions surrounding Puerto Rico's status. Despite the emergence of new scholarly approaches eschewing the narrow doctrinal, juricentric, and "relatively limited" purview of the previous decades' academic conversation,[58] the dominant constitutional commentary continued to center "on the reasoning of the *Insular Cases* and on how these rulings shaped America's subsequent governance of the newly acquired territories."[59] Anchored firmly in questions of judicial interpretation, this strand of constitutional-law scholarship on the territories would continue to "scrutinize the Court's [*Insular Cases*] opinions, their internal consistency, and the distinctions the Court drew between 'incorporated' territories, which the Court expected to eventually join the Union as states, and 'unincorporated' territories, . . . where only the most basic provisions of the Constitution applied."[60]

Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 825-29 (2010); Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 708-24 (2010); Gustavo A. Gelpí, *The* Insular Cases*: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, FED. LAW., March/April 2011, at 22, 25; Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS. J. 171, 174 (2012); Ernesto Hernández-López, *Guantánamo as a "Legal Black Hole": A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 167 (2010); and Fuentes-Rohwer, *supra* note 51, at 1549.

56. Kent, *supra* note 41; Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, *supra* note 55, at 264.

57. Burnett, *supra* note 35, at 1040; *Kent*, *supra* note 41, at 116.

58. *See, e.g.*, Vignarajah, *supra* note 55, at 797; Efrén Rivera Ramos, *The* Insular Cases*: What Is There to Reconsider?*, *in* RECONSIDERING THE *INSULAR CASES*: THE PAST AND FUTURE OF AMERICAN EMPIRE, *supra* note 10, at 29, 35-37.

59. *Id.* (discussing the work of Sparrow, Ponsa-Kraus, Ramos, Cabranes, and Torruella).

60. *Id.*; *cf.* Kent, *supra* note 41 (noting that the unduly narrow focus of the territories' scholarship as a "reason for the 2008 Court's misunderstanding of the *Insular Cases*" because the "briefing

This approach proved increasingly successful in "documenting the consequences of the Court's rulings and recognizing the *Insular Cases* as part of broader historical trends" while elevating the *Insular Cases*' visibility within the world of constitutional theory and pedagogy.[61] However, some commentators began to recognize that this approach had left fundamental antecedent questions unaddressed, particularly those posed by evolving institutional arrangements within the territories and the judiciary's relationship to other actors who shaped the constitutional future of the nation's territories.[62] It was at this point in the scholarship that proponents of the Law of the Territories would plant a flag, marking the center of an aspiring new field.

II. THE EMERGING FIELD AND ITS PERSISTENT NARROWNESS

The early materialization of the Law of the Territories as an academic field owes much to the editors of Volume 130 of the *Harvard Law Review*, who in 2017 assembled a collection of essays focused on the "five localities [that] make up what we know as the U.S. territories."[63] That 2017 collection arrived on the heels of three paradigm-breaking legal developments. The previous year had seen the Supreme Court decisions *Commonwealth of Puerto Rico v. Franklin California Tax-free Trust*[64] and *Puerto Rico v. Sanchez Valle*,[65] as well as the advent of PROMESA[66]—an unprecedented federal law imposing, among other things, a federally appointed board of overseers that holds the power to nullify essentially every major decision made by Puerto Rico's elected government. The three events played off each other. *Franklin California* paved the way for PROMESA by holding both that bankruptcy provisions of Puerto Rico's Recovery Act were federally preempted and that Puerto Rico's municipalities were ineligible for

the Court received in 2007 and 2008 and much of the scholarship about the *Insular Cases* is marked by a failure to look for legal precedents and interpretations outside the Supreme Court," ignoring "rich veins of precedent . . . in the decisions of territorial or 'legislative' courts in the islands, statutes of Congress and territorial legislative bodies, key congressional reports and debates, presidential orders, military orders, and opinions of the Attorney General, the Secretary of War, the Solicitor of the War Department and the Judge Advocate-Generals of the Army and Navy").

61. Vignarajah, *supra* note 55, at 800.

62. *Id*.

63. *See generally Developments in the Law*, *supra* note 13, at 1616 (announcing an edition of the Law Review focused on cases and academic debates surrounding the territories).

64. 579 U.S. 115 (2016).

65. 579 U.S. 59 (2016).

66. *See* Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101 (2018)).

Chapter 9 bankruptcy. *Sanchez Valle*—regarded at the time as "the most important case on the constitutional relationship between Puerto Rico and the United States since the establishment of the Commonwealth in 1952"[67]—held that Puerto Rico was not a separate sovereign from the United States for Fifth Amendment double-jeopardy purposes, despite decades of jurisprudence recognizing Puerto Rico's sovereign attributes by virtue of its "commonwealth" status.[68] And as the *coup de grâce*, PROMESA operationalized the once-theoretical specter of a congressional power to functionally revoke Puerto Rico's democratic self-governing status, notwithstanding the federal government's prior assent to the popularly ratified Commonwealth compact. These events would set the conditions for some of the largest public demonstrations in Puerto Rico's history.[69]

Those *Harvard Law Review* editors deserve credit not only for recognizing so immediately the significance of 2016's developments, but also for appreciating that the new constitutional landscape was in fact even "more complicated than [what] initially appears" from those groundbreaking legal developments affecting Puerto Rico.[70] Widening their vision to include other overseas territories' "unique histories and political perspectives," as well as their individually unique "legal relationships with the United States,"[71] the collection hypothesized the value of constructing a more complete picture of "the current law of the territories" that might otherwise be mistaken for the "law of Puerto Rico."[72] Much more importantly, the editors suggested that for such inquiry to prove valuable, it would need to go much further than a "mere recounting of the *Insular Cases* and the academic discourse that has surrounded them" since the late 1990s.[73] In appreciating the shortcomings of the existing *Insular Cases* discourse, the collection lighted a potential new path for the Law of the Territories.

This vision for a Law of the Territories was thus broader in scope than the existing "*Insular Cases* scholarship" and suspicious of the reflexive assumption that the United States-Puerto Rico relationship could be extrapolated to understand "the territories" as a conceptual whole. Nevertheless, the scholarship that followed under this heading did not pivot significantly on either of those dimensions. With few exceptions, the dominant threads of the previous decade—the doctrinal incoherence of the *Insular Cases* and the legal formalisms that attend the United States-Puerto Rico relationship—have not only remained in the

67. Petition for Writ of Certiorari at 1, *Sanchez Valle*, 579 U.S. 59 (No. 15-108).

68. *Sanchez Valle*, 579 U.S. at 78.

69. *See* Campbell, *supra* note 8, at 2546 n.2.

70. *Developments in the Law: The U.S. Territories*, *supra* note 13, at 1621.

71. *Id.* at 1617.

72. *Id.* at 1626.

73. *Id.*

foreground but have, in many ways, intensified. Thus, while some have described the emergence of the Law of the Territories as a "renaissance" in legal scholarship concerned with U.S. overseas imperialism[74]—ostensibly because it is "explor[ing] novel legal questions"[75]—other scholars have rejected that characterization.

For example, Carlos Iván Gorrín Peralta cautions us not to oversell the emerging field's novelty, insisting that the core questions that the Law of the Territories seeks to naturalize beneath its banner are decidedly *not* new.[76] In his view, legal scholars' newfound "concerns regarding the 'law of the territories'" cannot properly be described as "emerging issues" principally because those issues self-evidently have been a "constant concern in law schools [] within the territories for many decades," even if those concerns have remained a "well-kept secret" in "the academic and political mainstream of the United States."[77] Gorrín Peralta's hesitation to credit the Law of the Territories as a substantively novel or breakthrough space is, at the outset, a worthwhile reminder that to the extent we are commenting on "breakthroughs" from the *Insular Cases*' persistent invisibility—or of the "emerging" relevance of Puerto Rico's colonial condition to U.S. law more broadly—we are invariably commenting, at least to some extent, on the legal establishment's prolonged indifference to learned voices who have long urged their centrality. More concretely, Gorrín Peralta's point underscores that today's scholarship on the legal and constitutional condition of U.S. territories belongs to a contiguous scholarly movement that predates the appearance of the Law of the Territories in the academic catalog.

