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PLENARY POWER: TEACHING THE IMMIGRATION LAW OF THE TERRITORIES

Cori Alonso-Yoder *

ABSTRACT

Immigration law dominates national headlines and policy debates while immigrant communities struggle to secure legal representation. Law students are increasingly aware of these issues, often bringing lived experiences of the immigration system into the classroom. As immigration law professors seek to engage these students with doctrinal and clinical coursework, they often struggle to incorporate policy priorities and executive actions that shift with the political winds. In this tumult, many immigration law professors fail to realize that there is an entire body of U.S. immigration law they are not teaching – the immigration law of the U.S. territories. Indeed, many professors may not know that two of the five territories are not even subject to U.S. immigration law.

Yet, the operation of immigration law in American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands offers a wealth of examples that reinforce existing themes and concepts in immigration law.

This essay lays forward some of the central concepts taught in immigration legal doctrine and describes the immigration systems of the U.S. territories, including those that are exempt from federal immigration law. It then ties the legal principles at play in each system, including the central concept of the federal political branches’ “plenary power” over the territories and noncitizens alike, to topics presently taught in immigration law coursework.

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INTRODUCTION

Humberto Marchand: “You’re denying me? You’re denying me because I have a driver’s license which is a valid ID.”

Hertz Employee: “What’s your first and last name? [...] Would you like me to call the police?”¹

In May of 2023, Humberto Marchand attempted to rent a car from the Hertz rental car company at the New Orleans International Airport.² When he arrived, employees of the company refused to accept his Puerto Rican

¹ David Begnaud (@DavidBegnaud), X (May 13, 2023, 7:03 PM), <https://twitter.com/DavidBegnaud/status/1657521972031676416>.

² David Begnaud, *Hertz Apologizes for Denying Puerto Rican Man Car Because He Didn’t Have his Passport*, CBS NEWS (May 15, 2023, 1:45 PM), <https://www.cbsnews.com/news/hertz-apologizes-denying-puerto-rican-man-rental-car-new-orleans-passport-humberto-marchand/>.

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driver's license, suggesting that he was a foreign national and insisting on seeing his passport. When Marchand pressed acceptance of his validly-issued form of U.S. identification, a Hertz employee called law enforcement. The responding officer directed Marchand to leave. According to Marchand, the officer threatened Marchand that if he did not comply, the officer would contact "the border authorities,"³ if necessary.

Humberto Marchand, like the vast majority of the more than three million residents⁴ of Puerto Rico, is a United States citizen.⁵ Yet, the ignorance of the Hertz employee and, allegedly, the Louisiana police officer is typical of many Americans who do not recognize that Puerto Rico is a part of the United States that is inhabited by fellow Americans. According to a 2017 poll, almost half of the Americans surveyed did not know that Puerto Ricans are citizens of the United States.⁶ So significant is this misunderstanding that following the experience of Humberto Marchand and others, the Puerto Rican government announced in 2023 that it would begin issuing driver's licenses with the endorsement "USA" next to "Puerto Rico."⁷

Puerto Rico is the most populous and closest territory in proximity to the U.S. mainland of the five populated U.S. territories. American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands are even more unknown to many U.S. citizens. There is clearly a need for greater study of and education on the territories. Encouraging signs are evident in the law of the territories' recent resurgence in law scholarship⁸ and legal

³ *Id.*

⁴ DP05: *American Community Survey: Demographic and Housing Estimates, American Community Survey, 2019: ACS 5-Year Estimates Data Profiles*, U.S. CENSUS BUREAU, <https://data.census.gov/table/ACSDP5Y2019.DP05?q=dp05%20puerto%20rico> (last visited X date) (hereinafter "Puerto Rico Table DP05").

⁵ Alexandra C. Rivera-González et al., *The Other US Border: Health Insurance Coverage Among Latinos in Puerto Rico*, HEALTH AFF (MILWOOD) 2 (Aug. 12, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8359689/#:~:text=About%203%20percent%20of%20Puerto,and%2012%20percent%20from%20Cuba.&text=Moreover%2C%20among%20the%20approximately%20100%2C000,nearly%2030%2C000%20are%20undocumented%20immigrants> (noting that about 3% of Puerto Rico's population is foreign-born and that there are an estimated 30,000 undocumented immigrants on the island).

⁶ 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-I-know-puerto-ricans-are-us-citizens-poll>.

⁷ Kiko Martinez, *Here's Why Puerto Rico is Adding 'USA' to Driver's Licenses*, REMEZCLA (Oct. 11, 2023, 11:31 AM), <https://remezcla.com/culture/heres-why-puerto-rico-is-adding-usa-to-drivers-licenses/>.

⁸ See *U.S. Territories*, YALE L. J., <https://www.yalelawjournal.org/tag/us-territories> (last visited Mar. 19, 2024); see also *U.S. Territories*, HARV. L. REV., <https://harvardlawreview.org/topics/us-territories/> (last visited Mar. 19, 2024).

education. This essay is part of a symposium and accompanying journal issued to highlight pedagogy related to the law of the territories. In it, I argue that there is a special responsibility that immigration law professors have to integrate study of the law of territories into the immigration law curriculum. As one group of researchers put it when discussing the paucity of inquiries related to issues of immigration in Puerto Rico, “U.S. border...research has largely overlooked the island.”⁹

Indeed, a survey of the most influential immigration law casebooks reveals no focused attention on the immigration law of the territories.¹⁰ While these same sources do touch on territorial law when discussing the status of non-citizen nationals, a legal condition unique to Americans born in the territory of American Samoa,¹¹ they omit entirely the remarkable fact that American Samoa regulates its own form of immigration law. These sources also neglect to mention that since it entered into a political union with the United States in the 1970s, the Commonwealth of the Northern Mariana Islands has never fully incorporated federal immigration law.¹² The very existence of these separate immigration regulatory schemes strikes against core concepts of immigration doctrine taught on a daily basis throughout the country. Yet, immigration professors and scholars barely acknowledge them.

This essay proceeds in three parts. Part I introduces some of the central concepts from U.S. immigration law to suggest how the law of the territories illustrates the subjects presently taught in immigration law coursework. Part II describes the current state of immigration law in the five inhabited U.S. territories, while summarizing its history of U.S. involvement, geography, and relevant demographics. Part III proposes how immigration law professors can present and teach the immigration law concepts introduced in Part I through the existing curriculum. The essay concludes with resources for legal educators in the form of an appendix with a sample

⁹ Rivera-González et al., *supra* note 5.

¹⁰ See generally KIT JOHNSON, IMMIGRATION LAW: AN OPEN CASEBOOK (2d ed. 2023); T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY (9th ed. 2020); STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY (7th ed. 2018).

¹¹ JOHNSON, *supra* note 10, at 536 (citing 8 USC § 1101(a)(29)); LEGOMSKY & THRONSON, *supra* note 10, at 6.

¹² See *U.S. Immigration Law in the Commonwealth of the Northern Mariana Islands (CNMI)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/us-immigration-law-in-the-commonwealth-of-the-northern-mariana-islands-cnmi> (Oct. 4, 2023) (indicating that while the 2008 Consolidated Natural Resources Act “extended most provisions of U.S. immigration law to the Commonwealth of the Northern Mariana Islands,” the transition period for implementation has been extended through December 31, 2029).

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syllabus that builds on existing immigration topics by integrating materials relevant to the territories and a sample exercise applying the immigration law of the territories.

In so doing, the essay demonstrates how the central concept in immigration law of the political branches' plenary power to regulate immigration is also foundational in the application of territorial law. By studying these areas of law together, students and professors can begin to better understand the reach of immigration law while improving familiarity with and knowledge of the operation of the law in the territories. This not only enhances students' learning of the law; it also interrupts what Professor Maggie Blackhawk terms the law of American colonialism as "fractured and siloed," thereby "avoiding the backlash and retrenchment seen in areas of race, gender, and LGBTQIA+ constitutional reform."¹³ As Professor Jennifer Chacón observes in her response to Professor Blackhawk, "[a]mple intellectual space remains for analyzing the operation of immigration law in the context of U.S. colonialism"¹⁴ and "we must continue to fight for the teaching of the histories of the borderlands."¹⁵ This essay shares that perspective and invites immigration law professors to broaden their curriculum to account for the immigration law of the territories.

