
INTRODUCTION

American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands — these five localities make up what we know as the U.S. territories. These unincorporated but organized territories exercise self-governance, while still sitting subject to the U.S. Congress’s plenary power. The territories all have unique histories and political perspectives, and their legal relationships with the United States vary accordingly.

This *Developments in the Law* edition focuses on those legal relationships, which in recent years have been thrown into renewed focus.¹ Two Supreme Court cases last term — *Puerto Rico v. Sanchez Valle*² and *Puerto Rico v. Franklin California Tax-Free Trust*³ — stemmed from events in Puerto Rico. Puerto Rico finds itself in the middle of an economic crisis that has led thousands of people to leave the island and prompted new legislation from the federal government.⁴ Financial crises have begun to threaten the Virgin Islands and Guam too.⁵ American Samoa made national headlines in 2015 when the D.C. Circuit held that its residents were not U.S. citizens.⁶ And over the last few decades, the Guam Supreme Court has seen its relationship with the Ninth Circuit and U.S. Supreme Court fundamentally change; the same is true for the Supreme Court of the Virgin Islands.

To fully understand these developments, we must go back to a time this journal might rather forget. At the turn of the century, the *Harvard Law Review* published much of the legal debate surrounding the relationship between the U.S. territories and the federal government: What should, and could, the U.S. Congress do with the territory it had acquired following the Spanish-American War? What part of the Constitution “follow[s] the flag”?⁷

The debate arose from a unique historical moment. In 1898, the United States won the Spanish-American War and, by treaty, acquired

¹ This edition largely leaves alone local territorial law.

² 136 S. Ct. 1863 (2016).

³ 136 S. Ct. 1938 (2016).

⁴ Jeffrey Acevedo, *Puerto Ricans Leaving Island for U.S. in Record Numbers*, CNN (May 2, 2016, 3:16 AM), <http://www.cnn.com/2016/05/02/americas/puerto-rico-exodus> [<https://perma.cc/M5XZ-HQW9>].

⁵ Brian Chappatta, *More in Debt than Puerto Rico, the Virgin Islands Rejects Rescue*, BLOOMBERG (May 31, 2016, 9:50 AM), <https://www.bloomberg.com/news/articles/2016-05-31/more-in-debt-than-puerto-rico-the-virgin-islands-rejects-rescue> [<https://perma.cc/C5AU-4UC3>]; Gaynor Dumat-ol Daleno, *Puerto Rico Debt Crisis Is Lesson for Guam, Officials Say*, USA TODAY (July 7, 2016, 10:54 PM), <http://www.usatoday.com/story/news/nation-now/2016/07/06/per-capita-debt-territories/86730772> [<https://perma.cc/2AEJ-22GQ>].

⁶ *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

⁷ See Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147, 148 (2006).

the territories of Puerto Rico and the Philippines.⁸ Previous U.S. territorial acquisitions — for example, the Louisiana Purchase from France and the acquisition of Florida from Spain — obligated the federal government to admit these localities to the Union and extend constitutional rights to them.⁹ Not so for Puerto Rico and the Philippines.¹⁰ This lack of specific treaty language left open the degree to which the Constitution restricted Congress in its dealings with these new so-called “possessions,” and whether the United States was obligated to bring these “possessions” into the Union as states. Put differently, to what extent could the United States legally assume the traditional role of a colonial power?

Three academic camps emerged. The first was articulated chiefly by Professors Christopher Columbus Langdell and James Bradley Thayer, who argued that Congress had near complete dominion over the newly acquired territory. According to this camp, the term “United States” in the Constitution only applied to actual states in the Union.¹¹ Thayer’s view was informed by racist musings about “savage” people “unfit to govern themselves.”¹² Langdell, for the most part, grounded his views in textualist reasoning. However, he also embraced a protectionist economic argument based on an “us” (the residents of the continental United States) versus “them” (the residents of far off islands) mentality — elevating concerns about the ultimate success of the “us” group over that of the Puerto Ricans and the Filipinos.¹³

Carman F. Randolph and Judge Simeon E. Baldwin advanced a different view, positing that the term “United States” included those newly acquired territories and, thus, that the Constitution applied to

⁸ See José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 454 (1986) (book review); Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896–1900*, 78 DENV. U. L. REV. 921, 928 (2001). The United States acquired Guam at this time as well. See *id.*

⁹ Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 293 (1898). For example, the United States’ treaty for the purchase of the Louisiana territory provided the following: “The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States . . .” *Id.* (quoting Treaty Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, art. III, 8 Stat. 200, 202).

¹⁰ See Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155, 171 (1899).

¹¹ C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 379–80 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 473 (1899).

¹² Thayer, *supra* note 11, at 475.

