VOLUME 131 APRIL 2018 NUMBER 6

HARVARD LAW REVIEW FORUM

U.S. TERRITORIES COMMENTARY SERIES

PROBLEMATIZING THE PROTECTION OF CULTURE AND THE *INSULAR CASES*

Rose Cuison Villazor[*]

INTRODUCTION

On September 28, 2017, the U.S. Department of Justice filed a lawsuit against the government of Guam claiming that it engaged in racial and national origin discrimination in violation of the Fair Housing Act.[1] According to the complaint in *United States v. Guam*,[2] a local government agency, the Chamorro Land Trust Commission (Commission), limits its eligibility to "native Chamorros" (the indigenous peoples of Guam),[3] for a local housing program created under Chamorro Land Trust Act (CLTA or Act).[4] In particular, the federal government is challenging the Commission's implementation of the CLTA, claiming that the agency discriminates against non-Chamorros by denying them the ability to lease lands and obtain other benefits under the Act.[5] The federal government cited, for example, an African American man who lost the home that he built with his Chamorro wife after she passed away.[6] The

---

[*] Professor of Law, University of California, Davis, School of Law. I am grateful to Ernesto Hernández-López, Kevin Maillard, Christina Duffy Ponsa-Kraus, Gretchen Smith, and Neil Weare for helpful comments to previous versions of this Commentary. I also thank the editors of the *Harvard Law Review* for their excellent editorial assistance. All errors are my own.

[1] 42 U.S.C. §§ 3601–3619 (1968); Press Release, U.S. Dep't of Justice, Justice Department Sues Guam's Government for Racial and National Origin Discrimination in Violation of the Fair Housing Act (Sept. 28, 2017), https://www.justice.gov/opa/pr/justice-department-sues-guam-s-government-racial-and-national-origin-discrimination-violation [https://perma.cc/2Y8F-4PRL].

[2] No. 17-00113 (D. Guam filed Sept. 29, 2017).

[3] Complaint at 4–6, United States v. Guam, No. 17-00113 (D. Guam filed Sept. 29, 2017), https://www.justice.gov/opa/press-release/file/999936/download [https://perma.cc/997M-PFM8] (explaining the history of the passage of the Chamorro Land Trust Act and creation of the Chamorro Land Trust Commission).

[4] *See id.* at 4–5; 21 GUAM CODE ANN. § 75107(a) (2017).

[5] *See* Complaint, *supra* note 3, at 2.

[6] *Id.* at 9.

wife had obtained a lease on the land, and the couple built a three-bedroom home.[7] After she died, however, the Commission evicted the husband from the property because, as a non-Chamorro, he lacked eligibility to reside there.[8]

Local elected leaders in Guam vowed to defend the CLTA, highlighting the law's intent to protect indigenous peoples' rights. Governor Eddie Calvo, for example, noted that the CLTA is needed to "allow the native inhabitants of this land the opportunity to build a home and live on their native land."[9] The Attorney General of Guam argued that the Act "is intended to preserve Chamorro heritage and Chamorro culture."[10]

As the forgoing evidences, *United States v. Guam* highlights a conflict between an individual's right to be free from race discrimination and the indigenous group's claim for the protection of their lands and cultural rights.[11] It is the most recent case from a line of cases out of Guam and its neighboring islands, the Commonwealth of the Northern Mariana Islands (CNMI), also a U.S. territory, that underscores the tension between the rights of its native inhabitants and nonindigenous individuals who also call these islands their home.[12] As with the foregoing cases, a federal court would once again need to examine where the rights of indigenous peoples in the U.S. territories fit within the broader principles of equal protection and individual rights that are guaranteed under federal statutes and the U.S. Constitution.

---

[7] *Id.*

[8] *Id.*; *see also* Steve Limtiaco, *Feds Sue Chamorro Land Trust, Saying It Discriminates*, PAC. DAILY NEWS (Sept. 29, 2017, 9:58 AM), http://www.guampdn.com/story/news/2017/09/29/feds-sue-chamorro-land-trust-saying-discriminates/715242001/ [https://perma.cc/G3QG-XMZN].

[9] Mar-Vic Cagurangan, *Feds Sue Guam Over Chamorro Land Restrictions*, PAC. ISLAND TIMES (Sept. 29, 2017), http://www.pacificislandtimes.com/single-post/2017/09/30/Feds-sue-Guam-over-Chamorro-land-restrictions [https://perma.cc/GAE8-N9TL].

[10] Jasmine Stole, *AG Ready to Defend Chamorro Land Trust Act Against Federal Challenge*, PAC. DAILY NEWS (Oct. 10, 2017, 3:15 PM), http://www.guampdn.com/story/news/2017/10/10/ag-ready-defend-chamorro-land-trust-act-against-federal-challenge/745156001/ [https://perma.cc/H9RX-S3S3].

[11] *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 11 (1980); *see also* Davis v. Commonwealth Election Comm'n, 844 F.3d 1087 (9th Cir. 2016) (implicating, though not directly addressing, the Commonwealth of the Northern Mariana Islands' (CNMI) land alienation law embodied in Article XII of the CNMI Constitution). Such cultural claims have been raised mainly in American Samoa, Guam, and the CNMI, the smaller and arguably lesser-known territories when compared to Puerto Rico and the U.S. Virgin Islands. These questions, of course, are not new and have been raised by American Indian tribes and Native Hawaiians. Yet the issue of the protection of cultural rights, particularly regarding cultural claims to indigenous lands, has been addressed differently in the U.S. territories than in the "mainland."

[12] *See, e.g.*, *Davis*, 844 F.3d 1087; Davis v. Guam, 785 F.3d 1311 (9th Cir. 2015); *Wabol*, 958 F.2d 1450. I do not mean to suggest that everyone in Guam, or the CNMI for that matter, agrees that all indigenous peoples consider their rights to be in tension with the rights of nonindigenous peoples residing in these territories. The intragroup conflicts regarding what rights indigenous peoples should have raise normative and process questions that are beyond the scope of this Commentary.

Determining how to resolve the tension between these two seemingly competing rights in the U.S. territorial context is not easy.[13] Both implicate compelling claims that raise equality and social justice issues. On the one hand, the history of race discrimination underscores the importance of using equal protection principles to shield individuals against government oppression in property.[14] On the other hand, the ongoing efforts to decolonize the U.S. territories and address the harms of imperialism demonstrate the need to protect the rights of indigenous groups.[15]

Chapter Three of the *Developments in the Law*[16] provides the most recent exploration of this conflict between laws protective of indigenous peoples' cultural rights and equal protection principles as it manifests in the U.S. territories.[17] In particular, Chapter Three examines the extent to which the *Insular Cases* have addressed the legal debate between an individual constitutional right and an indigenous group's claim that implicates cultural rights. Importantly, the chapter contends that the

---

[13] Legal scholars have explored the conflict between individual rights and the rights of indigenous peoples in the United States in other contexts. *See, e.g.*, Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (discussing the tension between tribal sovereignty and the individual rights that may be compromised without the protections of federal civil rights laws); Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357 (2003) (examining the tension between Native American tribalism and constitutionalism in contemporary Indian law jurisprudence); Eric Yamamoto & Catherine C. Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of* Rice v. Cayetano, *in* RACE LAW STORIES 541 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (describing the legal struggles for redress of Native Hawaiians as a result of colonial expansionism).

[14] Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 1009–11 (2010) (discussing history of race discrimination in property law). For an in-depth examination of racial exclusion in property law, see ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW AND RACE (2011).

[15] *See, e.g.*, Julian Aguon, *On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 ASIAN PAC. AM. L.J. 47 (2011) (discussing how international law can be used as the basis for advocating for and maintaining indigenous rights); Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STAN. L. REV. 1197 (1991) (acknowledging the difficulties of building coalitions between Hawaiians and non-Hawaiians and recognizing the need for non-Hawaiians to understand the effects of white cultural imperialism in Hawai'i).

[16] *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1680 (2017) [hereinafter *Developments*].

[17] Scholars have explored this conflict in the context of the CNMI and American Samoa previously. *See*, *e.g.*, Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 743–44 (1995) (discussing the protection of land and culture in the CNMI and its tension with the Equal Protection Clause); 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, 358–59 (2008) (exploring whether land and cultural practices in American Samoa would survive equal protection analysis).