I.CONSTITUTIONAL PLENARY POWER AND FOUNDATIONAL IMMIGRATION
LAW DOCTRINE

Much of the foundational doctrine in immigration law is tied to questions of constitutional law and federalism. Students in immigration courses spend a fair amount of their studies understanding the separation of powers as it relates to federal versus state and local authority to regulate immigration. Professors also teach from sources that explain the limit of judicial intervention on matters of immigration law. Increasingly, materials that highlight the salience of race in U.S. law and policy feature prominently in immigration coursework.

This Part provides a general survey of some of the key aspects of immigration law. It begins by exploring the historical antecedents that established immigration policy, including the doctrinal justifications for determining the separation of powers in immigration law. These precedents continue today and restrict judicial review while concentrating law reform and enforcement in the political branches of the federal government. This

¹³ Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 12 (2023).

¹⁴ Jennifer Chacón, *Legal Borderlands and Imperial Legacies: A Response to Maggie Blackhawk's The Constitution of American Colonialism*, 137 HARV. L. REV. F. 1, 9 n.57 (2023).

¹⁵ *Id.* at 21.

Part begins with the historical and jurisprudential contexts for modern immigration law. It proceeds with concepts categorized around the three main buckets of immigration law that exist today: employment-based immigration, family-based immigration, and humanitarian protections.

A.Regulation of Immigration & the U.S. Constitution

1. Immigration law precursors: open frontier versus indigenous dispossession

Many immigration law casebooks proceed from a chronological accounting of U.S. immigration regulation within a historical context.¹⁶ Some authors begin the timeline with the modern United States already formed noting that, “[u]ntil the late 1800s, United States immigration law was largely a matter for the states.”¹⁷ These accounts tend to focus on European settlement, explaining that from the founding of the country in 1776 until 1875, the country was an “open frontier” with “generally unimpeded immigration.”¹⁸ Others move the timeline earlier, recognizing the existence of Native Americans in the areas European settlers colonized and noting how today’s Native Americans, “sometimes joke that the ‘Indians had bad immigration laws.’”¹⁹ Jokes aside, Professor Maggie Blackhawk observes how far from restricting immigration, the early Anglo-American law of the British colonists promoted unfettered immigration of settlers to displace Native nations:

From the earliest days of the United States, illegal settlement and military violence disrupted Native nations and plundered Native lands—violence and dispossession justified, in part, under the “Doctrine of Discovery” rooted in *terra nullius*, a law-of-nations principle that lands held by non-Christian savages were “vacant,” eligible for “discovery” by civilized, Christian peoples, as well as the origins of conquest.²⁰

¹⁶ See generally ALENIKOFF ET AL., *supra* note 10; see also LEGOMSKY & THRONSON, *supra* note 10.

¹⁷ LEGOMSKY & THRONSON, *supra* note 10, at 2.

¹⁸ *Id.* at 15.

¹⁹ See T. ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 3 (8th ed. 2016) (quoting LAWRENCE H. FUCHS & SUSAN FORBES MARTIN, SELECT COMM’N ON IMMIGR. AND REFUGEE POL’Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 162 (1981)).

²⁰ Blackhawk, *supra* note 13, at 28.

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2. The role of race in immigration regulation

As settlers continued to dispossess and decimate Native inhabitants, the economic system of the nation also began to rely on the forced migration of enslaved Africans. The earliest restriction on movement to the United States related to ending the transatlantic slave trade and was accounted for in the U.S. Constitution²¹ and in the “Act Prohibiting the Importation of Slaves” in 1808.²²

Yet, few immigration professors teach this legislation as forming part of the canon of immigration law, and most point to the 1882 Chinese Exclusion and Immigration Acts as the dawn of American legislation restricting immigration to the United States.²³ The undercurrent of racist sentiment is well-documented in these enactments, particularly in the overtly titled Chinese Exclusion Act. In 1889, the United States Supreme Court blessed the legislation and affirmed the political power of the federal government to exclude Chinese nationals.²⁴ In a decision rendered by the same court that would decide *Plessy v. Ferguson*, and the *Insular Cases*,²⁵ the Court determined that the federal government was empowered to “preserve its independence and give security against foreign aggression and encroachment...from vast hordes...crowding in upon us.”²⁶ This power, while not explicitly enumerated in the Constitution, derived from the federal government’s naturalization power, war power, foreign affairs power, and as an incident of sovereignty.²⁷ The Court went on to explain that in this arena, the federal government’s determination “is conclusive upon the judiciary.”²⁸

This language from *Chae Chan Ping v. United States*, or the *Chinese Exclusion Case*, would come to stand for the proposition that the federal government enjoys “plenary power” in determining immigration law. It

²¹ See U.S. CONST. art. I, § 9, cl. 1.

²² *An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord, one thousand eight hundred and eil ... March 2, 1810. Approved.*, LIBR. OF CONG., <https://www.loc.gov/item/2020767984/> (last visited Mar. 19, 2024).

²³ See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 16–17 (2007).

²⁴ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889); see also *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (an earlier case in which the Supreme Court struck down a California exclusion law for infringing on Congress’s authority to regulate foreign commerce).

²⁵ See Cori Alonso-Yoder, *Imperialist Immigration Reform*, 91 *FORDHAM L. REV.* 1623, 1632 (2023).

²⁶ *The Chinese Exclusion Case*, 130 U.S. at 606.

²⁷ *Id.* at 603–04.

²⁸ *Id.* at 606.

remains good law today, and explains in large part why most of the United States is subject to a uniform system of immigration at the federal level.

B. Foreign Labor Importation

The Chinese Exclusion Act passed into law after concerted efforts by U.S. interests to facilitate migration of Chinese nationals to the United States to labor in various industries, most notably, the transcontinental railroad.²⁹ When the railroad was completed, Chinese laborers were regarded as undesirable and expendable.³⁰ Mutual interest in foreign labor in the United States has led to a series of employment-based immigration categories. Today, employment-based permanent immigration³¹ is provided for, as is employment-based status for nonimmigrant, or temporary workers.³² Both programs are highly restrictive, burdensome, and politically charged.

C. Family-based Immigration

The modern immigration program for uniting family members bloomed out of the post-World War II era. While immigration laws had become quite restrictive, particularly given the implementation of racist national origin quotas in the 1924 Immigration Act,³³ some of these restrictions were eased to allow for the entry of spouses and children of American servicemen.³⁴ Today's immigration system is notoriously long and labyrinthine with certain family categories backlogged by decades.³⁵

D. Humanitarian Protections

Another innovation of the post-World War II era was the expansion of immigration pathways for humanitarian-based reasons. The 1948 Displaced

²⁹ Hall of Honor Inductee: The Chinese Railroad Workers, U.S. DEP'T OF LAB., [https://www.dol.gov/general/aboutdol/hallofhonor/2014_railroad#:~:text=The%20Chinese%20Railroad%20Workers%20\(1865,engineering%20feats%20in%20American%20history](https://www.dol.gov/general/aboutdol/hallofhonor/2014_railroad#:~:text=The%20Chinese%20Railroad%20Workers%20(1865,engineering%20feats%20in%20American%20history) (last visited Mar. 24, 2020).

³⁰ See MOTOMURA, *supra* note 23, at 16–17 (relating the history of anti-Chinese sentiment leading up the passage of the Chinese Exclusion Act).

³¹ 8 U.S.C. § 1255.

³² See 8 U.S.C. § 1101(a)(15)(A), (C), (D), (E), (G), (H), (I), (L), (O), (P), (Q).

³³ Immigration Act of 1924, PUB. L. NO. 68-139, 43 Stat. 153.

³⁴ See LEGOMSKY & THRONSON, *supra* note 10, at 18 (referencing the War Brides Act and Fiancées Act).

³⁵ See *Visa Bulletin for April 2024*, DEPT. OF STATE (Mar. 4, 2024), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-april-2024.html> (indicating that visas issued in April 2024 to married sons and daughters of U.S. citizens being issued to applicants from Sept. 1998).