¹³ Langdell, *supra* note 11, at 391–92.

them.¹⁴ But Randolph and Judge Baldwin's "anti-imperialist" views *also* took a decidedly racist tone. Judge Baldwin, for example, called residents of the newly acquired territories "half-civilized" and "ignorant and lawless brigands."¹⁵ Randolph also embraced incendiary language.¹⁶ Despite their denigration of these populations, Randolph and Judge Baldwin viewed the application of the Constitution to the territories as inescapable.

Professor Abbott Lawrence Lowell's "Third View,"¹⁷ meanwhile, was the one that ultimately prevailed. Instead of viewing the application of the Constitution as an all-or-nothing proposition, Lowell argued that some territory may be "so annexed as to make it a part of the United States, and that if so all the general restrictions in the Constitution apply to it."¹⁸ Certain territory, however, could "be so acquired as not to form part of the United States" and thus constitutional limits would not universally apply to it.¹⁹ Specifically, those "rights guaranteed to the citizens . . . which are inapplicable except among a people whose social and political evolution has been consonant with [that of the domestic United States]" would not apply.²⁰

Several Justices of the Supreme Court embraced Lowell's framework just two short years later in the *Insular Cases*.²¹ In 1901, Justice White in *Downes v. Bidwell*²² articulated what has come to be known as the "doctrine of territorial incorporation."²³ In so doing, he em-

¹⁴ See Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415–16 (1899); Randolph, *supra* note 9, at 297–99.

¹⁵ Baldwin, *supra* note 14, at 415 ("Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities from the sharp and sudden justice — or injustice — which they have been hitherto accustomed to expect, would, of course, be a serious obstacle to the maintenance there of an efficient government.")

¹⁶ Randolph, *supra* note 9, at 304–05 ("The United States . . . ought not to annex a country evidently and to all appearances irredeemably unfit for statehood because of the character of its people The Philippine islanders are, and are likely to remain, unfit for statehood. Indeed, their inferior estate is admitted by the plea that we should embrace them because they are not fit even to govern themselves.")

¹⁷ See generally Lowell, *supra* note 10.

¹⁸ *Id.* at 176.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Justice Brown's opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901), however, followed the views of Langdell and Thayer. 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, 14 (2001).

²² 182 U.S. 244 (1901).

²³ See Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 830–34 (1926).

braced, in large part, the theory articulated by Lowell. Justice White drew a distinction between incorporated and unincorporated territories.²⁴ Puerto Rico, according to Justice White, was “in an international sense . . . not a foreign country” but was “foreign to the United States in a domestic sense.”²⁵ In other words, Puerto Rico had not been incorporated and the Bill of Rights and other constitutional protections therefore did not apply. However, rights which were “inherent, although unexpressed, principles which are the basis of all free government” did.²⁶ Justice Brown, who also wrote an opinion, explicitly embraced otherizing views, calling the residents of Puerto Rico “an alien race[.]”²⁷

Just over two decades later, *Balzac v. Porto Rico*²⁸ unanimously confirmed *Downes*’s notion of territorial incorporation. In *Balzac*, the Supreme Court held that Puerto Rico remained an unincorporated territory and that the Sixth Amendment’s guarantee to a trial by jury was not a “fundamental right which goes wherever the jurisdiction of the United States extends.”²⁹ Therefore, it was permissible for judges to convict Puerto Ricans without giving them recourse to a jury trial.

Scholarship, as these cases demonstrate, has consequences. At the time, Lowell’s “Third View” might have seemed like an appropriate, middle-ground answer to a difficult question.³⁰ His article employs more race-neutral language than do those penned by many of his contemporaries and the opinions of the Court itself at the time. But the framework Lowell initially proposed has lived far beyond the era for which he wrote it.

Take, for example, the 1980 case of *Harris v. Rosario*.³¹ While not technically an Insular Case, scholars have sought to include it under the umbrella of the “doctrine of territorial incorporation.”³² In *Harris*, the Court summarily held that it was constitutional for the federal government to provide fewer benefits to Puerto Rico under the Aid to Families with Dependent Children program than to the states.³³ Because Congress had a rational basis in law, such discrimination was

²⁴ *Downes*, 182 U.S. at 299 (White, J., concurring).

²⁵ *Id.* at 341.

²⁶ *Id.* at 291.

²⁷ *Id.* at 287 (plurality opinion).

²⁸ 258 U.S. 298 (1922).

²⁹ *Id.* at 309.

³⁰ Cabranes, *supra* note 8, at 458.

³¹ 446 U.S. 651 (1980) (per curiam).

³² See, e.g., Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 37–38 (2000).