These challenges to the "newness" of the aspiring field ultimately confirm that the conversations coalescing as the Law of the Territories—perhaps more accurately described as the Law of the *Unincorporated* Territories—have held fast to questions that constitutional-law scholars have reliably posed since the new millennium. Most participants in these conversations continue to articulate the core debate as some version of "Does the Constitution follow the flag?" But they also *interpret* that question as inquiring after the federal government's de jure authority over five specific overseas colonies—territorial acquisitions maintained in the fictive temporary status the Supreme Court invented for lands it viewed

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74. Anthony M. Ciolli, *Microaggressions Against United States Territories and Their People*, 50 S.U. L. REV. 54, 60 (2022).

75. *Special Issue on the Law of the Territories*, *supra* note 4, at 1.

76. *See* Carlos Iván Gorrín Peralta, *The Law of the Territories of the United States in Puerto Rico, the Oldest Colony in the World*, 54 U. MIA. INTER-AM. L. REV. 33, 35-36 (2023). *But cf. Special Issue on the Law of the Territories*, *supra* note 4, at 1 ("The Law of the Territories is an emerging field that explores novel legal questions facing the residents of the U.S. territories.").

77. Peralta, *supra* note 76, at 35-36.

as inhabited by "savages" and persons of "uncivilized race"—rather than the machinations of empire more broadly.

The post-2017 period brought into the scholarship's peripheral vision at least one new question of where the *Insular Cases* fit within an emerging notion of a constitutional "anticanon."[78] Commentators have repeatedly framed the *Insular Cases* as a companion to *Plessy*, and the bulk of the territories scholarship since 2017 spurred the academy and the national civil-rights community into action after the Supreme Court, in 2018, overruled the last of Professor Jamal Greene's four paradigmatic "anticanon" cases: the 1944 Japanese internment decision in *Korematsu v. United States*.[79] Andrew Kent noted that during this period, the "scholarship about the *Insular Cases* and the doctrine of territorial incorporation" continued to coalesce around the view that these largely overlooked relics of U.S. constitutional law were important principally as "examples of discrimination, domination, and denial of rights" and examples of "the Supreme Court allow[ing] the U.S. government to 'totally disregard the Constitution in governing the newly acquired territory.'"[80] But looking back on the previous decade,

78. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 384, 389-90 (2011) (centering on four cases: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*, united principally by their (1) incomplete theorization; (2) amenability to traditional forms of legal argumentation; and (3) resonance with constitutive ethical propositions that have achieved consensus); *see also* Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everybody Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the* Insular Cases, 53 COLUM. HUM. RTS. L. REV. 721, 746-56 (2022) (using those four cases' anticanon status as a standard with which to analyze the *Insular Cases*). The period from 2017-2020 also saw a renewal of interest in the place of the *Insular Cases* in law pedagogy. *See, e.g.*, Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105, 112 (2018); Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the* Insular Cases *Should Be Taught in Law School*, 29 J. GENDER, RACE & JUST. 396, 416-27 (2018); Aziz Rana, *How We Study the Constitution: Why We Study the* Insular Cases *and Modern American Empire*, 130 YALE L.J.F. 312, 330-34 (2020).

79. Trump v. Hawaii, 585 U.S. 667, 710 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"). For recent scholarly responses, see, for example, Neil Weare, *Why the* Insular Cases *Must Become the Next* Plessy, HARV. L. REV. BLOG (Mar. 28, 2018), https://harvardlawreview.org/blog/2018/03/why-the-insular-cases-must-become-the-next-plessy [https://perma.cc/XL7G-ZE3Z]; and Luis F. Estrella Martínez, *Puerto Rico: La Evolución de un Apartheid Territorial*, 52 REV. JURÍDICA U. INTERAMERICANA P.R. 425, 426 (2017). The "next *Plessy*" articulation borrows heavily from the associative account voiced decades earlier by Judge Juan R. Torruella. *See* TORRUELLA, *supra* note 34, at 268 ("It is the Supreme Court which created the *Insular Cases* doctrine. As with *Plessy v. Ferguson*, it is the Supreme Court which should correct this grave injustice.").

80. *See* Kent, *supra* note 24, at 381; *see also* GUSTAVO A. GELPÍ, THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898-PRESENT) 104-10 (2017) (examining the application of the *Insular Cases* doctrine to Puerto Rico). Judge Gelpí's book is notable as one of the few works from this time that attempted to unite conceptually detailed analysis across multiple territories, breaking out of an otherwise heavily Puerto Rico-dominated

Kent also observed that this persistent tendency to "fram[e] the *Insular Cases* solely in terms of discrimination, subordination, and racism" was repetitive and limiting.[81] That framing, while certainly "not inaccurate," was also "incomplete," if only for ignoring the important "variables, motivations, and contexts" beyond judicial engagement with the *Insular Cases* as a strictly civil-rights problem.[82]

Consequently, as the Law of the Territories gained traction as a recognizable academic field, it became increasingly apparent that its theoretical center was a civil-rights conversation about whether and how to overturn the *Insular Cases*' doctrinal formalisms, especially after the Supreme Court handed down *United States v. Vaello Madero*[83] in 2022. In *Vaello Madero*, the Court upheld Congress's power to exclude low-income, disabled persons in Puerto Rico from nationwide benefits programs like Supplemental Security Income—the nation's largest income-assistance program—without relying (at least expressly) on the *Insular Cases*.[84] But of far greater academic interest were the opinions of Justices Sotomayor and Gorsuch, who wrote separately (from the majority and from each other) to suggest that they were prepared to do away with the troubled *Insular Cases* framework once and for all, should the right case present itself.[85] The 2021-2022 academic year saw another dramatic increase in the number of law-review publications on the territories and the *Insular Cases*—including three more influential symposia[86]—nearly all of it animated by Gorsuch and Sotomayor's portentous writings. In particular, scholarship began to circle Justice Gorsuch's citations to a specific case knocking at the door of the Supreme Court, *Fitisemanu v. United States*[87]—a Tenth Circuit reboot of the 2016 test case *Tuaua v. United*

milieu. *See also* Julian Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898, *supra* note 37, at 209, 209-29 (uniting inquiry about Puerto Rico, the Philippines, Guam, and American Samoa).

81. Kent, *supra* note 24, at 393.

82. *Id.*

83. 596 U.S. 159 (2022).

84. *Id.* at 166.

85. *Id.* at 189 (Gorsuch, J., concurring) ("[T]he Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them."); *id.* at 189-98 (Sotomayor, J., dissenting).

86. *HRLR 2022 Symposium*, COLUM. HUM. RTS. L. REV. (Apr. 8, 2022), https://hrlr.law.columbia.edu/symposium/hrlr-2022-symposium [https://perma.cc/K7PC-Z2D8]; *An Anomalous Status: Rights and Wrongs in America's Territories*, FORDHAM L. REV. (Apr. 2023), https://fordhamlawreview.org/symposiumcategory/an-anomalous-status-rights-and-wrongs-in-americas-territories [https://perma.cc/8LU9-DS9G]; *Spring 2024 Symposium: Territorial Law Across the Curriculum*, STETSON L. REV. (Mar. 22, 2024), https://www2.stetson.edu/law-review/symposia [https://perma.cc/E85P-8HVA].