Insular Cases, which have long been associated with colonialism and racism,[18] have now become "bulwarks for cultural preservation."[19]

To develop this provocative claim, Chapter Three examines the D.C. Circuit Court's opinion in *Tuaua v. United States*,[20] which relied on the *Insular Cases* to deny the extension of the Citizenship Clause to American Samoa in part because, according to the court, doing so would be contrary to the desire of the people as expressed through their politically elected officials.[21] Chapter Three then claims that *Tuaua* represents "an important shift in the federal courts' use of the doctrine."[22] That is, contrary to their previous deployment of the *Insular Cases* for colonial purposes, courts have begun to use the cases for beneficent reasons — to protect indigenous cultures in the territories.[23] Crucially, such benign use of the *Insular Cases*, Chapter Three contends, raises at least two questions relating to the legal protection of indigenous cultures. First, whether the *Insular Cases* fit doctrinally as a necessary framework for "reconciling individual rights with cultural autonomy."[24] Second, whether as a normative matter, it is "desirable to prioritize cultural preservation over individual rights" vis-à-vis the *Insular Cases*.[25]

This Commentary responds to Chapter Three's thought-provoking contributions to our contemporary understanding of the deployment of the *Insular Cases* in the U.S. territories.[26] To be clear, I believe that continued use of the *Insular Cases* to resolve claims to birthright citizenship is problematic. Indeed, I joined an amicus brief in support of the *Tuaua* plaintiffs, explaining that the Fourteenth Amendment and

---

[18] *See infra* note 44; *see also* Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181 (2014) (discussing the process by which colonization or "the empire" became constitutional); Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, *in* FOREIGN IN A DOMESTIC SENSE 182 (Christina Duffy Burnett & Burke Marshall eds., 2001) (acknowledging that "[t]he harm done by the Insular Cases doctrine in the twentieth century is undeniable," *id.* at 193).

[19] *Developments*, *supra* note 16, at 1681.

[20] 788 F.3d 300 (D.C. Cir. 2015).

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

[22] *Developments*, *supra* note 16, at 1680–81. It should be noted, however, as Chapter Three itself acknowledges, that courts have previously deployed the *Insular Cases* in ways that scholars have viewed in a positive light because they regard such an approach as protective of cultural rights. *See id.* at 1698–99 (discussing scholarship regarding the protection of cultural rights in the territories vis-à-vis the *Insular Cases*). Thus, Chapter Three's description of the *Tuaua* case as an "important shift" in the federal courts' use of the doctrine could perhaps be more accurately explained as a recent example of a long-held view that the *Insular Cases* should be used for cultural preservation. *See id*. Notably, this beneficent view of the *Insular Cases* for the protection of culture is itself contested. *See* Herald, *supra* note 17, at 743–44.

[23] *Developments*, *supra* note 16, at 1701.

[24] *Id.* at 1696.

[25] *Id.*

[26] The *Insular Cases* apply in other contexts as well. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); ACLU v. Mattis, No. 17-02069 (D.D.C. Oct. 5, 2017).

common law principles dictate that all persons born within and owing allegiance to the United States are U.S. citizens, and that the D.C. Circuit's reliance on the *Insular Cases* was erroneous.[27] A recent lawsuit filed by American Samoans residing in Utah seeking recognition as U.S. citizens under the Constitution demonstrates that this issue remains relevant and the decision in *Tuaua* disputed.[28]

My goal in this Commentary, however, is not to revisit the arguments that the amicus brief raised and with which I still agree. Instead, here, I seek to make two points to provide context to as well as problematize the connection between the *Insular Cases* and preservation of culture that Chapter Three examined. First, I argue that to fully appreciate why the *Insular Cases* may be interpreted today as protective of cultural claims, it is necessary to examine in a more in-depth fashion how conventional constitutional frameworks such as equal protection doctrine have treated *and* invalidated laws that are protective of indigenous groups. Specifically, as I have argued elsewhere, it is important to critically analyze how courts have situated such laws along an inflexible racial-versus-political analytical framework.[29] Using this binary paradigm, courts have upheld laws that furthered the rights of members of federally recognized American Indian tribes because they viewed such laws as having political goals.[30] By contrast, courts have struck down laws that were designed to promote the rights of Native Hawaiians and other non–American Indian indigenous groups because such laws were deemed to have had a racially discriminatory purpose.[31] Such a narrow racial-versus-political binary suggests that traditional frameworks may be inhospitable to territorial indigenous peoples' cultural or political

---

[27] Brief of Citizenship Scholars as *Amici Curiae* in Support of Petitioners, Tuaua v. United States, 136 S. Ct. 2461 (2016) (mem.) (No. 15-981), 2014 WL 1896358.

[28] Complaint, Fitisemanu v. United States, No. 18-00036 (D. Utah filed Mar. 27, 2018).

[29] Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801 (2008) (examining the racial-versus-political legal framing of certain indigenous-only land laws).

[30] *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 554 (1974) (concluding that employment preference for qualified Indians did not constitute racial discrimination or preference, but rather a criterion reasonably designed to further the cause of Indian self-government).

[31] *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 519 (2000) (refusing to conclude whether Congress determined Native Hawaiians to have a status like that of Native Americans and that such a proposition is of "considerable moment and difficulty," *id.* at 518). Chapter Three notes that at least one case in American Samoa, Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 12 (1980), applied equal protection analysis (instead of the *Insular Cases*), to analyze the constitutionality of American Samoa's blood quantum communal land ownership system. *See Developments*, *supra* note 16, at 1699 (citing *Craddick*, 1 Am. Samoa 2d at 12). Recognizing that the law discriminated on the basis of race because of its use of blood and not residency, the court nevertheless upheld the law, stating that the territory had a compelling government interest in protecting the American Samoan way of life and that land played a central role in American Samoan culture. *See Craddick*, 1 Am. Samoa 2d at 12–13. *Craddick*, however, predated *Rice*, as Chapter Three explains. *See Developments*, *supra* note 16, at 1700 (discussing *Rice v. Cayetano*).

claims because they are not federally recognized tribes. Setting the *Insular Cases* against such rigid conventional frameworks helps to explain why one might view the *Insular Cases*, with its doctrinal flexibility to limit the application of constitutional rights in favor of certain cultural norms and practices, as providing an alternative and cordial doctrinal path to cultural preservation claims. Ongoing reliance on the *Insular Cases* would be unnecessary if courts are willing to recognize and protect the cultural and political rights of non–American Indian indigenous peoples in the U.S. territories within contemporary equal protection or due process analysis.

Second, as a normative matter, although I agree that the law should protect indigenous territorial cultures,[32] I contend that certain limiting principles should be imposed on the use of the *Insular Cases* if courts continue to use them as a collective doctrinal vehicle for protecting indigenous peoples' cultures or cultural practices. One such limiting principle that I develop in this Commentary focuses on the need to consider the dynamic nature of culture. That is, because culture is not static and accordingly evolves over time,[33] the legal protection of cultural rights should be done with caution particularly where the assertion of rights affects the individual rights of others, including nonindigenous individuals as well as individuals who are members of indigenous groups. In other words, the fluctuating nature of culture, I argue, complicates cultural preservation claims. First, those invested in protecting culture risk protecting a cultural tradition or belief that no longer exists. That might have the effect of jeopardizing broader postcolonial and racial equality goals of indigenous peoples who continue to face the effects of historical and ongoing colonization and racism. Second, uncritical acceptance of cultural arguments may also unduly marginalize members of the indigenous group who are seeking to challenge the group's asserted cultural practices and beliefs. Third, such cultural arguments may be used in a pernicious way to discriminate against nonindigenous persons.

The Commentary proceeds as follows. Part I first reflects on the broader contributions of the *Developments in the Law*'s focus on the *Insular Cases* and the U.S. territories and Chapter Three's specific claim that courts have repurposed the *Insular Cases* to benefit indigenous cultures in the territories. Next, Part II discusses a different line of cases that uses traditional equal protection analysis that generally disfavors laws that privilege indigenous peoples except those laws that are passed

---

[32] A fulsome answer to the broader normative question of why and how the law should protect cultural rights in the U.S. territories requires a comprehensive and in-depth analysis that is beyond the space and time constraints allocated for this Commentary.

[33] Kevin R. Johnson, *Introduction: Comparative Racialization: Culture and National Origin in the Latina/o Communities*, 78 DENV. U. L. REV. 633, 634–35 (2001) (commenting that "[a]ny culture is constantly changing, affected by interaction with other cultures, especially in an era of globalization," *id.* at 634); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 511–13 (2001) (discussing the changing nature of culture).

to promote the rights of federally recognized tribes. This Part argues that when these cases are read together with the *Insular Cases*, they strengthen Chapter Three's claim that the *Insular Cases* are doctrinally necessary in preserving cultural rights in the U.S. territories. The juxtaposition of the *Insular Cases* and the conventional constitutional approach, I contend, calls for expanding political and cultural rights of indigenous peoples within contemporary equal protection or due process analysis.

Lastly, Part III considers how to address the normative question of whether cultural preservation should be privileged over individual rights vis-à-vis the *Insular Cases*.[34] It argues that frameworks developed to protect cultures whether through the *Insular Cases* or traditional constitutional analysis must contend with culture's inherent adaptive character. The Commentary concludes by emphasizing what *Tuaua* represents — it is less about cultural rights and more about contested views about the meaning of citizenship among American Samoans and what process should be available to them as they decide what their membership to the American political family should be.

I. THE REDEMPTIVE USE OF THE *INSULAR CASES*

At the outset, given the *Harvard Law Review*'s role in the legal development of the *Insular Cases*, the journal's decision to devote a series on the *Insular Cases* may be considered a notable token of atonement.[35] As the Introduction of the *Developments in the Law* series itself noted, "[s]cholarship . . . has consequences."[36] The Introduction was referring to the journal's role in the publication of Professor Abbott Lowell's law review article proposing that the Constitution does not need to wholly apply to territories that have not been annexed or incorporated into the United States.[37] The Supreme Court would later adopt Lowell's position in 1901 in *Downes v. Bidwell*[38] when it espoused the "doctrine of territorial incorporation."[39] This doctrine led to the judicial recognition of the U.S. territories as "foreign . . . in a domestic sense,"[40] which became the foundation of their historical and ongoing legal subordination

---

[34] *See Developments*, *supra* note 16, at 1697.