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Persons Act admitted roughly 400,000 war refugees into the United States.³⁶ In 1951, the recently formed United Nations adopted the Convention Relating to the Status of Refugees.³⁷ The United States did not sign the Convention until 1968 when it became an indirect party through the endorsement of the U.N.'s 1967 Protocol Relating to the Status of Refugees.³⁸ The 1980 Refugee Act incorporated these international commitments into federal law.³⁹ Despite these efforts liberalizing the immigration system to allow for humanitarian benefits, the more general trend in immigration law continued to be one of restriction. As a result, a new series of immigration protections for compelling humanitarian needs continued into the 1990s. The 1994 Violence Against Women Act⁴⁰ created immigration relief for certain survivors of domestic violence. The 2000 Victims of Trafficking and Violence Protection Act also created an immigration status provision for survivors of human trafficking and certain crime victims.⁴¹

II. OVERVIEW OF THE U.S. TERRITORIES

It bears noting at the outset that while the territories have largely been reduced to a singular political and legal status at the federal level, they are in fact separated by thousands of miles of geography and disparate cultural traditions. U.S. immigration law also pretends to treat foreign nationals in a uniform manner despite a series of historical precedents that have done quite the opposite.

This part of the essay gives an overview of the legal framework governing the territories and introduces each of the U.S. territories in the chronological order in which they came under the colonial rule of the United States.⁴² It lays forward specifics about the geography, demographics, and pertinent aspects of immigration law today.

Colonialism has been the organizing force propelling the formation of the U.S. since the earliest days of European settlement and the experience of the country's modern colonies reflects a variation on that theme. Initially,

³⁶ LEGOMSKY & THRONSON, *supra* note 10, at 17–18.

³⁷ U.N. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 137.

³⁸ U.N. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

³⁹ *See* Refugee Act of 1980, PUB. L. NO. 96-212, 94 Stat. 102.

⁴⁰ *See* PUB. L. NO. 103-322, 108 Stat. 1902.

⁴¹ *See* PUB. L. NO. 106-386, 114 Stat. 1464; *see also* 8 U.S.C. § 1101(a)(15)(T), (U).

⁴² This timeline is not meant to denigrate the important histories and cultural patrimonies that predated U.S. intervention in the territories. This essay merely adopts the U.S. “gaze” toward the territories in as far as it is a study of the operation of federal constitutional and immigration law in the territories.

the country used the process of territorial expansion to expand white settlement into what is today the western United States. Under this process, territories were presumed to be on the trajectory to eventually become new states of the Union.⁴³ This process was supported by the U.S. Constitution which laid out a provision for the incorporation of new states into the Nation and gave broad authority to Congress to work with state legislatures to decide on the admission of new states.⁴⁴ This territory-to-statehood trajectory generally applied to the U.S. acquisition of new territories in the nineteenth century, though questions of race, ethnicity, and language at times led to delays in the grant of statehood.⁴⁵

The Constitution also gave Congress the power to, “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁴⁶ This clause created a legal proposition under which “[f]ederal power is theoretically plenary and unlimited with respect to the territories.”⁴⁷ The resulting doctrine that legal scholars have identified as Congress’s “plenary power” to regulate the territories was strengthened by an infamous series of cases in the early twentieth century.

Resulting from the U.S. victory over the Spanish in the Spanish-American War, the United States in 1898 entered into a new era of territorial expansion and imperialist experimentation. As the spoils of war, the United States took possession of Guam, Puerto Rico, and the Philippines.⁴⁸ While prior territorial endeavors had generally rested on westward expansion

⁴³ See Kristina Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 589 (2022).

⁴⁴ See U.S. CONST. art. IV, § 3, cl. 1. (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress”).

⁴⁵ See e.g. Kathleen Ferris, *Racism as an Impediment to Statehood*, UNIV. OF N.M. DIGIT. REPOSITORY (Sept. 9, 2011), <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1002&context=nmstatehood2> (comparing the 62 years it took for New Mexico’s majority Mexican and Indigenous population achieve statehood to the experiences of other Western States that varied from 14 to 46 years).

⁴⁶ See U.S. CONST. art. IV, § 3, cl. 2.

⁴⁷ ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 110 (2014).

⁴⁸ See Treaty of Peace Between the United States and Spain art. II., U.S.-Spain, Dec. 10, 1898, 49 U.N.T.S. 3 [hereinafter Treaty of Paris] (“Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones”). The Philippines would eventually gain independence from the United States on July 4, 1946. See Philippine Independence Act of 1934, ch. 84, 48 Stat. 456,

<https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/48/STATUTE-48-Pg456.pdf>.

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premised on white settlement, these new non-contiguous territories were populated by non-white residents who differed in language, custom, and geography. Law and policy soon deviated from many norms with regard to its treatment of the new territorial possessions. Three days after the treaty that ended the war, the United States established a Division of Customs and Insular Affairs under the Secretary of War “to administer customs and civil affairs in the islands acquired by the United States.”⁴⁹ Policies that suspended the extension of political and legal rights in the islands were concretized in what would come to be known as the *Insular Cases*.⁵⁰

It bears noting for this pedagogical essay, that judicial reckoning with the question of the legal status of these territories followed a lively scholarly debate by some of the nation’s most prominent legal educators of the time.⁵¹ Dean Christopher Columbus Langdell of Harvard Law School, who is credited with establishing the casebook method of legal education that still dominates the curriculum today, reasoned that: “None of these islands have been acquired with a view to their being admitted as States, and it is to be sincerely hoped that they never will be so admitted, i.e., that they will never be permitted to share in the government of this country.”⁵²

This concept, that the territories were not intended by the national government to become part of the greater United States, would form the basis of the territorial incorporation doctrine. Justice Edward D. White’s concurring opinion in *Downes v. Bidwell* embraced this differentiation

⁴⁹ *Records of the Bureau of Insular Affairs (Record Group 350)* 1868-1945, NATIONAL ARCHIVES, <https://www.archives.gov/research/guide-fed-records/groups/350.html#350.1> (last visited X date).

⁵⁰ While some scholars include decisions regarding the territories made well into the late twentieth century as comprising the *Insular Cases*, the series of cases decided immediately following the conclusion of the Spanish-American War are most widely regarded as making up the *Insular Cases*. According to Judge Juan Torruella, they include *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901). Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 284 n.4 (2007).

⁵¹ 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 (1899) (arguing for the application of constitutional law in the territories with full vigor through a combination of the territorial clause and the privileges and immunities clause of the Constitution); see also James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 466–67 (1899) (positing that the Constitution affords the federal government, “the legal, constitutional power to govern these islands as colonies substantially as England might govern them” because this would “teach nations how to live”).

⁵² Christopher Columbus Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 391 (1899).

between territories bound for statehood – incorporated territories – and the country’s new island possessions.⁵³ When determining the reach of the Constitution to protect the rights of Puerto Ricans, Justice White concluded that Congress had not acted to incorporate the island for statehood in the Treaty of Paris.⁵⁴ As a result, the Constitution’s reach was limited there. Speaking for the plurality opinion, Justice Henry B. Brown spoke more directly to the racist underpinnings of the jurisprudential debate:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of Indians.⁵⁵

Downes v. Bidwell would serve as the leading decision in the series of Supreme Court precedents limiting the rights of territorial residents that would come to be known collectively as the *Insular Cases*. These cases have yet to be formally overruled and continue to cast a shadow on the application of constitutional law on the five U.S. territories today.

A. Puerto Rico & Guam

As described above, Puerto Rico and Guam both came under U.S. political influence at the conclusion of their colonial relationships with the country of Spain. Both territories were ceded to the United States with the 1898 Treaty of Paris at the conclusion of the Spanish-American War.⁵⁶ Despite this commonality in the circumstances generating their political relationship with the United States, the two territories are separated by thousands of mile geography, demographics, and population. This section sets forward these differences as they relate to understanding the operation of immigration law in each.

1. Puerto Rico

As explained in the Introduction, Puerto Rico is the most densely populated of the five U.S. territories with more than three million residents

⁵³ *Downes v. Bidwell*, 182 U.S. 244, 340 (1901).

⁵⁴ *Id.*

⁵⁵ *Id.* at 277.

⁵⁶ Treaty of Paris art. II., U.S.-Spain, Dec. 10, 1898, 49 U.N.T.S. 3.