87. 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

States,[88] which had unsuccessfully challenged the lack of birthright citizenship in American Samoa as a vehicle for overturning the *Insular Cases*.[89] With seemingly knowing timing, the *Fitisemanu* plaintiffs filed their petition for certiorari six days after Gorsuch published that opinion.[90]

In 2022, the *Yale Law Journal* announced that it would dedicate a rare special issue to "the Law of the Territories," a term it made no attempt to define, other than to describe generally the component essays as shedding light on the "complex and often-fraught relationship between the U.S. government and its territories," and, separately, some "recently decided cases involving the territories."[91] Readily apparent from that framing, however, was that the *Journal* perceived the timeliness and importance of the Law of the Territories as deriving from the imminent possibility of an opportunity for the Court to overrule the *Insular Cases* in the manner suggested by Justice Gorsuch's *Vaello Madero* concurrence—and in the *Fitisemanu* case specifically.[92] With an eye to the upcoming Supreme Court term, the *Journal* styled the collection explicitly as a "call to action."[93] Ironically, however, most of its authors ultimately did not embrace that framing. If anything, they appeared to converge on the proposition that even if the Court were inclined to overrule the *Insular Cases* in *Fitisemanu*, it would remain highly unclear what, if anything, would change about the territories' status quo relationships *in substance*—calling to mind the Court's ceremonious but largely symbolic overthrow of *Korematsu* in *Trump v. Hawaii*.[94] The Court ultimately denied certiorari in *Fitisemanu,* leaving the *Insular Cases* undisturbed and the *Journal*'s prefatory rhetoric rather hollow.

Coinciding with the *Yale Law Journal*'s Law of the Territories issue were numerous other symposia and curated publication opportunities inviting

88. 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 579 U.S. 902 (2016).

89. *See Insular Cases Resolution: Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 170th Cong. 42-43 (2021) (statement of Del. Aumua Amata Coleman Radewagen, Member, H. Comm. on Nat. Res.) (expressing forum-shopping concerns in connection with *Fitisemanu*).

90. Petition for a Writ of Certiorari, Fitisemanu v. United States, No. 21-1394 (U.S. Apr. 27, 2022), 2022 WL 1307059.

91. *See* Sommers, *supra* note 7, at i.

92. *Id.* (noting the possibility of Supreme Court review in *Fitisemanu*).

93. *Id.*

94. Rolnick, *supra* note 2, at 2748; Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2539 (2022) ("[I]t is true that overruling the *Insular Cases* would not concretely require Congress to do anything specific at any particular time."); Campbell, *supra* note 8, at 2603-04; *cf.* Greg Ablavsky, *Structural Federal Indian Law* (forthcoming 2025) (manuscript at 58) (on file with author) ("The Roberts Court has proven that it will happily repudiate prior injustices in the service of furthering present injustices, at least in the eyes of its critics."). For discussion of *Korematsu*'s overruling, see *supra* note 79 and accompanying text.

contributions geared toward the same themes—including at Columbia Law School, Fordham Law School, and the New York State Bar Association. Shepherded by the common orientation of attractive publication opportunities, the broader scholarship rallied around the idea that theorizing a judicial death knell for the *Insular Cases*, irrespective of what might replace those precedents, was the most fundamental and urgent concern of the emerging field. In this way, the *Vaello Madero* moment both catalyzed broad scholarly recognition of the Law of the Territories as an academic framework while simultaneously dragging the conversation back to the place from which the *Harvard Law Review* imagined the Law of the Territories might depart. Although contemporary flourishes have brought the conversation from Puerto Rico to American Samoa[95] and rekindled some debate over the proposition that the *Insular Cases* might be reclaimed or repurposed to the territories' benefit,[96] the resulting conversation is in substance the same one that scholars of the previous decade already perceived as unduly narrow and limiting. Shrouded still in threshold dissensus over which cases actually are the *Insular Cases* and which points of law they purportedly stand for, today's Law of the Territories scholarship continues to pit "standard accounts" of an unknown number of *Insular Cases* against the proposition of "territorial deannexation"; to explore civil-rights parallels to *Plessy*; and to advocate generally for the legal mainstream to pay more attention to the "segregated system of legal dualism, one preferential set of rules for States and one subservient set of rules for Territories."[97] Across each of these axes, the terms of the academic conversation have arguably grown more confused over time.[98]

The persistent narrowness of the Law of the Territories can be traced in part to a complex interplay between elite academic space, impact litigation, and the

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95. *See supra* notes 87-90 and accompanying text.

96. *See* Ponsa-Kraus, *supra* note 94, at 2455-64.

97. Lin, *supra* note 32, at 1187; *see* Kent, *supra* note 24, at 378 ; Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?* 94 IND. L.J. 1, 44 (2019); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 407 (2020); Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle*, 130 YALE L.J.F. 101, 125-30 (2020).

98. *See also* Amy McMeeking, *Citizenship, Self-Determination, and Cultural Preservation in American Samoa*, 70 UCLA L. REV. 840, 864 (2023) ("Another view is that while the *Insular Cases* have problematic origins, they have also been ascribed too much importance."); *cf.* Brief for Amici Curiae Members of Congress and Former Government Officials in Support of Petitioners at *11, Tuaua v. United States, 579 U.S. 902 (2016) (No. 15-981) ("[C]ompeting interpretations of . . . the *Insular Cases* have been a source of scholarship and commentary for decades."). *Compare* Ponsa-Kraus, *supra* note 94, at 2453 (arguing that "every account of the *Insular Cases* agrees" that they stand for the proposition that "the federal government has the power to keep and govern territories indefinitely, without ever admitting them into statehood (or de-annexing them, for that matter)"), *with* Cepeda Derieux & Cox Alomar, *supra* note 78, at 765 (noting Supreme Court precedent that views *Insular Cases* as involving the "power of Congress . . . to govern *temporarily* territories with wholly dissimilar traditions and institutions").

influence of nonprofit advocacy. Advocacy groups have been credited with engineering the *Tuaua* and *Fitisemanu* cases and recruiting American-Samoan-born plaintiffs,[99] and they have also been fairly transparent about their efforts to enlist the academy in marketing *Fitisemanu* as a case of generational importance and prioritizing theories of change centered on judicially overruling the *Insular Cases*.[100] Through both formal sponsorship and informal narrative shaping, the academy's close relationship to litigation efforts has steered the thematic direction of prominent, largely student-organized academic events. The calls for papers or front matter for the aforementioned symposia frequently aligned with those litigants' goals of bringing attention to the constitutional status of U.S. territories through a civil-rights and formal-equality lens, often using parallel verbiage.[101]

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99. *See* Fanachu! Podcast, *Addressing America's Colonies Problem Through a Civil Rights Lens*, FACEBOOK at 40:00-44:00 (Jan. 18, 2022), https://www.facebook.com/events/d41d8cd9/addressingamericas-colonies-problem-through-a-civil-rights-lens/408877357693627 [https://perma.cc/YX6R-7VEV].