[35] *Id.* at 1617 (commenting that to "fully understand" current developments in Puerto Rico and recent Supreme Court cases addressing the territory, it is necessary to "go back to a time this journal might rather forget").

[36] *Id.* at 1620.

[37] *Id.* at 1619 (referring to the "Third View," Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155 (1899)).

[38] 182 U.S. 244 (1901).

[39] *Id.*

[40] *Downes*, 182 U.S. at 341 (White, J., concurring).

rooted in racism.[41] By focusing on the territories and the *Insular Cases*, the *Developments in the Law* series provides a useful historical reminder of how the territories came to be part of the United States.[42] It also provides an exploration of the contemporary democratic deficit concerns given that none of the U.S. citizen residents of the territories may vote for the President and they do not have meaningful representation in Congress.[43] Notably, the series also facilitates valuable conversations about what the relationships between the territories and the United States should be today.

Chapter Three contributes to the series by focusing on the contemporary use of the *Insular Cases*. It initially analyzes *Tuaua v. United States* and then situates the case within the larger trend of legal scholars and judges utilizing the *Insular Cases* to protect the rights of indigenous peoples in the U.S. territories. That is, long thought to be the bastion of judicial acceptance of U.S. colonialism and racism,[44] the *Insular Cases*, as Chapter Three argues, have been repurposed as a doctrinal framework that has led to the protection of indigenous cultures in the U.S. territories.[45]

A brief discussion of *Tuaua* is warranted to better understand the import of Chapter Three's contributions. In *Tuaua*, the D.C. Circuit held that the Citizenship Clause does not extend to American Samoa.[46] Relying on the *Insular Cases*' impractical and anomalous test,[47] the court held that birthright citizenship is not a fundamental right[48] and that extending the Citizenship Clause to the territory would impose citizenship on people who do not want it.[49] The court explained that the American Samoan people feared that the Citizenship Clause's extension to their territory would negatively impact their communal landholding

---

[41] *See* 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, 245 (2010); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 47 (1998).

[42] *See Developments*, *supra* note 16, at 1625.

[43] *See id.*

[44] *See Downes*, 182 U.S. at 306 (White, J., concurring) (commenting on the negative impact to the United States that would result from the "immediate bestowal of citizenship" on an "uncivilized race"); *see also* Ernesto Hernández-López, Boumediene v. Bush *and Guantánamo, Cuba: Does the "Empire Strike Back"?*, 62 SMU L. REV. 117, 184 (2009) (discussing the "racial, cultural, and religious reasons" underlying the *Insular Cases*).

[45] *See Developments*, *supra* note 16, at 1680.

[46] Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015).

[47] *See* Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

[48] *Tuaua*, 788 F.3d at 309 (concluding that "a *jus sanguinis* tradition birth" is "irrelevant to the question of citizenship" and that such an asserted right is not "so natural and intrinsic to the human condition").

[49] *See id.*

system.[50] Noting that the American Samoan people's objection to citizenship was expressed through their elected leaders, the court held that extending the Citizenship Clause to the territory would be "anomalous."[51]

The importance of the judicial use of the *Insular Cases* in this way should not be understated. As Chapter Three explains, scholars, activists, judges, and other commentators have consistently argued that the *Insular Cases* had colonial purposes supported by racist beliefs.[52] Justice White's concurrence in *Downes*, for example, warned about the impact that the "immediate bestowal of citizenship" on an "uncivilized race" would have on the United States.[53] Subsequent cases relied on the *Insular Cases* to deny claims by people born in the U.S. territory of the Philippines that they were citizens at birth.[54]

Thus, that the court in *Tuaua* would use the *Insular Cases* to rule in favor of the (represented) preferred political status — American national as opposed to U.S. citizen — of the American Samoa people may reasonably be viewed as contrary to what the Supreme Court originally intended when it decided *Downes* and its progeny. The D.C. Circuit arguably turned the *Insular Cases* on their head by opining that extending the Citizenship Clause to the territory would constitute "an exercise of . . . imperialism" in light of the American Samoan peoples' rejection of U.S. citizenship and preference to maintain their U.S national status.[55] To be sure, the individual plaintiffs in *Tuaua* as well as other American Samoans residing in the territory who desire citizenship would argue that the use of the *Insular Cases* in this case was, in fact, contrary to the rights of American Samoans. From their perspective, the court maintained a status that they view as inferior to citizenship.[56] Nevertheless, as the D.C. Circuit alluded, for those in American Samoa who prefer national status because of the fear that citizenship would negatively impact their cultural land ownership practices, applying the

---

[50] *Id.* at 309–10.

[51] *See id.* at 311 ("We can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will.").

[52] *Developments*, *supra* note 16, at 1680; *see also* Malavet, *supra* note 41; Román, *supra* note 41.

[53] *Downes*, 182 U.S. at 306 (White, J., concurring).

[54] Lacap v. INS, 138 F.3d 518 (3d Cir. 1998) (holding that persons born in the Philippines during the territorial period are not entitled to United States citizenship by birth); Valmonte v. INS, 136 F.3d 914 (2d Cir. 1998) (finding that birth in the Philippine Islands in the territorial period does not constitute birth in the United States under the Citizenship Clause of the Fourteenth Amendment); Rabang v. INS, 35 F.3d 1449, 1453–54 (9th Cir. 1994) (concluding that birth in the Philippines does not give rise to United States citizenship).

[55] *Developments*, *supra* note 16, at 1695–96 (quoting *Tuaua*, 788 F.3d at 312).

[56] For additional exploration of the historical development of American national status, see Christina Duffy Burnett, *"They Say I Am Not an American . . .": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659 (2008); Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017).

Citizenship Clause to the territory was tantamount to the imposition of citizenship "by judicial fiat."[57]

The shift in what may be viewed as the redemptive use of the *Insular Cases* is particularly timely in light of recent events in the territories that reveal their marginalization and invisibility. As Professor Christina Duffy Ponsa-Kraus argues, one overlooked yet significant injury of the *Insular Cases* is their role in rendering the U.S. territories "essentially invisible."[58] Current events underscore the relative indiscernibility of U.S. territorial peoples. Days after Hurricane Maria passed through Puerto Rico, much of the island was in ruins. The storm destroyed homes and buildings,[59] flooded streets and neighborhoods,[60] and knocked down electricity, which left the entire island without power.[61] The worst hurricane to hit Puerto Rico in eighty years, Hurricane Maria had an "apocalyptic" wrath.[62] Disaster relief to the island, however, would not come for days.[63] Unlike the swift assistance that the federal government gave to the victims of Hurricane Harvey in Texas[64] or Hurricane Irma in Florida,[65] the relief provided to Puerto Ricans was slow.[66] Moreover,

---

[57] *Tuaua*, 788 F.3d at 302. As Chapter Three explained, however, the D.C. Circuit's concern about the effects that imposing citizenship would have on American Samoa's cultural practices or beliefs may be "misplaced or overblown" given that another case, Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1980), upheld a law restricting the right to own land in the CNMI to indigenous persons, who are also U.S. citizens. *See Developments*, *supra* note 16, at 1697.

[58] Christina Duffy Ponsa, *When Statehood Was Autonomy*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 1, 2 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

[59] Chandrika Narayan, *"Apocalyptic"' Devastation in Puerto Rico, and Little Help in Sight*, CNN (Sept. 26, 2017, 11:15 AM), http://www.cnn.com/2017/09/25/us/hurricane-maria-puerto-rico/index.html [https://perma.cc/8ERV-TMQP].

[60] Danica Coto, *Maria Destroys Homes, Triggers Flooding in Puerto Rico*, ASSOCIATED PRESS (Sept. 21, 2017), https://www.apnews.com/5f2002103e2f42e4916efeda88d0e511 [https://perma.cc/LQV7-MUSK].

[61] *Puerto Rico Loses Power and Sets Curfew*, N.Y. TIMES (Sept. 20, 2017), https://nyti.ms/2yd40Tu [https://perma.cc/6EPY-PKPT].

[62] Narayan, *supra* note 59.

[63] Aaron C. Davis et al., *U.S. Response in Puerto Rico Pales Next to Actions After Haiti Quake*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/investigations/us-responded-to-haiti-quake-more-forcefully-than-to-puerto-rico-disaster/2017/09/28/74fe9c02-a465-11e7-8cfe-d5b912fabc99_story.html [https://perma.cc/BJX9-JNE2] (reporting that Puerto Rico did not receive aid until eight days after the hurricane).

[64] Press Release, FEMA, Historic Disaster Response to Hurricane Harvey in Texas (Sept. 22, 2017), https://www.fema.gov/news-release/2017/09/22/historic-disaster-response-hurricane-harvey-texas [https://perma.cc/FTG8-XADD].