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on the island,⁵⁷ approximately 99% of whom are Latino.⁵⁸ The total white non-Hispanic population accounts for 17.1%.⁵⁹ Its proximity to the U.S. mainland – 980 miles separate the Puerto Rican city of Aguadilla from Miami, Florida⁶⁰ – has also created a significant diaspora of Puerto Rican descendants on the U.S. mainland. The Pew Research Center estimates the population of Americans of Puerto Rican descent at about 5.8 million individuals.⁶¹

As explained above, the status of Puerto Rico as one of the nation’s newest overseas possessions quickly brought the legal question of the rights of the territories under judicial review. Beginning with *Downes v. Bidwell*’s proclamation that Puerto Rico was “foreign to the United States in a domestic sense,”⁶² a series of cases sought to clarify the legal protections afforded to the island. In 1902, Isabel Gonzalez arrived to New York from Puerto Rico and was detained by U.S. immigration officials.⁶³ She was denied entry to the United States as an “alien immigrant” likely to become a public charge.⁶⁴ Gonzalez denied her detention on the grounds that she was a U.S. citizen.⁶⁵ The Court agreed that Gonzalez should not be excluded from the country, only because she was not an “alien immigrant.”⁶⁶ The Court refused to affirm Gonzalez’s contention that she was a citizen and U.S. citizenship for the people of Puerto Rico was not settled until 1917.

In that year, the Jones Act finally conferred citizenship on the residents of Puerto Rico.⁶⁷ It provided for a kind of opt-out to Congress’s blanket

⁵⁷ *Puerto Rico Table DP05*, *supra* note 4.

⁵⁸ Rivera-González et al., *supra* note 5, at 2.

⁵⁹ America Counts Staff, *Puerto Rico Population Declined 11.8% From 2010 to 2020*, U.S. Census Bureau (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/puerto-rico-population-change-between-census-decade.html>.

⁶⁰ Robert Kay, *American Cities Closest to Puerto Rico*, USA TODAY, <https://traveltips.usatoday.com/american-cities-closest-puerto-rico-110033.html> (last visited X date).

⁶¹ Mohamad Moslimani et al., *Facts on Hispanics of Puerto Rican origin in the United States, 2021*, PEW RSCH. CTR. (Aug. 16, 2023) <https://www.pewresearch.org/hispanic/fact-sheet/us-hispanics-facts-on-puerto-rican-origin-latinos/>.

⁶² 182 U.S. 244, 341 (1901).

⁶³ *Gonzales v. Williams*, 192 U.S. 1, 7 (1904); *see also* Brief of the Descendants of Dred Scott and Isabel Gonzalez as Amici Curiae in Support of Petitioners, *Fitisemanu v. United States*, 143 S.Ct. 362 (2022) (No. 21-1394). While the Supreme Court named the Petitioner “Isabella Gonzales,” I use the name acknowledged by her familial descendants in their amicus brief, Isabel Gonzalez.

⁶⁴ *Gonzales v. Williams*, 192 U.S. 1, 7 (1904).

⁶⁵ *Id.* at 12.

⁶⁶ *Id.* at 13.

⁶⁷ Puerto Rican Federal Relations (Jones) Act, ch. 145, sec. 5, 39 Stat. 951 (1917).

naturalization⁶⁸ of the people of Puerto Rico, offering an oath requirement whereby a resident could avoid U.S. citizenship by making a declaration in federal court to “retain his present political status.”⁶⁹ Notably this provision did not account for birthright citizenship. Congress finally established citizenship for Puerto Ricans born in the territory with the Nationality Act of 1940.⁷⁰ Section 202 of that law provided that:

All persons born in Puerto Rico on or after April 11, 1899, subject to the jurisdiction of the United States, residing on the effective date of this Act in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are hereby declared to be citizens of the United States.⁷¹

Today, birthright citizenship in Puerto Rico continues under congressional enactment and no court decision has ever affirmed birthright citizenship for Americans born in Puerto Rico under the Fourteenth Amendment to the U.S. Constitution.⁷² The 1940 Nationality Act also affirmed the definition of Puerto Rico as part of the United States in a “geographical sense”⁷³ and today immigration law operates in the territory in roughly the same fashion as in the 50 states. The largest immigrant group on the island is represented by 100,000 Dominican nationals, approximately 30,000 of whom are undocumented.⁷⁴

2. Guam

Guam is located in the Northern Pacific, approximately 8,000 miles from Washington, DC and 3,000 miles from the closest U.S. state.⁷⁵ It lies at the southern part of the Mariana Island chain.⁷⁶ The island had a population of 153,836 people at the time of the most recent census, with a

⁶⁸ See 8 U.S.C. § 1101(a)(23) (“‘naturalization’ means the conferring of nationality of a state upon a person after birth, by any means whatsoever”).

⁶⁹ *Id.*

⁷⁰ See Nationality Act of 1940, PUB. L. NO. 76-853, 54 Stat. 1137.

⁷¹ *Id.* § 202.

⁷² See Brief of the Descendants of Dred Scott and Isabel Gonzalez as Amici Curiae in Support of Petitioners, *Fitisemanu v. United States*, 143 S.Ct. 362 (2022) (No. 21-1394) at 3 (“Congress has extended citizenship to those born in the Commonwealth by statute. But no court has confirmed Puerto Ricans’ status as birthright citizens under the Constitution”).

⁷³ Nationality Act of 1940, PUB. L. NO. 76-853, § 101(d), 54 Stat. 1137.

⁷⁴ Rivera-González, *supra* note 5, at 2.

⁷⁵ LEIBOWITZ, *supra* note 47, at 314.

⁷⁶ *Id.*

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majority non-white populace.⁷⁷ This includes the largest census-created racial group, “Native Hawaiian and Other Pacific Islanders,” totaling 46% of the population.⁷⁸ It also includes the majority Chamorro ethnic group at 32.8%.⁷⁹ This category is followed by a large Asian population totaling 35.5%.⁸⁰ The white residents of the island account for a mere 6.8% of the total population.⁸¹

When it comes to Guam’s integration into the nation, the U.S. Congress did not provide for a federally-recognized governmental structure on the island until more than fifty years after the territory came under U.S. control. During that time the political status of Guam was considered “anomalous, with a military governor holding all legislative, executive and judicial authority over the land.”⁸² The Organic Act of 1950 established Guam as an unincorporated U.S. territory,⁸³ drawing on the legal status distinction established with the *Insular Cases*.⁸⁴ The Act also conferred citizenship status on the Guamanians, though by some accounts “Congress to date has acted as if obtaining U.S. citizenship was inconsequential.”⁸⁵ Today, nearly 75 years later, Guam still does not have its own constitution and the Organic Act continues to form the legal basis of the relationship between Guam and the U.S. Government.

In terms of immigration, Guam’s entry requirements “are the same as for any U.S. destination.”⁸⁶ But the foreign-born share of Guam is not at all like the general foreign-born population of the United States. According to the selected data from the 2020 census, the foreign-born population of

⁷⁷ *DPI: General Demographic Characteristics, Decennial Census of Island Areas, 2020: DECIA Guam Demographic Profile*, U.S. CENSUS BUREAU, <https://data.census.gov/table/DECENNIALDPGU2020.DP1?d=DECIA%20Guam%20Demographic%20Profile> (last visited Mar. 15, 2024) (hereinafter Guam Table DP1).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² LEIBOWITZ, *supra* note 47, at 313 (quoting Guam & Tutuila—Mil. Governors—Comm’ns, 25 Op. Att’y Gen. 292 (1904)).

⁸³ *Id.*

⁸⁴ *See supra* note 50.

⁸⁵ LEIBOWITZ, *supra* note 47, at 329.

⁸⁶ *Entry & Exit Formalities*, GUAM VISITORS BUREAU, <https://www.visitguam.com/about-guam/entry-and-exit-formalities/#:~:text=Entry%20requirements%20for%20Guam%20are,copy%20of%20the%20birth%20certificate> (last visited Mar. 28, 2024)

Guam is 50,374 individuals⁸⁷ out of a total population of 153,836 people.⁸⁸ This means the foreign-born population of Guam accounts for nearly 33% of the total population. The total foreign-born population of the United States is 13.9%.⁸⁹ Of the total foreign-born population, 31,058⁹⁰ individuals were born in the Philippines, meaning that Filipino immigrants alone account for 20% of the total Guamanian population.