³³ See *Harris*, 446 U.S. at 651–52. The Uniformity Clause shields states from similar discrimination. U.S. CONST. art. I, § 8, cl. 1.

permissible.³⁴ In a vigorous dissent, Justice Marshall highlighted the fact that such unequal payouts to the Puerto Rican government could lead to unequal payouts to Puerto Rican, and therefore U.S., citizens.³⁵ Justice Marshall called into question the validity of the *Insular Cases* themselves and argued that the Equal Protection Clause applied in full to the territories.³⁶

Harris and similar cases³⁷ have contributed to a damaging state of affairs in the territories. The territories receive “less in food stamps, welfare, and social security, and the protections of the federal minimum wage have also been restricted.”³⁸ Look at Puerto Rico: In the wake of the island’s financial crisis, its doctors have left in droves. This exodus has been blamed in part on low Medicare and Medicaid payments.³⁹ Medicaid covers nearly half of the island’s residents but its reimbursements fall far short of that same program’s payments on the mainland.⁴⁰ Because of these conditions, Puerto Rico’s healthcare system is in a “state of emergency.”⁴¹

As is often the case, the legal landscape is more complicated than it initially appears. A picture of the law in the U.S. territories — and even their status — is far from complete with a mere recounting of the *Insular Cases* and the academic discourse that has surrounded them. The political and legal status of the territories has not remained stagnant. One hundred years ago, the U.S. Congress passed the Jones Act.⁴² The Act granted Puerto Ricans citizenship and “provided for local election of both houses of the [Puerto Rican] legislature.”⁴³ In 1950, Congress passed Public Law 600,⁴⁴ which allowed Puerto Rico to

³⁴ See *Harris*, 446 U.S. at 651–52 (affirming Congress’s Territorial Clause authority to “make all needful Rules and Regulations respecting the territory . . . belonging to the United States,” *id.* at 651 (quoting U.S. CONST. art. IV, § 3, cl. 2)).

³⁵ *Id.* at 653 (Marshall, J., dissenting).

³⁶ *Id.* at 653–55.

³⁷ See, e.g., *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam).

³⁸ Lazos Vargas, *supra* note 8, at 935.

³⁹ See Greg Allen, *SOS: Puerto Rico Is Losing Doctors, Leaving Patients Stranded*, NPR (Mar. 12, 2016, 9:10 AM), <http://www.npr.org/sections/health-shots/2016/03/12/469974138/sos-puerto-rico-is-losing-doctors-leaving-patients-stranded> [<https://perma.cc/9Q3J-EG9C>]; *Amid Economic Disrepair, Doctors Flee Puerto Rico Leaving Patients Without Care*, FOX NEWS (Oct. 27, 2016), <http://www.foxnews.com/health/2016/10/27/amid-economic-disrepair-doctors-flee-puerto-rico-leaving-patients-without-care.html> [<https://perma.cc/ZDB5-JJAM>]; Heather Long, *Puerto Rico Is Losing a Doctor a Day*, CNN MONEY (Apr. 13, 2016, 12:01 PM), <http://money.cnn.com/2016/04/13/investing/puerto-rico-debt-medicare> [<https://perma.cc/67CV-M5WB>].

⁴⁰ See sources cited *supra* note 39.

⁴¹ Melvin Félix & Leonor Suárez, *Puerto Rico in a State of Emergency*, UNIVISION (Dec. 2, 2015), <http://especiales.univision.com/salud-en-puerto-rico/?lang=en> [<https://perma.cc/PM4K-FD5E>].

⁴² Organic Act of 1917 (Jones Act), ch. 145, § 26, 39 Stat. 951.

⁴³ Lazos Vargas, *supra* note 8, at 934 n.68.

⁴⁴ Act of July 3, 1950 (Public Law 600), Pub. L. No. 81-600, 64 Stat. 319.

draft its own constitution, including a bill of rights, and to elect its own governor,⁴⁵ which it did two years later. Puerto Rico is now considered a “commonwealth,”⁴⁶ though not a state.⁴⁷ And the passage of its constitution triggered Puerto Rico’s removal from the United Nations’ list of Non-Self-Governing Territories. (Though, as Chapter II argues, this decision was likely erroneous at the time.⁴⁸) Since then, however, the Puerto Rico Oversight, Management, and Economic Stability Act⁴⁹ (PROMESA) has fundamentally intruded on Puerto Rico’s sovereignty. Chapter I argues this statute might defy territorial federalism, and Chapter II uses PROMESA as evidence that Puerto Rico remains a Non-Self-Governing Territory under U.N. law.

Other U.S. territories also have gained greater autonomy over the years. In 1900, the United States entered into a treaty with Great Britain and Germany that granted it American Samoa.⁵⁰ “Samoan leaders formally ceded sovereignty to the United States in 1900 and 1904”⁵¹ The U.S. Navy ran the territory until 1951, when administrative authority was transferred to the Secretary of the Interior.⁵² In 1967, the Secretary approved the American Samoan Constitution, which “provide[d] for an elected bicameral legislature, an appointed governor, and an independent judiciary.”⁵³ Unlike people in the other four U.S. territories, however, American Samoans are considered “U.S. nationals” and not U.S. citizens.⁵⁴ Chapter III examines *Tuaua v. United States*,⁵⁵ a recent case in which the D.C. Circuit appealed to the *Insular Cases* in deciding not to extend U.S. citizenship to American Samoan residents.