[65] Press Release, FEMA, Hurricane Irma Response and Relief Operations Continue with Full Federal Capability (Sept. 15, 2017), https://www.fema.gov/news-release/2017/09/15/hurricane-irma-response-and-relief-operations-continue-full-federal [https://perma.cc/295D-TKGU].

[66] Gabriel Stargardter & Dave Graham, *Trump Lays Blame on Puerto Ricans for Slow Hurricane Response*, REUTERS (Sept. 30, 2017, 6:47 AM), https://www.reuters.com/article/us-usa-puertorico-trump/trump-lays-blame-on-puerto-ricans-for-slow-hurricane-response-idUSKCN1C50GQ [https://perma.cc/D6SB-5C8N].

public support for providing relief to the people of Puerto Rico did not seem as strong compared to the calls to assist those who were affected in Texas and Florida.[67] Two reasons given to explain the discrepancy in support was the perception that Puerto Rico is not part of the United States[68] and lack of political participation.[69] Polls showed that half of Americans do not realize that the damages in Puerto Rico are domestic, not foreign, ones.[70] Indeed, another poll showed that fifty-four percent of people polled did not know that Puerto Ricans are U.S. citizens.[71]

Current events suggest that Puerto Rico is not alone in being forgotten. Also relatively unknown are the other territories, such as Guam. For example, on August 9, 2017, the North Korean military announced that it was considering firing missiles into Guam.[72] News outlets reported the impact the missiles would have on the United States. Fox News, for instance, explained that 3,831 Americans would be affected in total.[73] The Associated Press had a higher estimate, stating that the attack would affect 7,000 U.S. military troops stationed on the island.[74] Both reports, however, underestimated the number of potential American

---

[67] *See* Eric Levenson, *3 Storms, 3 Responses: Comparing Harvey, Irma and Maria*, CNN (Sept. 27, 2017, 12:44 PM), http://www.cnn.com/2017/09/26/us/response-harvey-irma-maria [https://perma.cc/V9Q4-W2LR]; *see also* Dan Merica, *Trump Seems Ready to Pull Aid from Puerto Rico. He Took a Different Tone with Texas and Florida*, CNN (Oct. 12, 2007, 5:47 PM), http://www.cnn.com/2017/10/12/politics/trump-puerto-rico-texas-florida [https://perma.cc/7QYE-S4Q2].

[68] Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES (Sept. 26, 2017), https://nyti.ms/2jZEn6j [https://perma.cc/N6SB-AJMA].

[69] *See* Mattathias Schwartz, *Maria's Bodies*, N.Y. MAG. (Dec. 22, 2017, 5:00 AM), http://nymag.com/daily/intelligencer/2017/12/hurricane-maria-man-made-disaster.html [https://perma.cc/8FSJ-Z98R] ("Of the many curses that befell Puerto Rico this year, the most infuriating may be invisibility. Because of its isolation, its lack of political representation, and the deceptively low number of casualties counted by early reports, the island had mostly faded from public consciousness throughout the fall.").

[70] Claire Hansen, *Poll Finds Americans Don't Know Puerto Ricans Are Citizens*, U.S. NEWS & WORLD REP. (Sept. 26, 2017, 3:58 PM), https://www.usnews.com/news/national-news/articles/2017-09-26/almost-half-of-americans-dont-know-puerto-ricans-are-us-citizens-poll [https://perma.cc/VW5E-MXP3].

[71] *Id.*

[72] Alex Horton, *Why North Korea Threatened Guam, the Tiny U.S. Territory with Big Military Power*, WASH. POST (Aug. 9, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/08/09/why-north-korea-threatened-guam-the-tiny-u-s-territory-with-big-military-power [https://perma.cc/67SY-D8GP]; *N. Korea Threatens Missile Strike Near Guam*, YONHAP NEWS AGENCY (Aug. 9, 2017, 7:31 AM), http://english.yonhapnews.co.kr/news/2017/08/09/0200000000AEN20170809001051315.html [https://perma.cc/4ZV8-9HHT].

[73] *See* Gene Park, *Guam: A Colonized Island Nation Where 160,000 American Lives Are Not Only at Risk but Often Forgotten*, WASH. POST (Aug. 11, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/11/guam-a-colonized-island-nation-where-160000-american-lives-are-not-only-at-risk-but-often-forgotten [https://perma.cc/TX28-U9F3]. Fox News later clarified its video to specify the number of U.S. troops affected instead of Americans affected. *See id.*; *North Korea's Missiles Can Reach These U.S. Military Bases*, FOX NEWS (Aug. 9, 2017), http://video.foxnews.com/v/5457599769001/?#sp=show-clips (the updated video).

[74] Park, *supra* note 73.

casualties. The total population of Guam is around 160,000,[75] and the majority of the people there are U.S. citizens.[76] Both the Associated Press and Fox News have since updated their news reports, but their initial reporting suggests that many in the United States do not know that most people who live in Guam are U.S. citizens.[77] As one commentator suggested, the lives of these Americans are forgotten or ignored.[78]

Nearby Guam and also seemingly invisible is the CNMI. Two years ago, Typhoon Soudelor, described as the "most powerful [typhoon that] year," hit the island of Saipan, the capital of the CNMI.[79] Like Typhoon Maria that hit Puerto Rico in September 2017, Typhoon Soudelor destroyed houses, knocked down power lines, and damaged buildings and cars. Residents had to line up for hours for water and gas and did not have electricity for months.[80] Yet not a story about Soudelor's damage on Saipan appeared in mainstream domestic news.

These recent events illuminate the limited knowledge Americans have about the territories. Their obscurity may be expected given the interstitial status — foreign in a domestic sense — wrought by the Supreme Court in the *Insular Cases*, which rendered the territories as not fully part of the United States.[81] Thus, despite the increased attention paid to the *Insular Cases* in legal scholarship,[82] the U.S. territories remain largely invisible in American society. The choice to devote the *Developments in the Law* to the territories offers a necessary step toward emphasizing that these territories belong to the American political family. Not only does the series help explain how these U.S. territories came to be part of the United States but it also, perhaps importantly, explores

---

[75] News Release, U.S. Census Bureau, U.S. Census Bureau Releases 2010 Census Population Counts for Guam (Aug. 24, 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn179.html [https://perma.cc/CY2M-2JVF] ("On April 1, 2010, the population was 159,358.").

[76] U.S. Census Bureau, Profile of Selected Social Characteristics: 2010 — 2010 Guam Demographic Profile Data, AM. FACTFINDER, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DPGU_GUDP2&prodType=table [https://perma.cc/H4FD-9FYW] (stating that just 29,443 of Guam's total 2010 population of 159,358 were not U.S. citizens or nationals).

[77] *See* Grace Garces Bordallo & Audrey McAvoy, *Guam's Residents Feel U.S. Patriotism but Growing Concern*, ASSOCIATED PRESS (Aug. 10, 2017) https://www.apnews.com/1805f53f99494ff69e7b210ecbba90a0 [https://perma.cc/3ZNW-RFNY].

[78] Park, *supra* note 73.

[79] Austin Ramzy, *Taiwan Braces for Arrival of Typhoon Soudelor*, N.Y. TIMES: SINOSPHERE (Aug. 7, 2015, 2:33 AM), https://sinosphere.blogs.nytimes.com/2015/08/07/taiwan-braces-for-arrival-of-typhoon-soudelor/ [https://perma.cc/FR4B-29YA].

[80] Jayson Camacho, *A Day After Typhoon Soudelor*, SAIPAN TRIB. (Aug. 5, 2015), https://www.saipantribune.com/index.php/a-day-after-typhoon-soudelor/ [https://perma.cc/Q8AB-PTZB].

[81] *See* Villazor, *supra* note 56, at 1691–94 (discussing the *Insular Cases* and establishment of ambiguous, interstitial American national status).

[82] Ponsa, *supra* note 58, at 1 ("Once marginal judicial decisions that virtually no US constitutional scholar had ever heard of, they have come to be recognized as a watershed event in the constitutional history of American empire.").

the current political relationship between the territorial governments and the federal government.

To understand the legal and historical treatment of the U.S. territories and their peoples, it is necessary to look not only at the *Insular Cases*, however. As Part II next shows, it is equally crucial to focus on other legal principles that have developed along parallel lines that further affect the role of the *Insular Cases* today in shaping the political and legal relationships between the United States and the U.S. territories, including the indigenous peoples that reside in them.

II. THE *INSULAR CASES* AND THE RACIAL-VERSUS-POLITICAL BINARY

Chapter Three emphasizes what it sees *Tuaua* and the *Insular Cases* as representing: the tension between the "extension of individual constitutional rights and the protection of territorial culture."[83] To explain the development of this conflict, Chapter Three discusses "[c]ertain strands of case law."[84] One set of cases deals with courts that utilized the *Insular Cases* to accommodate cultural claims. Such cases include *Wabol v. Villacrusis*,[85] in which the Ninth Circuit Court of Appeals upheld a race-based land ownership law under the *Insular Cases* framework.[86] A different set of cases focused on how courts invalidated laws that gave preferences to indigenous groups. Such cases include *Rice v. Cayetano*,[87] in which the Supreme Court struck down a state election law that was limited to certain descendants of Native Hawaiians.[88] To be sure, Chapter Three also discussed *Craddick v. Territorial Registrar* in which the American Samoan High Court applied equal protection analysis to uphold the territory's racially based land ownership system.[89] Yet, as Chapter Three notes, *Rice* offers a clear warning to those who might believe that the earlier case of *Craddick* would provide protection for territorial cultural rights.[90]

Chapter Three was correct to identify these two threads of law. Yet, its analysis of *Rice* needed to probe more deeply on how that case fits

---

[83] *Developments*, *supra* note 16, at 1681.