100. *Id.* One organization in particular, Right to Democracy (formerly known as the "We the People Project" and the "Equally American Legal Defense and Education Fund") stands out as a key player in both litigation and in the origination and curation of academic fora. *See What We Do*, RIGHT TO DEMOCRACY, https://www.righttodemocracy.us/what_we_do [https://perma.cc/6LQE-4PJD]; Lahari Lingam, *Right to Democracy Launches to End Colonialism in the United States*, PASQUINES (July 5, 2023), https://pasquines.us/2023/07/05/right-to-democracy-launches-to-end-colonialism-in-the-united-states [https://perma.cc/8YK2-CPBG]; Letter from Right to Democracy to Rep. Harriet Hageman and Rep. Teresa Leger Fernandez (June 21, 2024), https://www.congress.gov/118/meeting/house/117351/documents/HHRG-118-II24-20240613-SD005.pdf [https://perma.cc/AHA9-UJZY]; *'We the People Project' Is Now 'Equally American,'* SAIPAN TRIB. (Mar. 19, 2018), https://www.saipantribune.com/news/local/we-the-people-project-is-now-equally-american/article_6d67d98e-81b2-5114-a995-2a56eb73c974.html [https://perma.cc/WB98-EEH5]. Other relevant organizations have included, at various points, the Virgin Islands Bar Association and the Samoan Federation of America. *See, e.g.*, *ABA Resolution 300*, AM. BAR ASS'N (2021), https://cdn.ymaws.com/www.usvibar.org/resource/resmgr/files2/digest_2021/ABA_Resolution_300.pdf [https://perma.cc/9Q7H-HMMB] ("[T]he American Bar Association urges law schools to offer courses on the law of the United States territories and to teach the *Insular Cases* . . . as part of existing courses on constitutional law.").

101. *Compare 2021-22 Special Issue (Print and Online)*, COLUM. HUM. RTS. L. REV., https://journals.library.columbia.edu/index.php/hrlr/specialissue [https://perma.cc/XR4K-XPDM] (describing the symposium and special issue as proceeding from the observation that "the United States has a colonies problem — a result of the Supreme Court's controversial rulings in the *Insular Cases*, a series of *Plessy*-era decisions grounded in racism that established a doctrine of "separate and unequal" status for the inhabitants of newly acquired overseas U.S. territories), *with Hearing on the President's FY22 Budget Priority for the Territories: Medicaid, SSI, and SNAP Parity Before the H. Comm. on Nat. Res.*, 117th Cong. (2021) (statement of Neil Weare, President and Founder, Equally American Legal Defense & Education Fund), https://docs.house.gov/meetings/II/II00/20210728/113979/HHRG-117-II00-20210728-SD004.pdf [https://perma.cc/EL9F-AW6U] (testifying that "America has a colonies problem and it is because of . . . the *Insular Cases* doctrine of 'separate and unequal'"), *and America Has a Colonies Problem: Constitutional Rights and U.S. Territories*, N.Y. ST. BAR ASS'N (June 17,

This influence has been further evinced in the selection of speakers, panelists, and other contributors aligned with those litigants, as well as in the conspicuous absence of Indigenous voices that have publicly denounced such efforts for lack of dialogue with or connection to impacted communities.[102]

To be clear, this endeavor to leverage academic space has been rather successful, both in increasing the visibility of U.S. territories in elite law schools generally and in advancing the narrative that overturning the *Insular Cases* is a pressing imperative at the center of a discrete academic field. Its success is a byproduct of efforts to marshal a particular set of fashionable constitutional-law arguments that cast the *Insular Cases* in the mold of *Plessy* and frame the territories' subordinate condition as one of de jure legal exclusion, "separate and unequal."[103] By framing the *Insular Cases* as part and parcel of a broader civil-rights movement toward the end of political and social inclusion, this narrative feeds the perception that the territories' legal status survives as an unconstitutional anomaly that stands apart from an otherwise redemptive constitutional tradition. Perhaps facilitated by what Levinson and Sparrow presciently termed the "professional deformation" in the constitutional-law field to disregard or underestimate the importance of actors other than the federal judiciary with regard to American constitutional development,[104] this lens has unsurprisingly gained traction within elite American law schools by portraying residents of U.S. territories as common aspirants to equal citizenship in the mold of the U.S. civil-rights movement and *Brown v. Board of Education*. But as the next Part observes, this has come at the high cost of sidelining broader, and potentially more fruitful, discussions of U.S. territories' aspirations for self-determination, nationhood, and political recognition.

There is a need for more thorough examination of the external nonacademic influences leveraging academic spaces to construct and constrict the Law of the Territories to align with a particular reform agenda. What is readily apparent, however, is that this constrained scholarly debate is gaining legitimacy in

2021), https://nysba.org/events/america-has-a-colonies-problem-constitutional-rights-and-u-s-territories [https://perma.cc/64ZQ-A5VH] ("The roots of America's colonies problem are the *Insular Cases*, a series of racist *Plessy*-era Supreme Court decisions that established a doctrine of 'separate and unequal' status for territorial residents.").

102. *See, e.g.*, Ausage Fausia, *Fono Passes Resolution Supporting Latest Fed Court Ruling on Birthright Status*, SAMOA NEWS (Aug. 9, 2021, 10:12 AM), https://www.samoanews.com/local-news/fono-passes-resolution-supporting-latest-fed-court-ruling-birthright-status [https://perma.cc/W7UD-UFE7]. This advocacy-driven model for shaping inquiry within the academy stands in some contrast to the 1998 Yale Law School conference that intentionally brought together "representatives of the decidedly different points of view" on the question of Puerto Rican independence. *See* Levinson, *supra* note 35, at 595.

103. *See supra* note 101 and accompanying text.

104. Levinson & Sparrow, *supra* note 37, at 2.

American legal scholarship, with potentially harmful implications for the future of territorial governance and U.S. constitutional-law inquiry. The Law of the Territories is increasingly recognizable in connection with ascendant constitutional-law discourse challenging the "[c]onventional wisdom [that] generally draws a distinction between constitutionalism and empire."[105] That conversation — one of the most prominent threads in public-law scholarship today — appears to regard scholarly engagement with the Law of the Territories as essential to advancing public understanding of the U.S. constitutional system.[106] It is crucial, then, that the inchoate problems in the formation of this "emerging field" be appreciated and accounted for before they become more deeply embedded in discourse on law and empire across time and space, potentially foreclosing more expansive decolonial possibility.

III. THE LAW OF THE TERRITORIES: SHOULD IT EXIST?

The final Part of this Essay foresees that the present momentum of the Law of the Territories will pose an obstacle — not a pathway — to sustained scholarly conversation with meaningful practical and theoretical value. "Field" or not, the conversation coalescing as the Law of the Territories tends toward inquiry that is equally detached from the lived realities of the communities for whom it prescribes change as it is from the larger questions of sovereignty and political membership that ought to connect it to broader public-law discourse. The persistent narrowness described in Part II privileges, though perhaps inadvertently, inquiry that assumes the rightfulness of judicially enforced U.S. constitutional integration over alternatives that might tend toward greater political autonomy or independence. While the Law of the Territories' present momentum is elevating important critiques of the *Insular Cases* as "central documents in the history of American racism" — critiques that are certainly worth reemphasizing — it is ultimately working to obscure the most challenging and complex realities of territorial sovereignty and self-determination. Ignoring the varied and nuanced problems of territorial and Indigenous self-governance across the American empire in favor of pursuing top-down judicial coherence for the five unincorporated territories risks shaping the political future of territories, and the future of U.S. constitutional law, in ways that are likely to mimic the detached paternalism that spawned the *Insular Cases* from these very pages more than a century ago.

Responding to this risk, this Part suggests three profitable redirections — two of which are already recognized and ongoing, and a third that is somewhat more novel. First, scholarship on the territories should continue to take stock of its

105. *See, e.g.*, Blackhawk, *supra* note 2, at 8-9.