B. American Samoa

Located in the South Pacific Ocean, American Samoa is the territory that is most distant from the contiguous United States. Comprised of seven islands and atolls (including the port town of Pago Pago on the main island of Tutuila), it is over 2,000 miles southwest of Hawaii⁹¹ and nearly 7,000 miles from Washington, D.C.⁹² The legal system of the territory is also remarkably distant from the system of laws recognized by most American lawyers. Federal jurisdiction is limited in American Samoa⁹³ and the territory is entirely exempt from federal immigration law.⁹⁴

American Samoa's unique legal arrangement with the United States owes in part to the distinctive way in which it came under U.S. influence. U.S. interests in the island chain began in the mid-nineteenth century during a time when the area was already subject to the colonizing influences of European powers, most notably the British and German.⁹⁵ In 1899, the British, German, and American colonizing powers agreed that Germany and Great Britain would renounce "in favor of the United States of America... all

⁸⁷ DP2: *Selected Social Characteristics, Decennial Census of Island Areas, 2020: DECIA Guam Demographic Profile*, U.S. CENSUS BUREAU, <https://data.census.gov/table/DECENNIALDPGU2020.DP2?d=DECIA%20Guam%20Demographic%20Profile> (last visited Mar. 15, 2024) (hereinafter Guam Table DP2).

⁸⁸ Guam Table DP1, *supra* note 77.

⁸⁹ Nicole Ward & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Mar. 14, 2023), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

⁹⁰ Guam Table DP2, *supra* note 87.

⁹¹ LEIBOWITZ, *supra* note 47, at 402.

⁹² Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 WASH. INT'L L. J. 325, 325 (2008).

⁹³ *Id.*

⁹⁴ *American Samoa*, U.S. DEP'T OF INTERIOR, <https://www.doi.gov/oia/islands/american-samoa#:~:text=American%20Samoa%20came%20under> (last visited Mar. 28, 2024) ("American Samoa...controls its own immigration and border matters.")

⁹⁵ LEIBOWITZ, *supra* note 47, at 413.

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rights and claims over and in respect to the Island of Tutuila and all other islands of the Samoan group east of Longitude 171.”⁹⁶

After such a disruptive and exploitative colonial past, it is more than understandable that the people of American Samoa have taken great pride in preserving their cultural practices and maintenance of self-government. Indeed, unlike in the experiences of Guam and Puerto Rico, ethnically indigenous political interests also participated in the U.S. acquisition of the territory. In 1900 and 1904, Samoan high chiefs (*Matai* in Samoan) formally ceded six of the seven islands in an agreement that would come to form part of the code of American Samoa.⁹⁷ As part of this agreement, the United States agreed to “respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District.”⁹⁸ Another central feature of the agreement permitted inhabitants of American Samoa to retain property rights based on blood ties in a system that persists today.

The population of American Samoa is 49,710 with ethnic Samoans accounting for 83.2% of the total population.⁹⁹ The white population totals 0.8%¹⁰⁰ and the foreign-born population totals 17,683 individuals, or roughly 36% of the population overall.¹⁰¹ The country that is represented with the largest share of the “foreign-born” population, nearly 79%, is the independent nation of Samoa.¹⁰²

American Samoa is the only jurisdiction within the United States that does not recognize birthright citizenship. Instead, Americans born in

⁹⁶ *Id.* at 414 (quoting Convention Between the United States, Germany, & Great Britain to Adjust Amicably the Questions Between the Three Governments in Respect to the Samoan Group of Islands, Dec. 2, 1899, 31 Stat. 1878 [hereinafter Tripartite Convention]).

⁹⁷ LEIBOWITZ, *supra* note 47, at 415; *See* Cession of Tutuila and Anu'u, April 17, 1900, U.S.-Tutuila Samoa. The final island, Swain's Island, was eventually annexed by congressional enactment. H.R.J. Res. 294, 68th Cong. (1925).

⁹⁸ Cession of Tutuila and Anu'u, April 17, 1900, U.S.-Tutuila Samoa, *preface to Am. Samoa Code Ann.* at 2 (1992).

⁹⁹ *DP1: General Demographic Characteristics, Decennial Census of Island Areas, 2020: DECIA American Samoa Demographic Profile*, U.S. CENSUS BUREAU, <https://data.census.gov/table/DECENNIALDPAS2020.DP1?d=DECIA%20American%20Samoa%20Demographic%20Profile> (last visited Mar. 15, 2024) (hereinafter American Samoa Table DP1).

¹⁰⁰ *Id.*

¹⁰¹ *DP2: Selected Social Characteristics, Decennial Census of Island Areas, 2020: DECIA American Samoa Demographic Profile*, U.S. CENSUS BUREAU, <https://data.census.gov/table/DECENNIALDPAS2020.DP2?d=DECIA%20American%20Samoa%20Demographic%20Profile> (last visited Mar. 15, 2024) (hereinafter American Samoa Table DP2).

¹⁰² *Id.*

American Samoa are subject to the anachronistic political status of non-citizen nationals under the U.S. Code.¹⁰³ Individual American Samoans have challenged this designation in recent federal litigation,¹⁰⁴ gaining legal traction and public awareness in the effort. But the circuit courts of appeal have denied these claims for the extension of constitutional birthright citizenship.¹⁰⁵ In these decisions, courts have leaned heavily not only on Supreme Court precedent in the *Insular Cases*, but have also invoked the cultural preservation of the ethnic Samoan way of life.¹⁰⁶

Some have attributed the limited federal political rights as a tradeoff for the expanded local autonomy granted to American Samoa. Among the more expansive authorities granted to the territory is its entirely unprecedented exemption from federal immigration law. American Samoa is the only locality to enjoy this absolute exemption. Stunningly, even United States citizens are excluded from immigrating to Samoa. Initially, American citizens could not even enter the territory without proper documentation.¹⁰⁷ Today, the immigration laws of American Samoa recognize just three immigration statuses: U.S. nationals, temporary residents, and the undocumented.¹⁰⁸ Compared to the bloated U.S. immigration system, American Samoa provides only ten categories of immigration classifications.¹⁰⁹ The categories under which non-nationals may obtain temporary residency in American Samoa are limited to family- and employment-based immigration.¹¹⁰ These temporary statuses are all subject to renewal, either on an annual or triennial basis.¹¹¹

C.U.S. Virgin Islands

The U.S. Virgin Islands (USVI) are located in the Caribbean Sea, about 100 miles off the coast of Puerto Rico and 1,596 miles from Washington,

¹⁰³ See 8 U.S.C. § 1408.

¹⁰⁴ See *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ LEIBOWITZ, *supra* note 47, at 447–48.

¹⁰⁸ David North, *What Can America Learn from the Immigration Rules of American Samoa?*, CTR. FOR IMMIGR. STUD. (Nov. 21, 2023), <https://cis.org/North/What-Can-America-Learn-Immigration-American-Samoa#:~:text=In%20American%20Samoa%20there%20is,There%20is%20no%20naturalization%20process>.

¹⁰⁹ See *Residency Classifications*, DEP'T OF LEGAL AFFS., <https://www.legalaffairs.as.gov/residency-classifications> (last visited Mar. 28, 2024).

¹¹⁰ *Immigration Office*, DEP'T OF LEGAL AFFS., <https://www.legalaffairs.as.gov/copy-of-immigration-office-1> (last visited Mar. 28, 2024).

¹¹¹ *Residency Classifications*, *supra* note 109.

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D.C. There were 87,146 inhabitants of the USVI at the time of the most recent census.¹¹² Of this number 71.4% identified as Black or African American, 18.4% as Hispanic or Latino, while 13.3% were classified as white.¹¹³

Following a history of European colonial influence and control that began in the fifteenth century, the United States eventually purchased the islands from the Danish under a treaty ratified in 1917.¹¹⁴ The question of the inhabitants of the islands' political status was initially answered with a familiar refrain: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress of the United States."¹¹⁵ Legislation enacted the year concluding the territory's purchase established a governmental structure that mirrored the status of the U.S. territories in existence at that time.¹¹⁶ Notably, this legislation omitted discussion of the legal status of the islands' inhabitants but this was resolved by legislation in 1927 that granted U.S. citizenship to Virgin Islanders.¹¹⁷

Today, the U.S. Virgin Islands is subject to the same system of immigration as in the 50 states and District of Columbia. The foreign-born population of the USVI is 29,579, or 34% of the total population. The vast majority of these individuals, 26,836, immigrated from other countries in the Caribbean.¹¹⁸

¹¹² *P1: Total Population, Decennial Census of Island Areas, Universe: Total Population, DECIA U.S. Virgin Islands Demographic and Housing Characteristics*, U.S. CENSUS BUREAU, [https://data.census.gov/table/DECENNIALDHCVI2020.P1?q=United States Virgin Islands](https://data.census.gov/table/DECENNIALDHCVI2020.P1?q=United+States+Virgin+Islands) (last visited Mar. 16, 2024) (hereinafter *Virgin Islands Table P1*).