[84] *Id.* at 1697.

[85] 958 F.2d 1450 (9th Cir. 1990).

[86] *Id.* at 1462 (concluding that extending the Equal Protection Clause to land alienation provisions in the CNMI would be "impractical and anomalous"); *see also* Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 688 (9th Cir. 1984) (finding that the *Insular Cases* hold that the Sixth Amendment right to trial by jury is a nonfundamental right that does not apply to unincorporated territories). *But see* King v. Andrus, 452 F. Supp. 11, 16 (D.D.C. 1977) (holding that a jury trial in American Samoa is not "impractical and anomalous").

[87] 528 U.S. 495 (2000).

[88] *Id.* at 499.

[89] *See Developments*, *supra* note 16, at 1699 (discussing *Craddick v. Territorial Registrar*).

[90] *See id.* at 1700 (discussing *Rice v. Cayetano*).

within the broader judicial treatment of laws that promote the rights of indigenous peoples. As section A argues below, laws that privilege certain nonindigenous groups have not fared as well under conventional constitutional frameworks. Notably, as section B explains, courts in the U.S. territories have recently followed this dichotomous approach in analyzing certain constitutional laws that privilege indigenous peoples in the U.S. territories.

A. The Racial-Versus-Political Dimension of Indigeneity

Under conventional constitutional analysis involving the rights of indigenous peoples, particularly when the definition of indigeneity is defined using blood-quantum rules, courts have engaged in a racial-versus-political framework.[91] Under this framework, courts have upheld the constitutionality of laws that further the rights of federally recognized American Indian tribes, emphasizing that such laws have the political purposes of promoting tribal sovereignty.[92] By contrast, courts have struck down laws that promote the rights of indigenous peoples who do not have the same status as American Indian tribes, concluding that those laws have a racial purpose that cannot survive strict scrutiny.[93] Understanding this inflexible racial-versus-political dichotomous framework simultaneously reveals a conventional constitutional paradigm that is antagonistic to certain indigenous interests and the *Insular Cases* as an alternative doctrine that appears to be welcoming of the protection of indigenous rights in the territories.

In *Morton v. Mancari*, the Supreme Court held that a federal employment preference for individuals with one-fourth American Indian blood was not racially discriminatory.[94] Central to the Court's opinion is what it saw as the underlying purpose of the preferential employment treatment: the promotion of the right of self-government of federally recognized tribes.[95] Thus, the federal government's intent was not to discriminate against non-Indian employees but rather to protect the political rights of those tribes that are federally recognized.[96]

That the Court intended to emphasize the political sovereignty of American Indian tribes in *Morton* became more evident in *Rice v. Cayetano*. In *Rice*, the Court invalidated a law that restricted the right to vote for

---

[91] For an in-depth analysis, see Villazor, *supra* note 29. *See also* Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006).

[92] Morton v. Mancari, 417 U.S. 535, 553 (1974).

[93] *Rice*, 528 U.S. 495 (finding that Native Hawaiians are not a federally recognized tribe and thus the exclusion of non-Hawaiians from voting for Office of Hawaiian Affairs trustees was not permissible).

[94] *Morton*, 417 U.S. at 553–55.

[95] *Id.* at 553–54.

[96] *Id.*

trustees of a Hawai'i state agency to Native Hawaiians as a form of ancestry discrimination that was odious to the Fifteenth Amendment.[97] Specifically, the Supreme Court emphasized that unlike the policy in *Morton* that furthered federally recognized tribes and thus had political purposes, the voting restriction in Hawai'i did not deal with a federally recognized tribe and thus lacked a political purpose.[98] In other words, the purpose of the law that sought to promote Native Hawaiian rights acquired a racial dimension because Native Hawaiians have not attained federal tribal recognition.

Thus, the racial-versus-political indigeneity binary flowing from *Morton* and *Rice* focuses on federal tribal recognition. The centrality of federal tribal recognition, however, overlooks one critical point — the legal process through which federal recognition is attained in the first instance. In particular, the current regulations that allow a tribe to apply for federal recognition are available "only to indigenous entities" in the forty-eight contiguous states and Alaska "that are not federally recognized Indian tribes."[99] Crucially, a court has held that the exclusion of Native Hawaiians from the process of acquiring federal tribal recognition was valid.[100] In other words, even if Native Hawaiians and indigenous groups in the U.S. territories wanted to acquire such a political category, it is possible that they could never acquire it. The result is thus conclusive in that while members of federally recognized tribes count as political entities, all other indigenous groups are considered racial groups.[101] In other words, the regulations reify the racial categorization of all other indigenous groups.[102]

---

[97] 528 U.S. at 518–22.

[98] *See id.* at 519–21.

[99] 25 C.F.R. § 83.3 (2017); *see also id.* § 83.1. To date, there are 567 federally recognized Indian tribes in the United States. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017).

[100] *See* Kahawaiolaa v. Norton, 386 F.3d 1271, 1282–83 (9th Cir. 2004) (affirming the denial of a Native Hawaiian group's application for federal tribal recognition despite recognizing that the regulations essentially said that "[n]o Hawaiians need apply," *id.* at 1274). In response to *Rice*, the late Hawai'i Senator Daniel Akaka introduced legislation that would have given Native Hawaiians a status akin to federally recognized tribes. *See* A Bill to Express the Policy of the United States Regarding the United States' Relationship with Native Hawaiians, S. 2899, 106th Cong. (2000); *see also* S. REP. NO. 112-251 (2012).

[101] Courts have continued to rely on *Morton v. Mancari* in ways that privilege federally recognized tribes. *See, e.g.*, O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1271, 1276 (D.N.M. 2002) (relying on *Morton* to distinguish between preferences in drug exemptions for the religious use of peyote by a federally recognized tribe and lack of exemptions for a Christian church engaged in indigenous practices); United States v. Warner, 595 F. Supp. 595, 600 (D.N.D. 1984) (stating that "preferences given to Indians do not constitute racial preferences or discrimination" (citing *Morton*, 417 U.S. at 552 (emphasis omitted)).

[102] This is not to say that federally recognized American Indian tribes have been treated well under the law. *See generally* Riley, *supra* note 13; Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97 (2015) (describing tribal-state disputes where tribal claims are "disruptive" but "not inherently harmful," *id.* at 102); Rolnick, *supra* note 91 (suggesting a new

Thus, conventional equal protection analysis is currently ill-suited to address the needs of certain indigenous groups' political, cultural, and postcolonial interests. This perspective highlights what may be seen as the value of the repurposing of the *Insular Cases* because these cases, at least in more modern memory, appear to provide doctrinal solace to certain indigenous groups asserting certain rights, notwithstanding the contested nature of these rights. Importantly, the foregoing discussion underscores the need to expand legal recognition of the rights of non–American Indian indigenous groups within conventional constitutional frameworks. Such legal protection is especially necessary in light of recent cases, as discussed next, in the territories that have followed the Supreme Court's approach in *Rice*.

B. Adoption of Rice v. Cayetano *in the U.S. Territories*

At the outset, it was not clearly evident whether the *Morton*/*Rice* framework would apply in the U.S. territories. Unlike Hawai'i, the territories are not states. Nevertheless federal courts chose to follow the racial-versus-political framework in deciding race-based discrimination claims. Thus, interestingly, although the *Insular Cases* currently appear, as Chapter Three does, to be supportive of laws that promote the rights of indigenous groups, courts located in the U.S. territories have elected not to rely on them.[103] In *Davis v. Commonwealth Election Commission*,[104] the Ninth Circuit affirmed the district court's ruling that voting restrictions to individuals of "Northern Marianas descent" was race based and violated the Fifteenth Amendment.[105] These voting restrictions in the CNMI denied individuals who were not of Northern Marianas descent the right to vote on any constitutional amendment affecting the CNMI's Article XII land alienation restrictions.[106] At the time of the dispute, a person of Northern Marianas descent was defined as a U.S. citizen or national who possessed at least one-quarter Northern Marianas Chamorro or Carolinian blood.[107]

Because the case raised a constitutional issue in the U.S. territories, the court could have used the *Insular Cases*.[108] Yet, in its analysis, the

---

framework for considering Indian issues and federal Indian law that draws on a more robust and realistic understanding of both race and "Indianness," id. at 958).

[103] For an in-depth analysis of these cases, see 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. 152 (2012).

[104] 844 F.3d 1087 (9th Cir. 2016).

[105] *Id.* at 1089.

[106] *Id.* at 1089–90.

[107] *Id.* at 1090.