106. *See id.* at 20-21.

connectivity to the broader contemporary public-law conversation—for example, by fostering the growing recognition of ties to the fields presently regarded as federal Indian Law and tribal law. Second, as some are already doing,[107] scholars should deprioritize abstract formalist questions and favor work that is directly focused on concrete legal puzzles that shape life in the territories. Finally, the field should excavate and engage directly with a previously underappreciated historical artifact: the use of the term "The Law of the Territories" in the mid-nineteenth century to refer to a public-law conversation as old as the country and touching its most fundamental questions of land, citizenship, and rights.

A. The Territories, Indian Law, and Public-Law Conversation

The work of refashioning the academic discourse surrounding U.S. territories should begin by situating it more thoughtfully within the growing body of work on law and empire that has been reshaping the boundaries of contemporary constitutional and political theory. Prominent scholars like Rana, Blackhawk, Erman, and Ablavsky are already emphasizing the centrality of U.S. territories to the broader discussions of sovereignty, empire, and constitutional development. Newer scholars like Alvin Padilla-Babilonia and Nazune Menka are adding fresh texture to those conversations by centering the territories in projects to illuminate patterns of law and governance that would remain invisible if overseas imperialism were relegated to a narrow field of study.[108] These are just a few of the growing cadre of scholars who are increasingly pushing the legal academy to recognize that the condition of unincorporated territories is nothing aberrant or sui generis. Rather, that conversation recognizes that constitutionally, politically, and socially, the activities of territorial settlement and expansion are "at the heart of what forged Americans into a distinctive people" at the Founding.[109] In constitutional law specifically, this discourse appreciates that with the Constitution largely silent on matters related to the federal government's power to expand the political community by acquiring new territory, the legal processes of territorial expansion have been primary sites of contestation over the document's meaning and fundamental commitments—contestation in which Native nations and territorial residents played outsize roles.[110]

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107. *See infra* notes 127-133 and accompanying text.

108. *See, e.g.*, Padilla-Babilonia, *supra* note 2, at 943-57; Alvin Padilla-Babilonia, *The Imposition of Constitutional Rights*, 122 MICH. L. REV. (forthcoming 2025); Nazune Menka, *Native Nation Resistance to the Machinations of Settler Colonial Democracy*, 59 HARV. C.L.-C.R. L. REV. 141, 172-74 (2024).

109. RANA, THE CONSTITUTIONAL BIND, *supra* note 2, at 43.

110. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1005-06 (2014). Scholars like T. Alexander Aleinikoff, Natsu Taylor Saito, Sarah H. Cleveland, Addie Rolnick, and Gerald L.

The conversation coalescing as the Law of the Territories should be cultivated in a way that contributes to, and grows alongside, this more expansive law-and-empire scholarship. With few exceptions, territories scholarship's dogged pursuit of internal doctrinal coherence and a long-awaited escape from the *Insular Cases*' purgatory feeds the perception that the territories' legal conundrums — and overall subordinate condition — flow from a small number of doctrinal relics living comfortably apart from the rest of an otherwise coherent and anticolonial constitutional tradition. Even though scholars like Blackhawk have used the term "the Law of the Territories" as a marker in projects that are consciously *rejecting* the narrow siloing of colonial legacies described in Part II, the emerging field's present momentum risks corrupting the foundation of this new scholarship by reinscribing the very features responsible for the siloing that Blackhawk and others have been working to overcome.

To the degree that current Law of the Territories scholarship displays a salvageable antiparochial trend, it might begin by exploring in greater depth the connections between the emerging field and federal Indian law — connections that scholars have already noted at high levels of generality. There are many promising starting points for this sort of work. In her historic *Harvard Law Review* Foreword, *The Constitution of American Colonialism*, Blackhawk lists "the law of the territories" immediately after federal Indian law when canvassing what she regards as the misapprehended "component parts of American colonialism" within American law. As Blackhawk explains, the artificial siloes of legal taxonomy enable constitutional-law scholars to regard the puzzles and problems in these fields as sui generis rather than as part and parcel of constitutional law writ large.[111] She goes on to link "the law of the territories" to Indian law as "seemingly disparate, but ultimately connected 'external' constitutional fields" that she proposes to bring within her own new field: the constitutional law of American colonialism.[112] Addie C. Rolnick, who has bridged many of those same siloes in reframing constitutional tensions at the intersection of race-antidiscrimination jurisprudence and Indigenous or collective rights, proposes weaving together ideas from "Indian law, the law of the territories, international law, and race

Neuman had already uncovered significant connective tissue between the legal puzzles of overseas imperialism, Indian law, and immigration. *See* ALEINIKOFF, *supra* note 36, at vii, 4 (imagining a "nascent field" of "sovereignty studies"). This body of work interrogates a set of common questions at the intersection of territorial sovereignty and political membership. But even those scholars who have previously tied the territories to federal Indian Law or grounded their inquiry in real-world challenges have explored the legal significance of today's U.S. territories predominantly (if not exclusively) within a particular expression of late-nineteenth-century plenary power or inherent-in-sovereignty jurisprudence reflected in the *Insular Cases*.

111. Blackhawk, *supra* note 2, at 6.

112. *Id.* at 21 (framing the law of American colonialism as a "new field").

law."[113] Rolnick adds, as a descriptive matter, that "Federal Indian Law, law of the territories, and civil-rights law" can be viewed as "distinct bodies of U.S. law."[114] Ponsa-Kraus, whose work is universally cited by those who have addressed "the law of the territories," recently used the term for the first time to allude to "parallels between the law of the territories, federal Indian Law, and civil rights law."[115] Jennifer M. Chacón locates a "visible doctrinal thread that connects immigration law with the law of the territories and Indian law": the plenary-power doctrine.[116]

These scholars—all leading voices in law-and-empire scholarship—thus suggest that the Law of the Territories might be regarded as a companion or analogue to the field of federal Indian law, and, more specifically, as a space that adds dimension to an existing relationship between Indian law and "civil rights law."[117] The analogy is a natural one to the extent that the Law of the Territories' imagined core questions are, at a high level of generality, (1) questions of public law and (2) questions that concern the structure and organization of the federal government's relationship to other governments it regards as subordinate.[118] However, further contours of the analogy remain largely unexplored.

Scholars might continue the project of appraising the Law of the Territories' aspirations and inchoate problems as a prospective field by articulating the concepts and questions capable of *distinguishing* it from federal Indian law.[119] While there is no accepted definition of what constitutes a "'field' of legal study," any claim to that label requires, at a bare minimum, "a distinct set of important,

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113. Rolnick, *supra* note 2, at 2660-63.

114. *Id.* at 2663.

115. Ponsa-Kraus, *supra* note 94, at 2458 n.26.

116. Chacón, *supra* note 19, at 9.

117. *See also* Menka, *supra* note 108, at 143 ("Despite this current era of federal policy being one of fostering self-determination, Indigenous Peoples and Native Nations are forced to fiercely advocate for increased measures of self-governance and legibility of citizenship in the federal polity, in part because the Indigenous experience in Alaska, Hawai'i, and the territories has long been deemed 'different.'").

118. The analogy is also intuitive to the extent that that those who see the Law of the Territories as encompassing its own "key areas" or "discrete line[s] of scholarship" identify them as public-law concepts like political self-determination and—most of all—federalism. Timothy M. Ravich, *Cabotage and Deregulatory Anomalies*, 87 J. AIR L. & COM. 571, 573 (2022) (identifying "federalism, self-determination, and autonomy" as "key areas of the Law of the Territories"); Ciolli, *supra* note 33, at 209 ("[A] line of scholarship has developed within the emerging field of the law of the territories advocating for a so-called 'territorial federalism.'").