⁴⁵ See *id.*

⁴⁶ P.R. CONST. pmb1.

⁴⁷ In fact, Puerto Rico has had multiple referendums and plebiscites on its legal status, though these votes have often produced equivocal results. See R. SAM GARRETT, CONG. RESEARCH SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 15 (2011), <https://fas.org/sgp/crs/row/RL32933.pdf> [<https://perma.cc/37TJ-4C9T>] (describing, for example, the 1998 plebiscite where 50.3% of voters selected “none of the above”). Most recently, in 2012, 54% of Puerto Rican voters rejected the current status of the island. Mariano Castillo, *Puerto Ricans Favor Statehood for First Time*, CNN (Nov. 8, 2012, 10:32 AM), <http://www.cnn.com/2012/11/07/politics/election-puerto-rico/> [<https://perma.cc/BB93-P6AG>]. In a second, separate question, 61% of voters chose statehood as their preferred alternative, with 33% voting for a “sovereign free association” and 6% for independence. *Id.*

⁴⁸ See *infra* ch. II, p. 1656.

⁴⁹ Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified in scattered sections of 15, 29, and 48 of the U.S. Code).

⁵⁰ See *Tuaua v. United States*, 951 F. Supp. 2d 88, 90 (D.D.C. 2013), *aff’d*, 788 F.3d 300 (D.C. Cir. 2015).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 91.

⁵⁵ 788 F.3d 300 (D.C. Cir. 2015).

As noted above, Guam too was acquired by the United States in 1898. It was subject to military rule until 1950 when control was handed over to the Department of the Interior,⁵⁶ and Guam's Organic Act⁵⁷ was passed. The Organic Act provided for U.S. citizenship for the residents of Guam, included a bill of rights, and provided for the direct election of a unicameral legislature.⁵⁸ In 1968, the governor of Guam became popularly elected,⁵⁹ and, in 1993, Guam established a supreme court, which it filled by 1996.⁶⁰ For a time, the decisions of that Court were reviewed by the Ninth Circuit and given deference. However, in 2004, the U.S. Congress eliminated the Ninth Circuit's appellate authority and commanded that the decisions of Guam's Supreme Court be "governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States"⁶¹ Chapter IV examines the relationship between the Guam Supreme Court and the U.S. Supreme Court and in particular focuses on the deference given to the Guam Supreme Court on matters of peculiarly local concern.

The two remaining territories, the U.S. Virgin Islands and the Northern Mariana Islands, are not the focus of a specific chapter in this *Developments in the Law*. But they too have experienced meaningful changes in the last century. The U.S. Virgin Islands became a U.S. "possession" in 1916 after it was purchased from Denmark.⁶² The Virgin Islands' first Organic Act⁶³ was passed in 1917,⁶⁴ and the residents of the Islands were extended U.S. citizenship statutorily in 1927.⁶⁵ Various revisions to the Organic Act and other legislation provided for the transfer of control over the Islands from the Navy to the Department of the Interior, the creation of a unicameral Islands-wide legislature, and the direct election of the Islands' governor.

The United States' relationship with the Northern Mariana Islands began following World War II, "when the United States signed a trust-

⁵⁶ Anne Perez Hattori, *Navy Blues: US Naval Rule on Guam and the Rough Road to Assimilation, 1898-1941*, 5 PAC. ASIA INQUIRY 13, 13 (2014).

⁵⁷ Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (codified as amended at 48 U.S.C. §§ 1421-1425 (2012)) [hereinafter Guam Organic Act].

⁵⁸ See *id.*

⁵⁹ Guam Elective Governor Act of 1968, Pub. L. No. 90-497, § 6, 82 Stat. 842.

⁶⁰ See Stephen L. Wasby, *Judging and Administration for Far-Off Places: Trial, Appellate, and Committee Work in the South Pacific*, 45 GOLDEN GATE U. L. REV. 193, 201 (2015).

⁶¹ 48 U.S.C. § 1424-2 (2012).

⁶² See 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, 494-95 (1992).

⁶³ Act of Mar. 3, 1917, Pub. L. No. 64-389, 39 Stat. 1132.

⁶⁴ Van Dyke, *supra* note 62, at 496.

⁶⁵ *Id.*

eeship agreement with the United Nations.”⁶⁶ That relationship grew closer in 1974, when the U.S. government and the Northern Mariana Islands entered into a covenant.⁶⁷ The Northern Mariana Islands, then known as the Commonwealth of the Northern Mariana Islands, adopted a constitution in 1977.⁶⁸