[108] For an analysis that relies on the *Insular Cases*, see Jose P. Mafnas, Jr., *Applying the* Insular Cases *to the Case of* Davis v. Commonwealth Election Commission*: The Power of the Covenant and the Alternative Result*, 22 U.C. DAVIS J. INT'L L. & POL'Y 105 (2016).

court relied substantially on *Rice* and echoed the sentiment that in the case of the CNMI, ancestry was in fact being used as a proxy for race.[109] Such a proxy thus violated the Fifteenth Amendment, and the district court was correct to enjoin its enforcement.[110]

The Ninth Circuit quickly concluded that the *Insular Cases* in fact did not apply.[111] The court held that the Covenant made the Fifteenth Amendment fully applicable in the Commonwealth and thus that its application is "not selective or in any way limited by the Commonwealth's status as an unincorporated territory."[112]

In a similar vein, Arnold Davis, a resident of Guam, sought to invalidate Guam's Native Inhabitant classification as an unlawful proxy for race in *Davis v. Guam*.[113] In that case, eligible "Native Inhabitants of Guam" were permitted to register to vote in a plebiscite concerning Guam's future political relationship with the United States. Because Davis did not qualify as a Native Inhabitant, he was ultimately ineligible to register and vote in the plebiscite.[114]

Like the Ninth Circuit held in *Davis v. Commonwealth Election Commission*, the Guam District Court on remand in *Davis v. Guam* relied on *Rice* to hold that the voter qualification is in fact "a proxy for race because it excludes nearly all persons whose ancestors are not of a particular race."[115] It further found that the Guam Legislature "manipulate[d] the system" to exclude others by "deleting the term 'Chamorro people' . . . and replacing it with "'Native Inhabitants.'"[116] While neutral on its face, the term "Native Inhabitants" was actually a means to mask the statutory objective of treating the Chamorro people as a distinct people.[117] Thus, the Guam Legislature sought to use ancestry as a proxy for race.[118]

---

109 *Davis*, 844 F.3d at 1092.

110 *Id.* at 1093.

111 *Id.* at 1095.

112 *Id.*

113 785 F.3d 1311 (9th Cir. 2015).

114 *Id.* at 1313–14.

115 Davis v. Guam, No. CV 11-00035, 2017 WL 930825, at *6 (D. Guam Mar. 8, 2017) (citing Rice v. Cayetano, 528 U.S. 495, 514–16 (2000)). The district court was unconvinced by an argument similarly made by the Plaintiff in *Davis v. Commonwealth Election Commission* — namely, that the definition of "Native Inhabitant" was not race-based because it relied on race-neutral criteria. The government of Guam contended that to qualify as a Native Inhabitant, one simply needed to prove she is descended from individuals who resided in Guam prior to 1950. This factor supported the race-neutral argument in that the 1950 census in Guam revealed that residents were not limited to one racial group, such as Chamorros. However, like the Ninth Circuit concluded in the CNMI's *Davis* case, the Guam District Court found this argument to be unpersuasive. Instead, the district court found that the Guam Legislature used ancestry as a racial definition and for a racial purpose. *Id.*

116 *Id.* at *8.

117 *Id.*

118 *Id.*

Just as the Ninth Circuit dismissed the *Insular Cases* as inapplicable to *Davis v. Commonwealth Election Commission*, the district court also found the *Insular Cases* to be inapplicable to *Davis v. Guam*.[119] Because Congress explicitly extended the Fifteenth Amendment and the Equal Protection Clause to Guam when it enacted the Organic Act of Guam,[120] the *Insular Cases* doctrine could not be used to support the government's argument.[121] The case is currently pending in an appeal to the Ninth Circuit.[122]

In holding that the *Insular Cases* do not apply in light of specific Congressional extensions of the Fifteenth Amendment, both *Davis* cases suggest a limiting principle: courts must apply traditional constitutional analysis where Congress has specifically extended a constitutional right. Yet, courts, including the Ninth Circuit, have not always taken a consistent approach. In at least one other case, in which the court acknowledged the extension of a different constitutional provision, the court found a way to create a narrow reading of the provision. In *Wabol v. Villacrusis*, the Ninth Circuit addressed a claim of racial discrimination in the CNMI's land ownership law that was raised under the Fourteenth Amendment.[123] The CNMI, through its Covenant, had adopted the Fourteenth Amendment just as it adopted the Fifteenth Amendment.[124] The court nevertheless deployed the *Insular Cases* and, in so doing, framed the right at issue not as a general right to equal protection but rather as "equal protection of the laws regarding long-term interests in real property."[125] To be sure, in its holding, the *Wabol* court commented that the political union between the CNMI and the United States would not have been achieved if not for the assurance that the CNMI would be able to restrict ownership of land to people from the Marianas in order to protect their cultural connection to their lands.[126]

Of course, the outcome in the foregoing *Davis* cases may be explained by the fact that the issue involved the denial of the fundamental right to vote on the basis of race. Similar to *Rice*, both *Davis v. Guam* and *Davis v. Commonwealth Election Commission* represent judicial

---

119 *Id.* at *14.

120 Pub. L. No. 81-630, 64 Stat. 384 (codified as amended at 48 U.S.C. §§ 1421–1425 (2012)).

121 Davis v. Guam, 2017 WL 930825, at *14.

122 Davis v. Guam, No. 17-15719 (9th Cir. filed Apr. 13, 2017).

123 958 F.2d 1450, 1451 (9th Cir. 1990).

124 Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 501(a), 48 U.S.C. § 1801 note sec. 501(a) (2012).

125 *Wabol*, 958 F.2d at 1460.

126 *See id.* at 1461. It could thus be argued that although Congress extended the Fourteenth Amendment to the CNMI, it created an exception regarding land ownership laws in light of the political agreements that gave rise to the relationship between the CNMI and the United States.

disapprobation of racial discrimination in the ballot box.[127] Given the history of explicit historical and contemporary legal barriers to voting on the basis of race, the courts' opinions that protect the right to vote make sense.[128] Further, they can be distinguished from *Wabol* because, as already noted, the CNMI specifically negotiated for protection of their lands. But these cases only reveal the flexibility that the *Insular Cases* arguably provide for cultural rights that, thus far, traditional constitutional analysis has not been able to offer.

In sum, at least two points should be clear. First, when an issue that raises the tension between the right of an individual against race discrimination and the right of an indigenous group to gain protection for their culture and autonomy, courts engage in the racial-versus-political analysis. Under this framework, unless the indigenous group is a federally recognized tribe, state and local laws that are designed to address the political rights of indigenous groups would get struck down. Second, that this binary holds such a stronghold in constitutional analysis is demonstrated by the fact that federal courts located in the territories themselves reject the use of the *Insular Cases*.[129] This legal vantage point strengthens the significance of the revisionist approach that courts have taken to the *Insular Cases*. That is, given that conventional frameworks appear to be hostile to laws that may be viewed as protective of the rights of indigenous groups, the *Insular Cases* seem to be, at this juncture, the primary means through which some territorial peoples might be able to push for protection of certain cultural and political rights that they believe they would not be able to achieve under traditional constitutional analysis.

---

[127] *Cf.* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

[128] ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015) (discussing the history of exclusion from the ballot box on the basis of race); William Jefferson Clinton, *The Voting Rights Umbrella*, 33 YALE L. & POL'Y REV. 383 (2015) (commenting on the history of race discrimination in the exercise of the right to vote).

[129] To be sure, not all federal courts have been consistent in their approach. For example, the district court in Puerto Rico relied on the *Insular Cases* to hold that the Supreme Court's holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) — that marriage is a fundamental right — does not apply in Puerto Rico. *See* Vidal v. Padilla, 167 F. Supp. 3d 279, 286 (D.P.R. 2016). The U.S. Court of Appeals for the First Circuit reversed the court, however. *In re Vidal*, 818 F.3d 765, 766 (1st Cir. 2016). Notably, in American Samoa, some have commented that *Obergefell*'s application is unclear, citing the *Insular Cases*. *See Legal Recognition of Same-Sex Relationships: American Samoa*, JONES DAY, http://www.samesexrelationshipguide.com/~/media/files/ssrguide/northamerica/united-states/legal-recognition-of-samesex-relationships--united-states-of-america--american-samoa.pdf [https://perma.cc/6KA7-MGHJ] (last updated Aug. 31, 2015).

III. THE LIMITS OF CULTURAL PRESERVATION CLAIMS

Having addressed how the *Insular Cases*, as a doctrinal matter, may be used to protect indigenous culture, this Part directly addresses Chapter Three's quest to consider the normative implications of the courts' repurposing of the *Insular Cases* for cultural preservation arguments. At the outset, it should be noted that it is not only domestic law that has been used to protect cultural rights of indigenous peoples. International law has also acknowledged the rights of indigenous peoples to their lands, water, and other resources, including those that are central to their cultural identity.[130] The United Nations Declaration on the Rights of Indigenous Peoples, for example, recognizes the need to respect the "inherent rights of indigenous peoples" to their cultures, "especially their rights to their lands."[131] The scope of these rights and how such rights ought to be protected remain contested[132] and it would be beyond the scope of this Commentary to wade deeply in that debate.