¹¹³ *DP1: General Demographic Characteristics, Decennial Census of Island Areas, 2020: DECIA U.S. Virgin Islands Demographic Profile*, U.S. CENSUS BUREAU, [https://data.census.gov/table/DECENNIALDPVI2020.DP1?g=040XX00US78&d=DECIA A%20U.S.%20Virgin%20Islands%20Demographic%20Profile](https://data.census.gov/table/DECENNIALDPVI2020.DP1?g=040XX00US78&d=DECIA%20U.S.%20Virgin%20Islands%20Demographic%20Profile) (last visited Mar. 16, 2024) (hereinafter *Virgin Islands Table DP1*).

¹¹⁴ LEIBOWITZ, *supra* note 47, at 245.

¹¹⁵ LEIBOWITZ, *supra* note 47, at 248 (quoting CHARLES CALLAN TANSILL, *THE PURCHASE OF THE DANISH WEST INDIES* 490 (1932)).

¹¹⁶ *See An Act to Provide a Temporary Government for the West Indian Islands Acquired by the United States from Denmark by the Convention Entered Into Between Said Countries on the Fourth Day of August, Nineteen Hundred and Sixteen, and Ratified by the Senate of the United States on the Seventh Day of September, Nineteen Hundred and Sixteen, and for Other Purposes*, PUB. L. NO. 64-388, 39 Stat. 1132 (1917).

¹¹⁷ *An Act to Confer United States Citizenship Upon Certain Inhabitants of the Virgin Islands and to Extend the Naturalization Laws Thereto*, PUB. L. NO. 69-640, 44 Stat. 1234 (1927).

¹¹⁸ *Virgin Islands Table DP1*, *supra* note 113.

D. Northern Mariana Islands

The Commonwealth of the Northern Mariana Islands (CNMI) is located roughly 8,000 miles from Washington, D.C. in the Philippine Sea. Its population totals 47,329,¹¹⁹ the majority of whom (22,054) are Asian.¹²⁰ The native Hawaiian and Pacific Islander category, which includes the native Chamorro ethnic group, is represented by 20,665 individuals.¹²¹ The Filipino population is significant with a staggering 33,175 individuals identifying as Filipino alone or in combination with another group.¹²² In 2017, the white population of the territory represented a mere 1.1%.¹²³

The CNMI came under the political control of the United States as a result of negotiations between the political leadership of the Northern Mariana Islands and the U.S. government following World War II.¹²⁴ Following a plebiscite vote that approved entering into a political union with the United States by a whopping 78.8%, Congress and President Gerald Ford ratified the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America and incorporated it into federal law.¹²⁵ During the negotiations leading to the approval of the covenant, the Samoan example was instructive to the leadership of the Northern Mariana Islands in navigating its relationship with the United States.¹²⁶ The covenant provided that the CNMI would initially be exempt from federal minimum wage¹²⁷ and

¹¹⁹ P1: Total Population, Decennial Census of Island Areas, Universe: Total Population, 2020: DECIA Commonwealth of the Northern Mariana Islands Demographic and Housing Characteristics, U.S. CENSUS BUREAU, <https://data.census.gov/table/DECENNIALDHCMP2020.P1?q=commonwealth%20of%20the%20northern%20mariana%20islands> (last visited Mar. 16, 2024) (hereinafter CNMI Table P1).

¹²⁰ Press Release, U.S. Census Bureau, 2020 Island Areas Censuses Data on Demographic, Soc., Econ. And Hous. Characteristics Now Available for the N. Mar. I. (Oct. 20, 2022) (on file with author) <https://www.census.gov/newsroom/press-releases/2022/2020-island-areas-northern-mariana.html>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ CNMI Labor Force Participation Survey 2017 Population Characteristics, N. MAR. I. DEP'T OF COM., <https://ver1.cnmicommerce.com/lfp-population-characteristics-2017-by-ethnic-group/#:~:text=CNMI%20Total,6.2%25%20of%20the%20total%20population> (last visited Apr. 11, 2024).

¹²⁴ See Cori Alonso-Yoder, *Imperialist Immigration Reform*, 91 FORDHAM L. REV. 1623, 1627 (2023)

¹²⁵ *Id.*; see also PUB. L. NO. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1801).

¹²⁶ LEIBOWITZ, *supra* note 47, at 94.

¹²⁷ An Act to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce, and for Other Purposes, ch. 676, 52 Stat. 1060 (1938) (codified as amended in scattered sections of 29 U.S.C.); see also § 6, 52 Stat.

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immigration laws.¹²⁸ The covenant also established naturalization for the residents of the CNMI and birthright citizenship for future generations.¹²⁹

This history of U.S. relations with the Northern Mariana Islands is perhaps the most unique in its bilateral character. While it would be naïve to suggest that the relationship is one of equal partnership, the leaders of the Northern Mariana Islands did enjoy a greater level of autonomy and decision-making authority when it came to establishing itself as a political extension of the United States. One of the key conditions exerted by the leadership of the Northern Marianas was Congress's concession to delay the full implementation of federal immigration law until an undetermined point in the future. As of this writing, the federal government has agreed to a further delay in the incorporation of U.S. immigration law until 2030.¹³⁰ In a shocking policy deviation, President Donald Trump signed federal legislation to grant federal immigration status to CNMI inhabitants regardless of whether their originally entry to the territory was authorized.¹³¹

III. TEACHING THE IMMIGRATION LAW OF THE TERRITORIES

While the history and circumstances of the U.S. involvement with territories have varied, commonalities emerge. Among these have been determining policies of naturalization, citizenship status, immigration control, and more fundamental questions of the reach of federal law into these jurisdictions. All of these questions implicate the parameters of federal immigration law, yet few scholars, and fewer teachers of immigration law, have focused on the immigration and nationality laws of the territories. Even the top nonpartisan migration policy thinktank seemingly does not compile information on the rates of immigration to the

1060, 1062 (codified as amended at 29 U.S.C. § 206); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 503, 90 Stat. 263, 268 (1976).

¹²⁸ Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 503(a), 90 Stat. 263, 268.

¹²⁹ *Id.* art. III, 90 Stat. 263, 265–66.

¹³⁰ See *U.S. Immigration Law in the Commonwealth of the Northern Mariana Islands (CNMI)*, *supra* note 12 (indicating that while the 2008 Consolidated Natural Resources Act “extended most provisions of U.S. immigration law to the Commonwealth of the Northern Mariana Islands,” the transition period for implementation has been extended through December 31, 2029).

¹³¹ *CNMI Long-Term Resident Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/cnmi-long-term-resident-status> (Oct. 24, 2023); see also Northern Mariana Islands Long-Term Legal Residents Relief Act, PUB. L. NO. 116-24, 133 Stat. 977 (2019) (codified as 48 U.S.C. § 1806(e)(6)).

territories.¹³² This absence leads to reporting of questionable reliability particularly as it relates to accurate accounting of the representation of certain groups in the United States. The Migration Policy Institute's 2014 report on Filipino immigration omits data from Guam and the CNMI despite the significant Filipino population present in both territories.¹³³ This lack of inquiry only furthers misunderstandings of the territories as outside of the United States and neglects the opportunities to explore how the territories have been treated by U.S. law *as if* they were foreign from the U.S. political project. In this Part, I suggest how teaching the immigration and nationality laws of the territories may be brought into the immigration law curriculum.

A.Regulation of Immigration, Federalism, and Race

The operation of immigration law in the territories offers unique opportunities to deepen the understanding of some of the foundational concepts in the development of immigration law. This section explores how the concept of federal plenary power, including limitations on state and local regulation, and the importance of race are present in the immigration laws of the territories.

1. Constitutional plenary power

As explained above, the federal government is deemed to enjoy plenary power under the U.S. Constitution in regulating the territories and immigration alike. Under the territorial clause and subsequent territorial incorporation doctrine, courts have determined that Congress has the exclusive authority to determine the laws of the territories.¹³⁴ A similar authority under the plenary power doctrine has animated U.S. immigration law since some of the earliest restrictions on U.S. immigration.¹³⁵ As a result of this understanding, the federal government has claimed to preempt state and local control of U.S. immigration law.¹³⁶ Immigration law professors teach this maxim of law unquestioningly, despite clear indications of a contrary system at play in two of the U.S. territories. Teaching the immigration laws of the CNMI and especially American

¹³² *United States, Demographics & Social*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/state-profiles/state/demographics/US> (last visited Mar. 28, 2024).