Yet, in spite of all these changes, the U.S. territories remain bound to their essentially colonial status. Congress continues to legislate in ways that subject, disadvantage, or quite frankly forget the U.S. territories. Take the example of Puerto Rico’s debt crisis and the Supreme Court case surrounding it. In the middle of a financial crisis, Puerto Rico legislated a debt-restructuring plan for its public utilities.⁶⁹ In *Puerto Rico v. Franklin California Tax-Free Trust*, however, the U.S. Supreme Court struck the plan down.⁷⁰ The Court found that Puerto Rico was a “State” under federal bankruptcy law for the purposes of preemption — meaning that Puerto Rico is prevented from legislating its own municipal bankruptcy — but not a “State” for the purposes of a different provision of the statute that authorizes it to approve municipal bankruptcies.⁷¹ In the wake of this decision, Congress stepped in to resolve Puerto Rico’s debt crisis. PROMESA created a Financial Oversight and Management Board to manage Puerto Rico’s debt.⁷² The Board has wide authority, including the power to develop a budget for Puerto Rico if the legislature and governor fail to submit a “compliant” one.⁷³ In effect, the seven-member Board (appointed by the U.S. President) is a supralegisative body that can overrule Puerto Rico’s elected branches. This legislation would be illegal if imposed on one of the fifty states.⁷⁴ In *Puerto Rico v. Sanchez Valle*, the other Puerto Rico-related case of the 2015 Term, the Supreme Court held that Puerto Rico was not a separate sovereign for the purposes of the Double Jeopardy Clause.⁷⁵ Even though Puerto Rico had moved dramatically toward self-determination and self-rule with its constitution, the “ultimate source” of its authority was not a constitutional

⁶⁶ Nicole Manglona Torres, Comment, *Self-Determination Challenges to Voter Classifications in the Marianas After Rice v. Cayetano: A Call for a Congressional Declaration of Territorial Principles*, 14 ASIAN-PAC. L. & POL’Y J., no. 1, 2012, at 152, 160. This agreement gave the United States “administrative authority” over a number of islands in the Pacific Ocean, including the Northern Mariana Islands. *Id.*

⁶⁷ *Id.* at 161–62. Approved by 78.8% of the Islands’ voters in a referendum, it “converted the Northern Mariana Islands into a commonwealth.” *Id.* at 162.

⁶⁸ *Id.*

⁶⁹ *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942–43 (2016).

⁷⁰ *Id.* at 1942, 1949.

⁷¹ *See id.* at 1946–47.

⁷² Pub. L. No. 114-187 § 101, 130 Stat. 549, 553–56 (2016).

⁷³ *See id.* §§ 5(6), 202(e)(3)(A), (C).

⁷⁴ *See New York v. United States*, 505 U.S. 144, 162 (1992).

⁷⁵ 136 S. Ct. 1863, 1876–77 (2016).

plebiscite by the people, but the U.S. government.⁷⁶ Therefore, unlike states, Puerto Rico cannot prosecute an individual for the same conduct if the federal government has already done so.⁷⁷ There are legitimate reasons to question the Supreme Court's double jeopardy jurisprudence generally. But the holding that, after all the changes Puerto Rico has made to take ownership of its own governance, it was still not a separate sovereign — at least for double-jeopardy purposes — dealt a deep blow to its people's sense of their own democratic autonomy.

Other disadvantages and questions persist. To this day, no resident of a U.S. territory has a right to vote for President.⁷⁸ All five territories have representatives in the U.S. Congress, but, as is the case for Washington, D.C., none of those representatives can vote on legislation.⁷⁹ The death penalty, which is outlawed by the Puerto Rican constitution in unequivocal terms,⁸⁰ can — according to the First Circuit — still be imposed on federal defendants in the territory, as Chapter II discusses.⁸¹

Other concerns focus on the judiciary.⁸² In 2007, for example, the U.S. Supreme Court declined to defer to the Guam Supreme Court's interpretation of Guam's Organic Act — Guam's quasi constitution.⁸³ The Court did this, according to Chapter IV, notwithstanding the

⁷⁶ *Id.* at 1876.

⁷⁷ *Id.* at 1876–77.

⁷⁸ *U.S. Electoral College: Frequently Asked Questions*, NAT'L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/faq.html#territories> [<https://perma.cc/Q7X3-SP6C>].

⁷⁹ BETSY PALMER, CONG. RESEARCH SERV., RL32340, TERRITORIAL DELEGATES TO THE U.S. CONGRESS: CURRENT ISSUES AND HISTORICAL BACKGROUND I (2006).

⁸⁰ P.R. CONST. art. II, § 7.

⁸¹ *United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001). *See also infra* ch. II, p. 1670.