Instead, this Part advances two arguments designed to problematize cultural preservation arguments raised through the *Insular Cases*. First, analysis of claims to the protection of territorial cultures should be carefully conducted and should consider the fluid nature of culture. Second, assertions for cultural preservation should be seen as part of a broader argument for the right of indigenous peoples to self-determination.

A. Culture Changes

Although anthropologists and sociologists do not have a precise definition of culture, the term is generally recognized as the set of "learned traits shared by a group of people" including beliefs, values, language, and religion.[133] Importantly, it is well established that culture is not static but is instead dynamic.[134] It is ever changing as a result of a number of factors including exposure to new people, beliefs, ideas, practices, religions, and experiences.[135] As a result, over time, norms, values,

---

130 *See* Kristen Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1032–38 (2009) (discussing the recognized rights of indigenous peoples to property).

131 G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

132 *See generally, e.g.*, Carpenter et al., *supra* note 130.

133 Kim Forde-Mazrui, *Does Racial Diversity Promote Cultural Diversity?: The Missing Question in* Fisher v. University of Texas, 17 LEWIS & CLARK L. REV. 987, 995–96 (2013) (discussing a working definition of culture).

134 Johnson, *supra* note 33, at 634–35 ("Any culture is constantly changing, affected by interaction with other cultures, especially in an era of globalization." *Id.* at 634).

135 Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2039 (2007) (acknowledging the inevitability of cultural change, hybridity, and fusion providing society "plenty to celebrate and plenty to decry").

and attitudes change.[136] Indigenous cultures are not exempted from the inevitability of change.[137] Indeed, survival of indigenous groups has required them to adapt and, notably, international instruments recognize the protection not only of their traditional livelihoods but also ways in which they have had to adapt to modern life.[138]

Arguments to protect culture, including indigenous cultures, thus face a paradox. In seeking legal protection for culture, there is the possibility that law could protect "traditional culture" that no longer reflects modern practices or beliefs. This leads to the double harm of essentializing a culture that no longer exists and also freezing a certain view of "traditional culture" that might pose difficulties later for the indigenous group seeking legal protection for a belief, tradition, or value that is no longer shared in the community.

Further, cultural changes occur not only due to outside influences but also because of desired changes by members of the group. As Professor Madhavi Sunder notes, individuals engage in "cultural dissent" and thereby instill cultural changes from within.[139] Cultural dissent practices may come from individuals who are members of an indigenous group as well as nonindigenous individuals who reside with or are related to members of indigenous groups. Courts that are analyzing claims to culture, whether through the *Insular Cases* framework or conventional analysis, must carefully consider the culture's dynamic nature.

Revisiting *Wabol v. Villacrusis* might illustrate this point. In this case, the Ninth Circuit upheld Article XII of the CNMI Constitution, which restricted the right to own land or obtain long-term leases to people of Northern Marianas descent (NMD).[140] At the time *Wabol* was decided, an NMD individual was a U.S. citizen or national and at least one-quarter Northern Marianas Chamorro or Carolinian.[141] In relying on the *Insular Cases* to reject an equal protection claim brought by a

---

136 Michael E. W. Varnum & Igor Grossmann, *Cultural Change: The How and the Why*, 12 PERSP. ON PSYCHOL. SCI. 956, 956 (2017) ("Clearly, human cultures are not static. Not only do political attitudes and norms change, but societies develop new technologies, many of which dramatically influence how people work and live.").

137 John Borrows, *Indigenous Legal Traditions in Canada*, 19 WASH. U. J.L. & POL'Y 167, 199–200 (2005) (noting that indigenous cultures are no exception to cultural changes although stating that changes to indigenous cultures does not equate with the extinction of indigenous cultures).

138 Amelia Cook & Jeremy Sarkin, *Who Is Indigenous? Indigenous Rights Globally, in Africa, and Among the San in Botswana*, 18 TUL. J. INT'L & COMP. L. 93, 114 (2009) (stating that "being indigenous does not mean a group must live exactly as their ancestors did several thousand years ago").

139 *See generally* Sunder, *supra* note 33.

140 Wabol v. Villacrusis, 958 F.2d 1450, 1463 (9th Cir. 1990).

141 N. MAR. I. CONST. art. XII, § 4 (amended 2014). In 2014 the CNMI Legislature amended Article XII to provide that an NMD person is one "who is a citizen or national of the United States and who has at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof." *Id*.

non-NMD person against Article XII, the Ninth Circuit reasoned that the Bill of Rights was not intended to "operate as a genocide pact for diverse native cultures."[142] Notably, the court reasoned that land is the "only significant asset of the Commonwealth people and 'is the basis of family organization in the islands. It traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members.'"[143] The court further explained that Article XII was enacted to prevent native inhabitants from "selling their cultural anchor for short-term economic gain."[144]

The Supreme Court's opinion in *Rice* raises the possibility that Article XII may be subject to a new legal challenge, which could be brought by an NMD person who wants to sell land to a non-NMD individual. Assuming such a lawsuit is brought, at least one question that could be raised is whether the basis of the protection of culture and lands articulated twenty-five years ago in *Wabol* under the *Insular Cases* is still applicable today. That is, how might traditional claims to culture be addressed in light of changes that have taken place in the CNMI, including the presence of new hotels,[145] abandoned buildings,[146] and a new casino[147] on lands that have been leased or occupied for decades by nonindigenous groups?[148] The Ninth Circuit's reasoning that highlights the connection between indigenous peoples and land seems out of step with contemporary use and value of lands in the CNMI.

B. Claims to Self-Determination

The foregoing discussion of the limits of cultural preservation claims points to the need to broaden an indigenous group's argument for cultural protection. In particular, the right to indigenous culture should be

---

142 *Wabol*, 958 F.2d at 1462 (citing Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337, 386–88 (1981)).

143 *Id.* at 1461 (citing Larry Guerrero, Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 175 (Dec. 6, 1976) (unpublished manuscript), http://nmhcdigitalarchive.org/ConConVer.1.0/1st%20Con-Con%20Directory%2012_04_06/1976%2012%2006%20Constitution%20Analysis.pdf [https://perma.cc/ZMU8-YTET]).

144 *Id.* (citing Guerrero, *supra* note 143, at 175).

145 Bea Cabrera, *Zoning: Applications for New Hotels Up*, SAIPAN TRIB. (Oct. 26, 2017), https://www.saipantribune.com/index.php/zoning-applications-new-hotels/ [https://perma.cc/PHF9-58WY].

146 Erwin Encinares, *SNILD Holds Hearing on Abandoned, Blighted Buildings*, SAIPAN TRIB. (Sept. 6, 2017), https://www.saipantribune.com/index.php/snild-holds-hearing-abandoned-blighted-buildings/ [https://perma.cc/FE7D-2T2P].

147 *See* Neil Gough & Cao Li, *U.S. Investigates Work at Pacific Island Casino Project with Trump Ties*, N.Y. TIMES (May 4, 2017), https://nyti.ms/2pK84JY [https://perma.cc/H28N-P8DN]. .

148 For a contemporary discussion of Article XII, see Gretchen Smith, *When Minorities Collide: An Examination of Interminority Tensions in the CNMI* (Feb. 15, 2018) (unpublished manuscript) (on file with author).

seen as part of a larger claim for the right of indigenous peoples to exercise self-determination, including their ability to have control over their economic, social, and cultural development.[149]

An examination of the *United States v. Guam* case illustrates how a cultural claim to land should be couched as part of a larger argument for self-determination. As discussed above, in this case, the federal government has alleged that the Guam government violated the Fair Housing Act (FHA) by denying non-Chamorros the right to apply for benefits under the Chamorro Land Trust Act (CLTA). Under the traditional equal protection analytical framework of the FHA, a court would inquire whether the government engaged in conduct with "invidious discriminatory purpose."[150]

The federal government asserts that the Chamorro Land Trust Commission (Commission) is indeed engaging in race discrimination. First, the fact that the Guam legislature amended the statute by removing the blood-quantum requirements and instead focusing on when people of Guam became citizens would not erase the racial dimension of the Act. As the Complaint explains, "[a]pproximately 98.6% of all persons made citizens under the Organic Act in 1950 were Chamorro."[151] Second, the federal government alleges that the Commission, in implementing the CLTA, limited eligibility to apply for benefits under the Act to indigenous Chamorros. The Complaint asserts, for example, that the Commission denied an African American man the right to lease property because he is not "blood Chamorro."[152] Because of what it sees as blatant race discrimination, the federal government seeks to enjoin such practices. Apparently the government of Guam expected the lawsuit.[153] Additionally, a white man filed a complaint with the Department of Housing and Urban Development in August 2017 about race discrimination, claiming that he was denied the ability to apply for benefits under the Act.[154]

Under conventional equal protection analysis, the Guamanian government would arguably have a difficult time defending the statute. As explained earlier, the Guam Attorney General maintained that the CLTA was intended to preserve "Chamorro heritage and Chamorro culture."[155] This articulation of the right, however, misses the larger goal

---

149 G.A. Res. 61/295, *supra* note 131.

150 Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

151 Complaint, *supra* note 3, at 4.

152 *Id.* at 9.