119. The relationship between federal Indian law and U.S. territories is ripe for close scholarly attention and a subject to which I intend to devote considerable future study. *See* Campbell, *supra* note 8, at 2627-51 (advocating further judicial and scholarly engagement with Indian law and the "law of the territories").

interesting and unanswered legal questions, rich and reliable resources with which to answer them, and a critical mass of scholars." [120] If those invested in this recent move toward the Law of the Territories aspire to produce anything resembling Indian law's staying power, then it ultimately must locate *principles* that attach to a jurisdiction's status as a territory. The legal academy and legal profession have been made to recognize the lasting distinctiveness of concepts like tribal sovereignty, the Indian trust relationship, and the enforcement of treaty rights — concepts that are illegible in today's landscape of unincorporated territories.[121] It may well be that the Law of the Territories promises similarly distinctive and durable concepts, and the field's durability may turn on whether future scholarship can successfully articulate what they are. Recent scholarship expressing various forms of high-level skepticism about analogies between Law of the Territories and Indian law validates the need for a closer inspection of these supposed connections and, ultimately, the notion that the Law of the Territories makes sense as a discrete field even on very different terms.[122]

B. Avoiding the Formalist Coherence Trap

Scholars must also be vigilant about the Law of the Territories' troubling inclination to prioritize doctrinal consistency and theoretical coherence over the real-world legal problems of the communities it describes. At a minimum, scholars should actively interrogate the ways in which excessive formalism has led to an outsized focus on cohering judicial doctrine around whether or not the Constitution "follows the flag." Echoing similar problems that once plagued the field now known as federal Indian law, today's Law of the Territories scholarship exhibits a troubling inclination to privilege the pursuit of top-down, judicially imposed coherence for its own sake. In constructing debates that pit "territorial exceptionalism" against constitutional uniformity, the emerging field approaches the *Insular Cases* on strikingly formalistic terms — at the expense of meeting the territories' actual legal problems as they are experienced and articulated on the ground. As Phillip P. Frickey observed of Indian law scholarship before the 1990s, such formalistic and ungrounded doctrinalism invariably leads

120. Eric Ruben & Joseph Blocher, *You Can Lead a Horse to Water:* Heller *and the Future of Second Amendment Scholarship*, 68 DUKE L.J. ONLINE 1, 2-3 (2018).

121. *See generally* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019) (discussing the exceptional nature of certain aspects of federal Indian law).

122. *See, e.g.*, Charles & Fuentes-Rohwer, *supra* note 2, at 163-66.

to systemic problems by encouraging judges to interpose familiar but ill-fitting legal principles from other contexts.[123]

Yet for the Law of the Territories, the problem is much more fundamental than insufficient realism or an overemphasis on courts. What is most revealing about this emerging field's practical disconnects is the widespread recognition that overturning or repurposing the *Insular Cases* may not have *any* immediately discernible effect on the actual substance of the colonial relationships at stake.[124] Nevertheless, the scholarship remains focused on overwriting an incoherent area of *Plessy*-era doctrine whose continued survival "devalues the importance of constitutional rights" writ large.[125] This framing encourages engagement with the *Insular Cases* because of the potential "momentous symbolic significance" of judicial interventions that would "bring attention to the plight of the territories," even if they do little to ameliorate it.[126]

Accordingly, the Law of the Territories appears headed for a coherence trap: traditional theoretical questions—such as which Supreme Court decisions make up "the *Insular Cases*," how many discrete points of law they implicate, and whether the "standard account" of their meaning is correct—risk crowding out more urgent questions that are responsive to lived realities. Indeed, framing the field's central object as helping judges to fashion more logically satisfying doctrine presupposes that coherence and symmetry are either prior to or more important than realizing the self-determined wishes of the people of the territories. Indian law has long rejected this unduly narrow vision for the possibility of

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123. *See, e.g.*, Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1203 (1990). It also, of course, limits our understanding of the mechanics of power and imperial control. *See, e.g.*, Paul A. Kramer, *Power and Connection: Imperial Histories of the United States in the World*, 116 AM. HIST. REV. 1348, 1378-81 (2011).

124. *See* Ponsa-Kraus, *supra* note 94, at 2538-39 (["[I]t is true that overruling the *Insular Cases* would not concretely require Congress to do anything specific at any particular time."); Campbell, *supra* note 8, at 2603-04; *cf.* Sigrid Vendrell-Polanco, *Puerto Rican Presidential Voting Rights: Why Precedent Should Be Overturned, and Other Options for Suffrage*, 89 BROOK. L. REV. 563, 589-90 (2024) ("If the Insular Cases are overturned, with respect to the very narrow issue of the incorporation of Puerto Rico, Puerto Rico would then, theoretically, be afforded the full extent of constitutional protections, as is technically afforded to the single, uninhabited, and incorporated territory that the United States currently governs (Palmyra Atoll). However, this recognition would only be so helpful, since the Constitution, despite several amendments to expand voting rights, does not provide an affirmative right to vote to any US citizens. Rather, US citizens are represented by electors in presidential elections. Thus, it is important to note the limitations of such a reversal of case law." (citation omitted)).

125. Steve Vladeck, *American Samoans Are the Latest Victims of These Ignorant Supreme Court Rulings*, MSNBC (June 18, 2021, 4:30 PM EDT), https://www.msnbc.com/opinion/american-samoans-are-latest-victims-last-century-s-racism-n1271341 [https://perma.cc/7JJ5-7WFG].

126. Ponsa-Kraus, *supra* note 94, at 2539.

reform—and for good reason. Even if we accept the firm consensus that the existing doctrinal and political status quo is fundamentally untenable, the *Insular Cases* now undergird 125 years of divergent legal and institutional relationships at every level of government in various locales across the world. Lighting a way out (or, realistically, many ways out) will require an accounting of the real-world institutional dynamics that shape and constrain the territories' prospects for meaningful choice and negotiation—dynamics that inevitably determine the possibility of future consent-based relationships.

This Collection can help us imagine what it might look like for the Law of the Territories to unyoke itself from the abstract formalist inclinations that once plagued federal Indian law. It contains work that strives to meet the pressing legal puzzles of the territories at sites of real-world harm and injustice. It highlights the value in bringing closer to the emerging field's theoretical center underappreciated scholarship that has pushed beyond the uncertain doctrinal meaning of the *Insular Cases* to help us understand a wider range of institutional actors shaping the territories' heterogeneous legal relationships to the metropole. This work is concretely valuable whether or not we accept the Law of the Territories as its own field. Notable examples include Andrew Hammond's *Territorial Exceptionalism and the American Welfare State*,[127] Tom C.W. Lin's *Americans Almost and Forgotten*,[128] and Line-Noue Memea Kruse's *The Pacific Insular Case of American Sāmoa: Land Rights and Law in Unincorporated US Territories*.[129] There is also great promise in the work of newer scholars like Emmanuel Arnaud[130] and Cori Alonso-Yoder,[131] who have illuminated evolving sites of power in federal-territorial relationships that affect matters of enforcement in criminal prosecutions and in immigration law and policy. That work pushes us not only

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127. *See generally* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639 (2021) (mapping the confused web of overlapping statutory schemes excluding residents of United States territories in varying discriminatory combinations).

128. *See generally* Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249 (2019) (exploring possible solutions for addressing the overseas colonies' subordinate condition through the realms of maritime law, federal veterans and disaster relief appropriations, and economic empowerment zones).