¹³³ Sierra Stoney & Jeanne Batalova, *Filipino Immigrants in the United States*, MIGRATION POL'Y INST. (June 5, 2013), <https://www.migrationpolicy.org/article/filipino-immigrants-united-states-2011>.

¹³⁴ *See supra* Part II.

¹³⁵ *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

¹³⁶ *See* Arizona v. United States, 567 U.S. 387 (2012).

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Samoa can help to call into question the rigidity of federal government's monopoly on the regulation of immigration law.

2. Local regulation

As discussed in Part II, American Samoa and the Northern Mariana Islands have retained a level of autonomous control of local immigration affairs that is anomalous among the territories and inconsistent with immigration legal doctrine regulating the States and District of Columbia. While Congress sought to bring CNMI under federal immigration law in the Consolidated Natural Resources Act of 2008,¹³⁷ American Samoa retains total control of its own system of immigration.¹³⁸ While this arrangement has been understood as the corollary to land preservation under the traditional *matai* system that limits land ownership to native Samoans, it “in fact operates to assure political power is passed on to the ethnic compatriots of the governing group.”¹³⁹ Immigration restrictionists have taken note, suggesting that immigration control in American Samoa could function as a useful model for immigration policy in the United States writ large:

The American Samoa immigration system, unlike that of the Mainland, is not under attack; there is no danger of over-population created by masses of international migrants, or even migrants from the Mainland. Maybe our people in Washington should look to the migration policy makers in Pago Pago for some inspiration on controlling our borders.¹⁴⁰

3. Race

As suggested in Parts I and II, the federal government's acquiescence to this level of autonomy is almost certainly linked to the racial compositions of these territories and the federal government's disinterest in pursuing the islands for white settlement. As detailed above, the federal government generally permitted unfettered European immigration to the country and only began to limit entry into the country as an effort to exclude Chinese nationals whose labor was no longer desirable.¹⁴¹ Indeed, immigration

¹³⁷ PUB. L. NO. 110-229, 122 Stat. 754 (2008).

¹³⁸ See *Immigration Office*, *supra* note 110.

¹³⁹ LEIBOWITZ, *supra* note 47, at 94.

¹⁴⁰ North, *supra* note 108.

¹⁴¹ See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

policy directing the exclusion of non-white immigrants led to fluctuations in the contours of U.S. territorial policy.

As discussed above, the United States gained control over the former Spanish colonies of Puerto Rico, Guam, and the Philippines as a condition of the cessation of hostilities in the Spanish-American War. The Philippines are not a U.S. territory today, in part due to federal immigration policy.

In 1934, Congress passed the Philippine Independence Act which would eventually lead to the emancipation of the islands from U.S. colonial rule in 1946 following a series of political and military campaigns affecting the Filipino population.¹⁴² While this may initially appear to be the result of a benevolent emancipatory action on the part of the United States, the reality is that tensions around immigration policies barring Asian immigration to the United States forced the issue of Filipino political membership in the country. The Act treated Filipinos as “aliens” for purposes of immigration law and set an annual quota capping their admission to the United States at fifty persons.¹⁴³

But the impact of race on immigration and nationality policy is not limited to the historical record. Today, nationals of American Samoa, with its majority Native population, continue to experience what some scholars have termed “third class citizenship.”¹⁴⁴ Studying the federal court cases that have argued for constitutional birthright citizenship for Americans in American Samoa, including *Tuaua v. United States*¹⁴⁵ and *Fitisemanu v. United States*¹⁴⁶ can help students understand these divergences from the norm within the context of racial difference.

Understanding the history for territories who now enjoy statutory birthright citizenship, such as through studying the immigration case of Isabel Gonzalez,¹⁴⁷ is also important not just for intellectual curiosity, but also for understanding the contours of birthright citizenship moving forward. In 2017, the Trump White House circulated a memo urging the president to investigate so-called birth tourism in the Northern Marianas.¹⁴⁸ In the

¹⁴² *July 4, 1946: The Philippines Gained Independence from the United States*, THE NAT'L WWII MUSEUM NEW ORLEANS (July 2, 2021), <https://www.nationalww2museum.org/war/articles/july-4-1946-philippines-independence>.

¹⁴³ Philippine Independence Act of 1934, § 8(a)(1), 48 Stat. 456.

¹⁴⁴ Anthony Ciolli & Dana M. Hrelc, *Third-Class Citizen: Unequal Protection Within the United States Territories*, 55 SUFFOLK U. L. REV. 179 (2022).

¹⁴⁵ *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

¹⁴⁶ *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

¹⁴⁷ *Gonzales v. Williams*, 192 U.S. 1 (1904).

¹⁴⁸ See Memorandum from Andrew Bremberg, Dir. Of the Domestic Pol'y Council, Exec. Off. Of the President of the U.S., to President Donald J. Trump 4–5 (Jan. 23, 2017) (on

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current presidential political debates, more than one candidate has suggested that birthright citizenship may be overturned by political action.¹⁴⁹



Figure 1. Image from American Samoa Immigration Website¹⁵⁰

B.Foreign Labor Importation in the Territories

Immigration-premised on the importation of foreign labor has been a central feature in the United States generally and in the territories specifically. The USVI experienced an influx of foreign labor-based migration in the twentieth century, due in part to the federal government's more lax interpretation of temporary work visa rules.¹⁵¹ The CNMI lobbied to retain immigration control, not only to protect native land rights, but also to enforce a more relaxed system for importing foreign labor. Combined with the territory's exemption from federal minimum wage law, the CNMI's immigration system led to foreign labor exploitation and the need for congressional intervention. The result was the passage of the 2008

file with the University of Wisconsin-Madison Social Science Computing Cooperative), <https://users.ssc.wisc.edu/~mchinn/Draft-executive-orders-on-immigration.pdf>.

¹⁴⁹ Lauren Sforza, *Ramaswamy Says at Debate He Would End Birthright Citizenship, Echoing Trump*, THE HILL (Sept. 28, 2023, 9:46 AM), <https://thehill.com/homenews/campaign/4227711-ramaswamy-end-birthright-citizenship-2024-debate/>.

¹⁵⁰ *Immigration Office*, *supra* note 110. The attached historical image accompanies the American Samoa Immigration Office's information on "Employment Based Immigration."

¹⁵¹ See LEIBOWITZ, *supra* note 47, at 281.

Consolidated Natural Resources Act which finally sought to bring the CNMI under federal immigration law.¹⁵²

By contrast, American Samoa has generally sought to restrict foreign labor-based immigration. Under the ten categories available, only one exists for employment-based immigration – for guest workers of “State of Samoa employed by the cannery.”¹⁵³ It bears note, however, that these workers are only temporarily authorized to be in the territory, and inexplicably do not receive authorization to work.¹⁵⁴

C. Family-based Immigration in the Territories

The family-based immigration system of the Immigration and Nationality Act operates roughly the same way in the U.S. territories as it does in the fifty states – with the notable exception of American Samoa. For all practical purposes, family-based immigration does not exist in that territory. Instead, the American Samoan government provides only temporary resident status to non-national Samoans.¹⁵⁵

D. Humanitarian Protections in the Territories

American Samoa does not provide for asylum protections within the territory. Asylum also does not presently exist in the CNMI as a result of the federal extension of the deadline for immigration law into the territories.¹⁵⁶ Arguably, these prohibitions call into question U.S. compliance with international agreements protecting refugees, including the 1967 Protocol Relating to the Status of Refugees.¹⁵⁷ Teaching this aspect of U.S. immigration law is important, particularly as U.S. commitments to asylum protection form the basis for an ongoing debate about asylum protections at the United States-Mexico border.

Despite the absence of full integration of U.S. immigration law in both the CNMI and American Samoa, Congress has acted to extend certain humanitarian protections to those territories. The I-914, Application for T Nonimmigrant Status form purports to extend to those physically present in

¹⁵² See Consolidated Natural Resources Act of 2008, PUB. L. NO. 110-229, 122 Stat. 754.

¹⁵³ *Residency Classifications*, *supra* note 109.

¹⁵⁴ *Id.*

¹⁵⁵ See *Immigration Office*, *supra* note 110.

¹⁵⁶ *EOIR Extends Bar for Asylum in CNMI in 2030*, IMMIGR. POL’Y TRACKING PROJECT, <https://immipolicytracking.org/policies/doj-extends-bar-for-asylum-in-cnmi-to-2030/> (last visited Mar. 28, 2024).