153 *See* Stole, *supra* note 10.

154 Shawn Raymundo, *Caucasian Man Files HUD Complaint Against Chamorro Land Trust Program*, PAC. DAILY NEWS (Aug. 23, 2017, 6:01 PM), http://www.guampdn.com/story/news/2017/08/23/caucasian-man-files-hud-complaint-against-chamorro-land-trust-program/592373001/ [https://perma.cc/KJ78-CJCH].

155 Stole, *supra* note 10.

of protecting the property rights of the indigenous people of Guam. As a result of more than three centuries of colonization, many Chamorros of Guam lost their land. When the United States acquired Guam in 1898 after the Spanish American War, many Chamorros continued to be landless. In 1975, the Guam legislature passed the CLTA to transfer approximately 20,000 acres of unused and unreserved lands in Guam to the Commission, which would ensure that "land will always remain within the territory in trust for the use of descendants of the island's historic inhabitants."[156] The intended beneficiaries of the CLTA are Chamorros. By the late 1980s, however, many Guamanians still did not have lands allocated to them.[157] Angel Santos, a leader of the "Chamoru Nation," argued for the implementation of the CLTA, demanding "rights to [their] land so that [they could] survive."[158] In *Santos v. Ada*,[159] the Superior Court of Guam ruled in favor of Santos and required the government to implement the CLTA.[160] The government eventually adopted rules and regulations for the implementation of the Act.[161]

Thus, as the foregoing account shows, the CLTA was designed to address the impact of colonization on the property rights of Chamorro people and the need to preserve what little lands are left for them in Guam.[162] Ensuring that indigenous peoples have land assists them in determining for themselves their economic, cultural, and political development.[163] Ownership of land is thus better understood to be not only about the protection of culture but a broader argument for indigenous peoples' right to self-determination.[164]

---

156 Complaint, *supra* note 3 (alteration in original); *see also* ROBERT F. ROGERS, DESTINY'S LANDFALL: A HISTORY OF GUAM 249 (1995) (discussing the passage of the Chamorro Land Trust Act as based on similar law in Hawai'i designed to grant land rights to indigenous peoples). For a discussion of the Chamorro Land Trust Act and the rights of Chamorros in Guam, see Anthony (T.J.) F. Quan, Comment, "*Respeta I Taotao Tano": The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 ASIAN-PAC. L. & POL'Y J. 3 (2002).

157 *See* ROGERS, *supra* note 156, at 249 (explaining that the Chamorro Land Trust Act was not implemented for eighteen years because of legal uncertainty regarding the definition of native Chamorro).

158 Steve Limtiaco, *Key Events in Chamorro Land Trust*, PAC. DAILY NEWS (Oct. 6, 2017, 1:32 PM), http://www.guampdn.com/story/news/2017/09/29/key-events-chamorro-land-trust/715421001/ [https://perma.cc/NF2N-2B7U]; *see generally* ROGERS, *supra* note 156.

159 No. SP0083-92 (Guam Super. Ct. 1992).

160 Decision and Order on Petitioners' Writ of Mandate, Respondent's Motion to Dismiss Petitioners' Writ of Mandate and Motion for Summary Judgment, No. SP0083-92 (Guam Super. Ct. June 4, 1992).

161 *See* Complaint, *supra* note 3, at 4–10 (discussing implementation of the CLTA).

162 For an analysis of the history of colonization of Guam and the Chamorros' ongoing quest to exercise their right to self-determination, see Quan, *supra* note 156, at 66–80.

163 For a discussion of the relationship between the right to self-determination and property rights, see Aguon, *supra* note 15, at 61, which discusses the recognition of indigenous peoples' property rights in Belize.

164 G.A. Res. 61/295, *supra* note 131. Scholars have argued that Guam has yet to exercise its right to self-determination because it has not had the opportunity to determine its political status. *See, e.g.*, Torres, *supra* note 103, at 197.

CONCLUSION

On the whole, the *Developments in the Law* series shines a light on the U.S. territories and the role that the *Insular Cases* played in shaping the relationships between the United States and the five U.S. territories. Focusing on the territories could not have come at a better time. Current events related to natural disasters and potential military strikes underscore that many Americans are unaware of the U.S. territories and how they and their people became part of the United States. The *Developments in the Law* series thus offers a critical step towards reversing the relative obscurity of the U.S. territories in American consciousness to the detriment of the people who reside in those territories.

Additionally, Chapter Three and its analysis of *Tuaua v. United States* has brought critical attention to the *Insular Cases* and the deployment of these cases for the preservation of indigenous peoples' cultures in the territories. As this Commentary has maintained, however, part of the reason why the *Insular Cases* seem cordial to cultural preservation arguments is because conventional constitutional analysis, at this point, appears to be hostile to such claims. Importantly, the protection of culture in law should be more nuanced, consider culture's adaptive nature, and be part of a broader claim to self-determination, including the right to decide a group's political and economic development.

It is this right of indigenous peoples to determine their political destiny that this Commentary chooses to explore in this concluding section. The D.C. Circuit in *Tuaua* refused to extend the Citizenship Clause to American Samoa because it believed that doing so would be tantamount to "overt cultural imperialism."[165] A different, yet equally important way of analyzing *Tuaua* is to consider it from the perspective of those American Samoans who have argued against the extension of the Citizenship Clause and to consider their underlying reasons for refusing citizenship. Citizenship is conventionally understood as an ideal status such that if given the opportunity, noncitizens would want to have it.[166] After all, citizenship comes with a host of rights, privileges, and benefits.[167] Yet, as *Tuaua* indicated, citizenship is contested in American

---

165 Tuaua v. United States, 788 F.3d 300, 312 (D.C. Cir. 2015).

166 *See* Andrew Kent, *Citizenship and Protection*, 82 FORDHAM L. REV. 2115, 2115 (2014) (providing Chief Justice Earl Warren's description of citizenship as "man's basic right" because "it is nothing less than the right to have rights" (quoting Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting))).

167 Lee J. Terán, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583, 607 ("The benefits of U.S. citizenship —

Samoa. There are those within the American political family who may prefer to maintain their noncitizen status and, accordingly, forego the rights and privileges that attend citizenship. In other words, they voluntarily choose to have a subordinate legal status.

Tuaua suggests the need to explore the questions whether individuals should have the option to decline U.S. citizenship, the process through which indigenous peoples should be able to decide such question, and the implications of such citizenship-rejection for our broader understanding of membership to the United States. Limited attention has been paid to the ways in which noncitizens have refused citizenship.[168] Much scholarship has focused on the desire for citizenship and the ways in which those who sought membership experienced various barriers. For example, there is ample evidence of obstacles that noncitizens faced in their quest for naturalization, including racial restrictions,[169] gender-based rules,[170] criminal history,[171] lack of good moral character,[172] a habitual drunkard provision,[173] and financial costs of naturalization.[174] *Tuaua* suggests the need to explore the other side of the citizenship coin — those who refuse to become permanent members of the United States and the normative and theoretical implications of their repudiation of citizenship.

---

stability, mobility, political rights, employment, education, and importantly, a defense from deportation — are fundamental, viewed as 'one of the most valuable rights in the world today.'" (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963))).

168 *See* Alan Hyde, Ray A. Mateo & Bridgit Cusato-Rosa, *Why Don't They Naturalize? Voices from the Dominican Community*, 11 LATINO STUD. 313, 313–14 (2013) (stating the need for more scholarly attention to naturalization and low rates of citizenship).

169 *See, e.g.*, Ozawa v. United States, 260 U.S. 178 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923). For an excellent examination of racial restrictions to naturalization, see IAN F. HANEY LÓPEZ, WHITE BY LAW (1996).

170 *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 443–47 (2005) (exploring the impact of citizenship rules on women).

171 *See, e.g.*, United States v. Rebelo, 646 F. Supp. 2d 682 (D.N.J. 2009); United States v. Nunez-Garcia, 262 F. Supp. 2d 1073 (C.D. Cal. 2003); United States v. Accardo, 113 F. Supp. 783 (D.N.J. 1953).

172 *See, e.g.*, United States v. Chandler, 152 F. Supp. 169 (D. Md. 1957); United States v. Orrino, 120 F. Supp. 569, 572 (E.D.N.Y. 1954) ("Fraud connotes perjury, falsification, concealment and misrepresentation . . . . [and] constitutes a lack of good moral character." (quoting Knauer v. United States, 328 U.S. 654, 657 (1946))); United States v. Murray, 48 F. Supp. 920 (E.D. Ark. 1943).

173 *See* Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Laws*, 51 HOUS. L. REV. 781, 781 (2014).

174 *See, e.g.*, Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1201 (2012) ("The cost-benefit theory of naturalization posits that noncitizens do not naturalize because they do not see the benefits of U.S. citizenship outweighing the costs."); Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CONST. L. 111, 127 (2010); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1465 (1997).

Recommended Citation: Rose Cuison Villazor, Commentary, *Problematizing the Protection of Culture and the* Insular Cases, 131 HARV. L. REV. F. 127 (2018), https://harvardlawreview.org/2018/04/problematizing-the-protection-of-culture/.