129. *See generally* LINE-NOUE MEMEA KRUSE, THE PACIFIC INSULAR CASE OF AMERICAN SĀMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES (2018) (exploring the unique complexity of land rights in American Samoa). Most legal scholars writing on the *Insular Cases* and the birthright citizenship or other questions of Indigeneity in the territories continue to skip over the relevant Indigenous intellectual voices in this area, even those like Kruse and Julian Aguon who have recently penned notable books touching on those subjects in the English language. *See* JULIAN AGUON, NO COUNTRY FOR EIGHT SPOT BUTTERFLIES 58-62 (2021).

130. *See, e.g.*, Emmanuel Arnaud, *Colonizing by Contract*, 124 COLUM. L. REV. 2239, 2239-52 (2024).

131. *See, e.g.*, Cori Alonso-Yoder, *Imperialist Immigration Reform*, 91 FORDHAM L. REV. 1623, 1625-43 (2023).

to look outside the "judicial sphere" to other branches of the federal government,[132] but also to look to territorial institutions and operational problems that are intimately bound up with, if not determinative of, the territories' actual functional autonomy.[133]

The takeaway from this Essay surely is not that scholars ought to put down the pen altogether on the *Insular Cases*, their nakedly racist underpinnings, or even doctrinal engagement with them in judicial spaces. To the contrary, the nascent Law of the Territories needs more and better work about judicial engagement with the *Insular Cases* and the many possible universes that might result from upending them. Indeed, many of those works discussed here as representing broader and more positive scholarly trends have expanded the conversation even while continuing to comment on the *Insular Cases*. There is a place for scholarship that repeats or reemphasizes well-traveled critiques, but that work becomes counterproductive when it marginalizes conversations that that help make sense of the territories' mired legal condition in all its complexity, a task already impeded by the glaring absence of Indigenous perspectives and authorship.

C. Excavating the Law of the Territories' Lost Predecessor

Finally, scholars should explicitly hold up the contemporary Law of the Territories against largely forgotten nineteenth-century academic commentaries that were published under that very same heading. Only one contemporary scholar has observed that this is not the first time "the Law of the Territories" has surfaced as a topic of interest in American legal thought.[134] In the 1850s and 1860s—several decades before the *Insular Cases* and the advent of the modern

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132. *See* Ramos, *supra* note 58, at 31-32.

133. The contributions discussed in this paragraph are not the only examples of work that exhibit this quality in whole or in part. *See also* Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469, 515 (2020) (discussing the potential impact of local governments in territories such as Puerto Rico); Yxta Maya Murray, *"FEMA Has Been a Nightmare:" Epistemic Injustice in Puerto Rico*, 55 WILLAMETTE L. REV. 321, 321-22 (2019) (describing Puerto Rican residents' fruitless reliance on federal government support in the wake of Hurricane Maria); Kristen David Adams, *The Move Toward an Indigenous Virgin Islands Jurisprudence:* Banks *in Its Second Decade*, 91 FORDHAM L. REV. 1601, 1602-03 (2023) (laying out the development of the Virgin Islands' jurisprudence); Anthony M. Ciolli, *Representation of United States Territories on the Federal Courts of Appeals*, 98 N.Y.U. L. REV. ONLINE 320, 320 (2023) (discussing "stagnation in the law of the territories"). There is much to be gained also from looking at new constitutional work on the territories that does not run through the existing terms of doctrinal debate about the *Insular Cases* and the Incorporation Doctrine. Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 87-90 (2021) (proposing "[m]ore inclusive institutional and doctrinal analysis of separation-of-powers questions" as a new starting point).

134. *See* Padilla-Babilonia, *supra* note 2, at 992 n.346.

law journal—"the Law of the Territories" was an academic heading that housed some of the deepest and most fundamental questions about state formation, the nature of the constitutional community, and the complex relationship of territorial sovereignty to political membership in circumscribing the powers of the federal government. Indeed, the nineteenth-century Law of the Territories monikered what would soon prove itself to be the weightiest constitutional debate of its time.

In a series of essays fashioned into an 1859 treatise titled *The Law of the Territories*, Sidney George Fisher, a Philadelphia lawyer and popular essayist, employed the term to designate the manner in which the federal government used its "plenary" power over its territories—and its power to acquire new territory in the first instance. Fisher paid specific attention to the uncertain constitutionality of that power and noted that it formed the backdrop to some of the most fundamental contestations over the Constitution's scope, structure, and meaning. These contestations were present at the Founding and would soon precipitate the U.S. Civil War.[135] Other contemporary commentators employed the term in much the same way.[136]

Fisher's 1859 work formulated many of its component questions in terms that are familiar to contemporary scholars: for example, whether there exists a "plenary power over the territories" and whether "principles of the Constitution . . . dwell under the flag."[137] But it viewed those questions as asking something quite different than whether and on what terms the people residing in those territories could access formal constitutional equality. Rather, to Fisher and his contemporaries, the Law of the Territories was a broader proving ground for the contested nature of the constitutional community, the formation of the state, and the relationship of territorial sovereignty to political membership in circumscribing the powers of the federal government.

The material disputes of the time largely concerned the federal power to outlaw slavery in U.S. territories—the aim of the Missouri Compromise before the Supreme Court declared it unconstitutional.[138] The constitutional liminality of the territories was central to these disputes not simply because it shed light on the colonial character of people residing there, but because it forced confrontation on antecedent questions: To what extent should the Supreme Court allow republican principles like "equality before the law" to bend in order to

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135. *See* FISHER, *supra* note 6, at 51; *see generally id.* (discussing factors that the author predicted might lead to a civil war).

136. *See generally* JOEL PARKER, PERSONAL LIBERTY LAWS, (STATUTES OF MASSACHUSETTS), AND SLAVERY IN THE TERRITORIES, (CASE OF DRED SCOTT) (1861) (discussing the Law of the Territories' significance to the slavery question).

137. FISHER, *supra* note 6, at 51, 53.

138. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451-53 (1857).

accommodate the "noble work of building up an empire of political liberty for the great Saxon race," or to prevent the prize of native expropriation, won by "bold and hardy men," from being "cultivated . . . by and for the Negro?"[139] Would "invok[ing] the ancient and long-exercised, but now denied and derided [plenary] power of Congress over the Territories" create a "dangerous weapon" imperiling the "equal rights" of all citizens—in this case, the equal right to property in chattel slaves?[140] More fundamentally, would the Constitution be understood primarily as a "union of republican states" or as a document that guarantees that "the people have equal rights?"[141] How should the Constitution conceive of the relationship between rights and citizenship? And to the extent rights may be located in citizenship, are "the rights of American citizens in American Territories less worthy of respect?"[142]

These questions that were thought to comprise the Law of the Territories in the 1850s came to a head in *Dred Scott v. Sandford*.[143] There, the U.S. Supreme Court ultimately declared the Missouri Compromise unconstitutional on the ground that the federal government lacked a plenary power to restrict slavery in the territories.[144] Ironically, Fisher's troubling 1859 volume maintains contemporary relevance in legal scholarship that is not in conversation with the emerging Law of the Territories.[145] It has been cited, instead, in connection with work aimed at the slavery and race implications of *Dred Scott* for questions of citizenship, namely for the view that "should [Congress] make a distinction between [the Southern people] and the North in regard to the national domain, then the great republican principle of equality before the law would be violated."[146] This is, of course, a reminder that *Dred Scott* itself—contrary to what it stands for in popular memory—is as much a case about the federal government's uncertain powers over people in U.S. territories as it is about the racial boundaries of citizenship. More than that, it is a reminder that *Dred Scott* draws us back to the dynamic but inextricable link that has always existed between questions of territorial sovereignty and questions of political sovereignty, both within and

139. FISHER, *supra* note 6, at 27, 49.

140. *Id.* at 31-32.

141. *Id.* at 32, 48.

142. *Id.* at 58.