¹⁵⁷ U.N. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

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American Samoa and CNMI.¹⁵⁸ Given the history of labor abuses in the CNMI in particular, the extension of such protections seem vital, though it is unclear how effectively they may be given the extremely low numbers of reported instances of human trafficking in both territories.¹⁵⁹

CONCLUSION

While few scholars have considered the immigration law of the territories, a more intentional study integrating the operation of immigration law in these areas of the country is possible and necessary. Such study is not only important for accuracy and comprehensiveness; it also reflects important commitments to fostering diverse viewpoints within the classroom and giving a voice to oppressed histories, a concept that has animated immigration and other critical legal scholarship for decades. The French philosopher Auguste Comte is credited with the maxim “demography is destiny” and perhaps nowhere is that clearer than in U.S. policies toward immigration and the territories.

¹⁵⁸ USCIS, DHS, I-914 FORM: APPLICATION FOR T NONIMMIGRANT STATUS OMB No. 1615-0099, available at <https://www.uscis.gov/sites/default/files/document/forms/i-914.pdf> (last revised Dec. 2, 2021)

¹⁵⁹ See DEP’T OF HEALTH & HUM. SERVS., NORTHERN MARIANA ISLANDS: EFFORTS TO COMBAT HUMAN TRAFFICKING (2017), https://www.acf.hhs.gov/sites/default/files/documents/otip/northern_mariana_islands_pro_file_efforts_to_combat_human_trafficking.pdf (reporting 6 cases of human trafficking); *see also* DEP’T OF HEALTH & HUM. SERVS., AMERICAN SAMOA: EFFORTS TO COMBAT HUMAN TRAFFICKING (2017), https://www.acf.hhs.gov/sites/default/files/documents/otip/american_samoa_efforts_to_combat_human_trafficking.pdf (reporting fewer than 3 cases of human trafficking).

APPENDIX A: SAMPLE IMMIGRATION LAW SURVEY COURSE SYLLABUS
WITH MATERIALS ON THE IMMIGRATION LAW OF THE TERRITORIES

This syllabus is based on the sample syllabus provided in the Teacher’s Manual to the Ninth Edition of the Immigration and Citizenship: Process and Policy casebook by T. Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, Maryellen Fullerton, Juliet P. Stumpf, and Pratheepan Gulasekaram.¹⁶⁰ The authors of this syllabus designed it to cover 37 class assignments in a four-hour immigration survey course that meets 39 times in a span of a 13-week semester.¹⁶¹

I am indebted to these brilliant scholars and teachers and have adapted their sample syllabus to incorporate sources relevant to the study of immigration law in the U.S. territories. Given the prominence of this casebook for teaching immigration law, I have chosen it to show how incremental adjustments to integrate sources relevant to the immigration law of the territories can be readily inserted into the existing curriculum.

Sources regarding immigration law in the territories have been added to the existing topics where relevant and are indicated with *** at the beginning and end of the source.

SAMPLE IMMIGRATION SURVEY COURSE SYLLABUS WITH MATERIALS ON
TERRITORIAL IMMIGRATION LAW

Chapter One: The Foundations of Immigration and Citizenship Law

1) *early plenary power*

Territorial Clause of the U.S. Constitution

2) *the boundaries of immigration law*

3) *the evolution of plenary power*

4) *the 2017 Trump exclusion order*

5) *administrative law and the “public charge” rule*

Gonzales v. Williams, 192 U.S. 1 (1904)

6) *moral constraints on the immigration power*

Chapter Two: Immigrants and Nonimmigrants: Admission Categories and the Undocumented

7) *admission categories, part 1*

8) *admission categories, part 2*

9) *the Constitution and family immigration*

10) *immigration based on marriage*

11) *employment-based immigration; investors*

¹⁶⁰ T. ALEXANDER ALEINIKOFF ET AL., TEACHER’S MANUAL TO IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 6–8 (9th ed. 2020).

¹⁶¹ *Id.*

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CNMI Long-Term Resident Status¹⁶²

48 USC § 1806(e)(6)¹⁶³

****American Samoa Department of Legal Affairs, Immigration
Office****¹⁶⁴

12) *nonimmigrants*

13) *temporary workers, students*

14) *unauthorized migrants*

Minority Rights Group, Dominicans in Puerto Rico¹⁶⁵

CNMI Long-Term Resident Status¹⁶⁶

48 USC § 1806(e)(6)¹⁶⁷

Chapter Three: Admission Procedures

15) *admission procedures, esp. adjustment of status*

16) *constitutional due process, part 1*

17) *constitutional due process, part 2*

18) *detention, part 1*

19) *detention, part 2*

Chapter Four: Citizenship and Its Significance

20) *citizenship by birth, part 1*

****Gonzales v. Williams*, 192 U.S. 1 (1904)***

21) *citizenship by birth, part 2; multiple citizenship*

22) *citizenship by naturalization*

*** Revised Organic Act of 1917, section 5***¹⁶⁸

Chapter Five: Inadmissibility and Deportability

23) *the inadmissibility-deportability line; inadmissibility: crimes; fraud*

24) *inadmissibility: immigration law violations; public charge; public health*

25) *deportability: constitutional law and the meaning of lawful permanent residence*

26) *deportability: immigration control, public charge, and crime-based deportability, part 1*

27) *crime-based deportability, part 2*

28) *crime-based deportability, part 3: classifying convictions*

Chapter Six: Relief From Removal

¹⁶² *CNMI Long-Term Resident Status*, *supra* note 131; *see also* Northern Mariana Islands Long-Term Legal Residents Relief Act, 48 U.S.C. § 1806(e)(6)).

¹⁶³ Northern Mariana Islands Long-Term Legal Residents Relief Act, 48 U.S.C. § 1806(e)(6)).

¹⁶⁴ *Immigration Office*, *supra* note 110.

¹⁶⁵ *Dominicans in Puerto Rico*, MINORITY RTS. GRP., <https://minorityrights.org/communities/dominicans/> (last visited Mar. 29, 2024).

¹⁶⁶ *CNMI Long-Term Resident Status*, *supra* note 131; *see also* 48 U.S.C. § 1806(e)(6)).

¹⁶⁷ 48 U.S.C. § 1806(e)(6)).

¹⁶⁸ Providing citizenship by birth in Puerto Rico.

29) cancellation of removal and other relief leading to lawful permanent residence

30) voluntary departure; prosecutorial discretion, inc. DACA

Chapter Seven: Asylum and Other Humanitarian Protections

31) asylum procedure; what is “persecution”?

32) membership in a particular social group, part 1

33) particular social group, part 2; Convention Against Torture; Temporary Protected Status

Chapter Nine: Enforcement and Beyond

34) state and local governments: enforcement

35) state and local governments: non-cooperation and integration

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APPENDIX B: LEGISLATIVE DEBATE SIMULATION EXERCISE

The goal of this exercise is to get students to apply their understanding of the legal and policy considerations around the state of immigration law in the U.S. territories and their implications for immigration law and policy generally.

Instructors can spin out this exercise into a broader exercise by assigning the prompt to teams for the preparation of the arguments. It is recommended that the instructor assign students to a position, rather than allowing students to volunteer to represent a position. Depending on the size of the class, any students not assigned to the groups presenting their arguments can provide feedback on which presentations they found the most compelling and why. Generally, students should be allotted about five to minutes for preparation of their presentation and five to ten minutes for each presentation. The exercise can also be assigned for preparation outside of class to reserve valuable class time.

Instructors may consider issuing a general reminder before the exercise begins to recognize that the classroom is composed of students with a variety of experiences and to always strive to be respectful and cordial to one's colleagues with their arguments, remarks, and commentaries.

SIMULATION EXERCISE ON IMMIGRATION AND NATIONALITY POLICY

Congress is debating a bill to extend U.S. citizenship to residents of American Samoa who presently hold U.S. national status.

One student (or group of students) will represent a member of Congress to argue that citizenship should be conferred on U.S. nationals and on those born in the territory prospectively. Another student (or group of students) will represent a member of Congress on the other side of the debate to argue that the current U.S. national status should remain.

As you are preparing your arguments, be sure to reference sources (judicial, legislative, historical, or cultural) that support your view. You should also consider the points you anticipate your opponent will make and consider how to respond in your presentation to the counterpoint.