⁸² The district court judges in Guam, the Northern Mariana Islands, and the Virgin Islands are Article IV judges, *see History of the Federal Judiciary: Territorial Courts*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/courts_special_ter.html [<https://perma.cc/C8XM-WMS5>], typically serve only ten-year terms, and can be removed by the President, *see United States v. Xiaoying Tang Dowai*, 839 F.3d 877, 879 (9th Cir. 2016). Puerto Rico has a full-fledged Article III court, complete with life-tenure protections. *History of the Federal Judiciary: Territorial Courts, supra*. As recently as October 2016, the Ninth Circuit was forced to pass on the constitutionality of a conviction by a Northern Mariana Islands Article IV judge; the conviction was held to be constitutional. *Dowai*, 839 F.3d at 885. In 2003, moreover, the Supreme Court actually struck down a decision by a Ninth Circuit panel composed of two Ninth Circuit judges and a Northern Mariana Islands district court judge on statutory grounds. *Nguyen v. United States*, 539 U.S. 69, 74 (2003). American Samoa lacks a district court entirely, and, as one can imagine, this deficiency has created substantial concern about the federal prosecution of American Samoan residents off-island. *See Uilisone Falemanu Tua, A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J., no. 1, 2009, at 246, 249–50; Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 326 (2008).

⁸³ *See Limtiaco v. Camacho*, 549 U.S. 483, 491–92 (2007).

U.S. Supreme Court's longstanding doctrine of deference to local territorial courts on matters of peculiarly local concern.⁸⁴

Yet, for all the challenges presented by the territories' unequal status, the extension of the U.S. Constitution to the territories (much of which has been done statutorily) has been understood to infringe on territorial self-determination in complicated ways. The Constitution of the Commonwealth of the Northern Mariana Islands, for example, restricted voting on constitutional amendments to "persons of Northern Marianas descent."⁸⁵ The Ninth Circuit enjoined enforcement of this provision under the Fifteenth Amendment, which protects voting rights and was extended to the Northern Marianas by its covenant with the United States.⁸⁶ Concerns about the impact of the U.S. Constitution thus cut in different directions, as Chapter III details: for example, the American Samoan government itself opposed the extension of the Citizenship Clause to the islands in 2014.⁸⁷ In an amicus brief, the government expressed concern that the extension of the clause would trigger heightened scrutiny of American Samoa's communal land system, which sits at the heart of *fa'a Samoa*, or the Samoan way of life.⁸⁸

Lowell's 1901 article and the incorporation framework it proposed present a difficult question for legal scholarship. On its face, the article looks like a neutral discussion of doctrine: a "search for a principle which shall reconcile . . . as large a part of [legal precedent] as possible."⁸⁹ While it seems unlikely that Lowell could foresee the full legacy of his work — and in particular the longstanding "unincorporated" status of Puerto Rico and other territories later acquired — he knew he was leaving this question in the hands of the federal political branches, in which the territories had no representation. Regardless of where one stands on the responsibility scholars — and their publishers — have to consider the consequences of their ideas, one must acknowledge that these ideas have consequences. And in the case of the U.S. territories, the consequences have largely been bad ones.

The Chapters of this edition of the *Developments in the Law* consider these consequences. Each Chapter is grounded in legal principles, precedent, and theory. Analyzing the current law of the territories and some of the recent developments discussed above, each

⁸⁴ See *infra* ch. IV, pp. 1705–06.

⁸⁵ N. MAR. I. CONST. art. XVIII, § 5(c).

⁸⁶ See *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087, 1089 (9th Cir. 2016).

⁸⁷ See Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government & Congressman Eni F.H. Faleomavaega, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 12-01143), 2014 WL 4199267.

⁸⁸ *Id.* at 16.

⁸⁹ Lowell, *supra* note 10, at 155.

highlights arguments in favor of, or identifies trends that might increase, self-determination for the U.S. territories.

Chapter I tackles the concept of “territorial federalism” using the “paradigmatic example” of Puerto Rico.⁹⁰ Territorial federalism, it argues, describes Puerto Rico’s structural and functional progression toward a state-like level of self-governance. This progression is most typified by the adoption of Puerto Rico’s constitution, which Congress authorized in 1950 in an effort to “fully recogniz[e] the principle of government by consent.”⁹¹ However, this march toward federalism was halted, and has begun to reverse, with the passage of PROMESA.⁹² As discussed above, PROMESA created a federal oversight board with sweeping power. It “is much closer to legislation envisioned within a colonial relationship than a federal one; the Puerto Rican people certainly seem to see it as such.”⁹³

After endeavoring to illuminate this latent concept of territorial federalism, Chapter I turns to “[n]ineteenth-[c]entury [f]oundations” and “[t]wentieth-[c]entury [i]nnovations” in the federal government–U.S. territory relationship.⁹⁴ For most of the nineteenth century, the United States acquired new territories, annexed them, and turned them into states.⁹⁵ While Congress was understood to possess plenary authority over its territories, that authority was bound up in its obligation to prepare the territories for eventual statehood.⁹⁶ However, with the Spanish-American War came a new era of American colonialism. Yet in Justice White’s famous concurrence in *Downes*, he suggested that “for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated” might be a “violation of duty under the Constitution.”⁹⁷ According to Chapter I, Puerto Rico’s current status — and in particular its regression under PROMESA — seems a betrayal of the promise that it not remain forever in constitutional limbo.