143. 60 U.S. (19 How.) 393 (1857).

144. *Id.* at 438-52.

145. *See, e.g.*, Jonathon J. Booth, *The Cycle of Delegitimization: Lessons from* Dred Scott *on the Relationship Between the Supreme Court and the Nation*, 51 U.C. L. CONST. Q. 5, 19 & n.94 (2024); Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 304 (1997).

146. FISHER, *supra* note 6, at 51; *see, e.g.*, Booth, *supra* note 145, at 19 & n.94; Graber, *supra* note 145, at 304.

outside the geographic United States. While *Dred Scott*'s most controversial citizenship holding would be overwritten by the Fourteenth Amendment, its territorial-sovereignty puzzles are little more resolved today than they were 150 years ago. And those sovereignty-membership dilemmas are likely to endure regardless of whether the Supreme Court ceremoniously overturns the *Insular Cases* in the manner that most litigants and academics have so far urged.

And so we should ask: Why is it that this antebellum conversation about the uncertain legal condition of territories in early America continues to live entirely outside the emerging conception of today's Law of the Territories? And how is it that the constitutional significance of federal power over territory has waxed and waned from the forefront of public-law debate to near-total invisibility—so much so that today's Law of the Territories cannot yet recognize itself in one of the most consequential public-law debates in American history?

At present, it remains unclear whether and to what extent the Law of the Territories would regard the uncertainties surrounding the United States's pre-1898 territorial acquisitions as directly relevant to contemporary study of the relationship between the federal government and the five populated unincorporated territories formally under U.S. rule today. It is difficult to understand why the emerging Law of the Territories has not yet forced meaningful engagement with the sizable contemporary scholarship that considers the subordinate condition of western territorial subjects in early continental America. Consider the most recent book by Judge Jeffrey S. Sutton, *Who Decides?*, a work that expounds rather eloquently the old-world colonial existence of early U.S. territories and their disenfranchisement—but only from the perspective of the settler state. To Sutton, the territories' experience as colonies subject to a supreme plenary power "echoe[s] the experiences of the first thirteen states" that fought to throw off the yoke of British colonial subjectship and eventually adopt their own Constitution under one federal sovereignty:

> Noblesse oblige went only so far in the British Empire. Parliament did not treat the residents of its colonies in the same way it treated British citizens, often failing to heed their complaints, always denying them a way to protect their interests: the right to vote. [The right to vote] of course was the central complaint that triggered the Revolution, a lack of representation of the American colonies in Parliament and "the long train of abuses and usurpations" that resulted. A comparable problem arose in the American territories. Instead of colonies of the British Empire, they became territories of an American Empire—often ignored, often frustrated by a lack of representation in the national government, a lack of

> local authority over their own affairs, and a lack of local understanding by the federal appointed officials who ruled them.[147]

Glaringly absent from this account—and from Sutton's book in its entirety—is the fact that this condition still holds true for several million Americans today. Indeed, this book, which is ostensibly about pluralism in the American legal tradition, fails to acknowledge that the United States *still has territories*, let alone that their present constitutional puzzles might be relevant to our understanding of these long-running dilemmas about the nature and scope of the constitutional community and the classes of persons entitled to invoke the document's limitations on governmental power. That this incongruence can go unnoticed is evidence enough that the emerging Law of the Territories currently presupposes that the core legal questions facing places like Puerto Rico belong to specific doctrinal issues born of a discrete historical anomaly. Forcing critical engagement between modes of territorial relationship dating back to the Founding and new modes blossoming around the globe today would, if nothing else, expose the enduring relevance of colonial dynamics in the formation of the American political experiment as we understand it today. And it would open within the emerging Law of the Territories new space to explore how the imperatives of territorial expansion and Native conquest have shaped "internal" constitutional reality for settler-insiders as much as they have shaped the "external" subjugation of colonized places and peoples.

Whether it proceeds under the banner of "the Law of the Territories" or not, there is clearly unrealized possibility in today's conversation about overseas imperialism in the U.S. constitutional order. The time is ripe to recover the lost continuities between today's Law of the Territories and that term's past expression, even if only to appreciate the former's present limitations. In addition to seeking out today's overseas colonies' distinctive and consequential legal questions where they matter on the ground, scholars in this area should seek an expansive account of how this specific set of imperial territories connects more generally to the construction of American governance and state formation across time and space. Should it exist, the field of the Law of the Territories ought to facilitate comprehensive study about the differential structures of governance across American territory. It should explore the enduring foundational questions about how American federalism and statecraft emerged over time, giving shape to what is presently imagined as the "internal" political community and the "external" peoples over which it exercises power. Ironically, then, it may be that only by returning to its own distant past can this "emerging field" raise questions of lasting significance about the multiplicity of peoples, principles, and institutions

147. JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 102-03 (2021) (citation omitted).

that have forged the constitutional system we have today. At a minimum, it is an inviting starting point for imagining how the current wave of academic interest in U.S. territories could unwind the existing imperialism of categories to transform the study of American public law.

CONCLUSION

Although the future of this under-interrogated "emerging field" dubbed the Law of the Territories is highly uncertain, it is clear that significant interventions are necessary. If scholarship on the U.S. territories is to contribute meaningfully to key debates in American legal thought—particularly those surrounding self-government, indigeneity, race, citizenship, and borders—it must critically reassess its current trajectory and realign itself both with more expansive principles and closer engagement with the realities of the territories themselves.

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APPENDIX: "THE LAW OF THE TERRITORIES"—NOTABLE RECENT USAGES

Carlos Iván Gorrín Peralta, *The Law of the Territories of the United States in Puerto Rico, the Oldest Colony in the World*, 54 U. MIA. INTER-AM. L. REV. 33, 35-36 (2023).

Tom C.W. Lin, *Americans, Beyond States and Territories*, 107 MINN. L. REV. 1183, 1187 (2023).

Timothy M. Ravich, *Cabotage and Deregulatory Anomalies*, 87 J. AIR L. & COM. 571, 573 (2022).

Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2401 (2022).

Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2541 (2022).

Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 209 (2022).

James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories,"* 131 Yale L.J. 2542, 2642-43 (2022).

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Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 587 (2022).

Anthony M. Ciolli, *Territorial Paternalism*, 40 MISS. COLL. L. REV. 103, 106 (2022).

Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2660-63 (2022).

Russell Rennie, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. REV. 1683, 1718 (2017).

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Anthony M. Ciolli, *Microaggressions Against United States Territories and Their People*, 50 S.U. L. REV. 54, 60 (2022).

Jennifer M. Chacón, *Legal Borderlands and Imperial Legacies: A Response to Maggie Blackhawk's the Constitution of American Colonialism*, 137 HARV. L. REV. F. 1, 9 (2023).

Justin Burnworth, *The Curious Case of Justice Neil Gorsuch*, 44 PACE L. REV. 1, 31 (2023).

Anthony M. Ciolli, *Representation of United States Territories on the Federal Courts of Appeals*, 98 N.Y.U. L. REV. ONLINE 320, 320 (2023).

Nazune Menka, *Native Nation Resistance to the Machinations of Settler Colonial Democracy*, 59 HARV. C.R.-C.L. L. REV. 141, 142 (2024).

Rachel Valentina Sommers, *Introduction to the Special Issue on the Law of the Territories,* 131 YALE L.J. i, i-iii (2022).

Cori Alonso-Yoder, *Plenary Power: Teaching the Immigration Law of the Territories*, STETSON L. REV. (forthcoming) (manuscript at 3).

Emmanuel Arnaud, *Colonizing by Contract*, 125 COLUM. L. REV. 2239, 2248 (2024).