Finally, the Chapter works to reconcile territorial federalism with the doctrine of traditional federalism. In *Garcia v. San Antonio Metropolitan Transit Authority*,⁹⁸ the Supreme Court defined the bounds of the most explicit font of federalism in the Constitution: the Tenth Amendment. Garcia construed federalism protections narrowly

⁹⁰ *Infra* ch. I, p. 1634.

⁹¹ Public Law 600, Pub. L. No. 81-600 § 1, 64 Stat. 319, 319.

⁹² *See infra* ch. I, p. 1633.

⁹³ *Infra* ch. I, p. 1641.

⁹⁴ *Infra* ch. I, pp. 1642–47.

⁹⁵ *See infra* ch. I, pp. 1642–43.

⁹⁶ *See infra* ch. I, pp. 1643–45.

⁹⁷ *Downes v. Bidwell*, 182 U.S. 244, 343–44 (1901) (White, J., concurring).

⁹⁸ 469 U.S. 528 (1985).

because structural considerations — “the states’ control over congressional electoral qualifications,” the states’ citizens’ “role in presidential elections,” and the states’ “guarantee of equal representation in the Senate” — seemed to furnish adequate protection.⁹⁹ Those justifications, however, do not apply to Puerto Rico, which has no federal representation, and whose citizens cannot express dissatisfaction and outrage or change the status quo through the ballot box. Instead, a distinct federalism — one in which the judiciary scrutinizes congressional intervention in territorial self-governance — needs to emerge to protect the values of territorial federalism. This Chapter begins that critical discussion.

Chapter II also looks at Puerto Rico, but from an international perspective. Following the adoption of its constitution, the island was removed from the United Nations’ list of Non-Self-Governing Territories.¹⁰⁰ This decision should have been made on the basis of an “inquiry focused on the unencumbered exercise of the right to self-determination, the ability to determine international status, and the ability to control internal self-governance.”¹⁰¹ Instead, in making its case to the United Nations, the U.S. government relied on representations about the “compact” status of the Puerto Rico Constitution.¹⁰² Notably, these views directly conflicted with statements made by members of the U.S. Congress at the time of the “compact’s” approval.¹⁰³ Nevertheless, the delisting was erroneously approved.¹⁰⁴

According to Chapter II, two more recent case studies — PROMESA and the death penalty — confirm that it remains an error for Puerto Rico to be left off the list of Non-Self-Governing Territories. First, PROMESA, which creates the Financial Management and Oversight Board, directly sanctions intervention into Puerto Rico’s internal matters and exerts pointed economic pressure over the island. Because the Board’s members are appointed by the President, with the Governor sitting only as a nonvoting member, the Board constitutes a direct and deep federal intrusion into Puerto Rico’s ability to engage in self-governance. Second, there is a deep cultural rejection of capital punishment in Puerto Rico — its constitution provides simply that “the death penalty shall not exist.”¹⁰⁵ Yet federal courts have insisted that

⁹⁹ *Infra* ch. I, p. 1651 (footnotes omitted).

¹⁰⁰ *See infra* ch. II, p. 1656.

¹⁰¹ *Infra* ch. II, p. 1658.

¹⁰² Juan R. Torruella, *¿Hacia Dónde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1516 (1998) (reviewing JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997)).

¹⁰³ *See* TRÍAS MONGE, *supra* note 102, at 113.

¹⁰⁴ Humberto García Muñiz, *Puerto Rico and the United States: The United Nations Role 1953–1975*, 53 REV. JUR. U.P.R. 1, 48–49 (1984).

¹⁰⁵ P.R. CONST. art. II, § 7; *see infra* ch. II p. 1669.

the federal death penalty remains available in Puerto Rico.¹⁰⁶ This is an infringement on a matter central to the island's social and cultural autonomy and indicates, again, the degree to which the United States continues to undercut Puerto Rico's self-governance.

Were Puerto Rico to be relabeled a Non-Self-Governing Territory, argues Chapter II, a number of positive consequences might result. First, the relisting might bring national attention and international embarrassment to the United States' continuing role as a colonial power.¹⁰⁷ It might present a colorable argument for the application of the odious debt doctrine to the island.¹⁰⁸ And finally, the relisting could have consequences for international treaties whose content, while not self-executing, "provides . . . a potentially powerful rhetorical device."¹⁰⁹

Chapter III examines recent developments in the federal courts' use of the *Insular Cases* framework to apply the U.S. Constitution to unincorporated territories.¹¹⁰ It looks in depth at a recent D.C. Circuit decision, *Tuaua v. United States*, which held that the Fourteenth Amendment's Citizenship Clause does not apply to American Samoa.¹¹¹ In part, the court reasoned, constitutional birthright citizenship should not be imposed on American Samoa because it might portend the application of the Equal Protection Clause, which could pose a threat to the local culture — endangering, for example, racially restrictive land alienation laws that help to keep property in native hands.

Tuaua and other recent cases indicate the federal judiciary's embrace of a once-controversial academic argument: that the *Insular Cases* should be reclaimed and repurposed as an instrument of "cultural preservation," despite their troubling origins.¹¹²

Recent trends in case law from the Supreme Court and other federal courts lend support to the notion that the *Insular Cases* can serve such a function, and that doing away with the framework might indeed yield results such as the constitutional invalidation of territorial land laws feared by the *Tuaua* defendants and their amici.¹¹³ The development of this revisionist chapter in the story of the *Insular Cases* has begun to take hold in the courts and thus cannot be easily dismissed, even as its normative desirability remains much contested.

¹⁰⁶ *United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001). See also *infra* ch. II, p. 1670.

¹⁰⁷ See *infra* ch. II, p. 1674.

¹⁰⁸ *Infra* ch. II, p. 1676.

¹⁰⁹ See *infra* ch. II, p. 1679.

¹¹⁰ See *infra* ch. III, p. 1680.

¹¹¹ See *infra* ch. III, pp. 1680–81.

¹¹² See *infra* ch. III, p. 1681.

¹¹³ See *infra* ch. III, p. 1685.

Chapter IV tackles the relationship between Guam's Supreme Court and the U.S. Supreme Court. In particular, it focuses on the deference (or lack thereof) given to the Guam Supreme Court's interpretation of its Organic Act (its quasi constitution).¹¹⁴ Since before the time of the Spanish-American War, the U.S. Supreme Court has given territorial courts clear error deference on matters of "peculiarly local concern."¹¹⁵ This Chapter explains how the Court justified such deference on the basis of, among other things, the territorial courts' "authority, expertise, and self-determination."¹¹⁶

However, as the Chapter demonstrates, the Supreme Court has defined matters of peculiarly local concern in a relatively cramped and confusing way. In *Pernell v. Southall Realty*,¹¹⁷ a case involving the District of Columbia, the Court noted that it "has long expressed its reluctance to review matters of peculiarly local concern, absent a constitutional claim or a problem of *general federal law of nationwide application*."¹¹⁸ Yet, in *Limtiaco v. Camacho*,¹¹⁹ the Court refused to defer to the Guam Supreme Court's interpretation of a debt limitation provision of the Organic Act, noting that it was bound to construe the Act, as federal law, "according to its terms."¹²⁰

The Chapter argues that *Limtiaco* and lower court opinions that fail to give deference to the Guam Supreme Court make critical errors by failing to fully wrestle with the core justifications for deference that undergirded the early U.S. Supreme Court cases on the topic as well as general principles of judicial deference. First is the question of authority: Though it does not have such authority with regard to state supreme courts, the Supreme Court could theoretically grant no deference to the Guam Supreme Court's interpretation of its quasi constitution. But there is good reason to apply the rationale for judicial deference to administrative agencies — "implied delegation" — to the Guam court's interpretations of its Organic Act. Second is the question of expertise: Guam's judges, who live steeped in the experience of being Guamanian, are, for example, more likely to understand the religious priorities of its peoples — and thus better able to interpret religion clauses. They are also more likely to understand the political and economic environments in which they are required to make critical decisions about, for example, gubernatorial vetoes and the issuance

¹¹⁴ *Infra* ch. IV, pp. 1705–06.

¹¹⁵ *See i nfra* ch. IV, pp. 1708–09.

¹¹⁶ *Infra* ch. IV, p. 1704–06.

¹¹⁷ 416 U.S. 363 (1974).

¹¹⁸ *Id.* at 366 (emphasis added).

¹¹⁹ 549 U.S. 483 (2007).

¹²⁰ *Id.* at 492.

of debt.¹²¹ Third is the question of political accountability and self-determination: Guam’s judges, appointed by Guam’s governor and subject to retention elections, are more politically accountable than the justices of the U.S. Supreme Court.¹²² For all these reasons, this Chapter concludes, Guam’s Supreme Court deserves deference with respect to its interpretation of Guam’s Organic Act.

Each of the Chapters shares the same impulse toward empowerment, though some more directly than others. Chapter IV specifically pushes for the extension of deference as a means of empowering Guam’s Supreme Court. Chapter I argues for increased scrutiny by federal judges of U.S. congressional actions that undermine “territorial federalism.” Chapter II offers a direct reckoning with where we are now, identifying Puerto Rico as a Non-Self-Governing Territory and calling for its relisting as a means of jumpstarting engagement with the problematic nature of the United States’ control over it. Chapter III, by contrast, takes a more descriptive tack. But in providing evidence of the courts’ repurposing of the *Insular Cases* to be in tune with cultural sensitivity, Chapter III recognizes the same self-governance and cultural preservation principles that animate the other chapters. With these pieces, this edition of *Developments in the Law* seeks to contribute to a new discussion of territorial empowerment grounded firmly in both legal reasoning and the rule of law.

¹²¹ See *infra* ch. IV, pp. 1724–25.

¹²² See *infra* ch. IV, pp. 1725–27.