A QUALIFIED DEFENSE OF THE *INSULAR CASES*

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The Insular Cases *have, since 1901, granted the political branches significant flexibility in governing U.S. territories like American Samoa and Puerto Rico—flexibility enough, indeed, to ignore certain constitutional provisions that are not "fundamental" or which would be "impractical" to enforce in the territories. Long maligned as judicial ratification of empire, predicated on racist assumptions about territorial peoples and a constitutional theory alien to the United States, the* Insular Cases *had a curious renaissance in the late twentieth-century. As local territorial governments began to exercise greater self-rule, newly-enacted local laws in the territories began to pose constitutional issues, but courts generally acquiesced in these constitutional deviations. This Note argues that this accommodationist turn in* Insular *doctrine complicates the legacy of the cases—that their use to enable local peoples to govern themselves as they desire, and to protect their cultures, means the* Insular *doctrine is not merely defensible but perhaps even necessary, and finds support in arguments from political theory. Moreover, the Note contends, such constitutional accommodation has a long pedigree in the American constitutional system.*

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INTRODUCTION

On June 5, 2015, the D.C. Circuit told Leneuoti Fiafia Tuaua that, notwithstanding his birth in American Samoa, the Constitution did not make him a U.S. citizen.[1] What gives? The people of the island claim the highest enlistment rates of any U.S. state or territory, bar none.[2] Their men fill the gridirons of American cities and college towns beyond all proportion.[3] The first people to greet most of the Apollo astronauts upon their earthly returns were not sturdy Midwestern farmers or cheering New York crowds—they were Samoans.[4] American Samoa could put apple pie to shame; how come they don't merit the same privileges as other Americans?

The Citizenship Clause of the Fourteenth Amendment, it turns out, doesn't apply to American Samoa.[5] To understand the black magic that robs the Constitution of its full force in the territories, and was invoked by the D.C. Circuit in *Tuaua v. United States*, we have to reach back over a century to a passel of cases decided in the wake of the Spanish-American War. The United States, newly victorious in its war with Spain, had to figure out what to do with its spoils: Guam, the Philippines, and Puerto Rico.[6] Undesirous of throwing up constitutional roadblocks to the new American empire, and hesitant to do anything that might irrevocably bind the United States to the "distant

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[1] Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (rejecting the claim that the Fourteenth Amendment's Citizenship Clause applies of its own force to U.S. territorial residents born in the territories).

[2] *See* Mark Potter, *Eager to Serve in American Samoa*, NBC (Mar. 5, 2006, 10:30 PM), http://www.nbcnews.com/id/11537737/ns/nbc_nightly_news_with_brian_williams/t/eager-serve-american-samoa (detailing why American Samoa is a "military recruiter's dream").

[3] *See, e.g.*, Leigh Steinberg, *How Can Tiny Samoa Dominate the NFL?*, FORBES (May 21, 2015, 7:58 PM), https://www.forbes.com/sites/leighsteinberg/2015/05/21/how-can-tiny-samoa-dominate-the-nfl ("A Samoan male is 56 times more likely to play in the NFL than an American non-Samoan.").

[4] *See Sea Recovery Swift After Perfect Entry*, N.Y. TIMES, Apr. 18, 1970, at A12 (reporting on the return of the Apollo 13 astronauts to the United States via Pago Pago, American Samoa).

[5] *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

[6] *See* BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 4 (2006) (listing the territories acquired by the U.S. in the Treaty of Paris).

ocean communities"[7] that lived in these islands, the Supreme Court got creative. In the *Insular Cases*,[8] it sketched out a rule allowing the government to ignore certain constitutional provisions—generally those guaranteed by the Fifth and Sixth Amendments—that were deemed not "applicable" in the territories, because the Court did not think them "fundamental."[9] For a few decades, the *Insular Cases* lay dormant until Justice Harlan gave them a new meaning, reinterpreting them to allow the government to disregard constitutional provisions that would be "impractical or anomalous" to apply in the territories or overseas.[10] Not quite American, not quite foreign: The territories are a constitutional platypus of sorts, or in Justice White's unconscious paradox, "foreign . . . in a domestic sense."[11] The *Insular Cases* have taken heavy fire ever since, beginning with the dissents in the 1901 cases. They ignored precedent; they mocked the notion of a government of limited and enumerated powers;[12] they created an "occult" distinction between incorporated and unincorporated territories out of whole cloth;[13] and like the Court's decision in *Plessy v. Ferguson*[14] only five years prior, they judicially—even constitutionally—ratified a racial theory, if only under the surface.[15] Beyond the big-ticket deficiencies, the doctrine was also muddled and unclear: What constitutional protections *did* survive in the territories? The foregoing critiques are persuasive, and this Note does not attempt to rationalize or defend the offensive origins and effects of the *Insular* doctrine. It does seek, however, to complicate the legacy of the cases.

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7 Balzac v. Porto Rico, 258 U.S. 298, 311 (1922).

8 The cases falling under the heading of "the *Insular Cases*" is a contested issue. Some commentators include only the cases decided in 1901; others reach as far forward as *Balzac*, 258 U.S. 298. *See* Christina Duffy Burnett, *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389–92 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE]. I use the term to describe only the *constitutional* cases beginning in 1901 and ending with *Balzac*. Primarily, I refer to *Balzac*; *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); and *Downes v. Bidwell*, 182 U.S. 244 (1901).

9 *See infra* Section I.A.

10 *See infra* Section I.B.

11 *See Downes*, 182 U.S. at 341 (White, J., concurring).

12 *See id.* at 382 (Harlan, J., dissenting) ("[Congress] is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication.").

13 *See id.* at 373 (Fuller, C.J., dissenting) (describing the distinction as "occult"); *id.* at 391 (Harlan, J., dissenting) (same).

14 163 U.S. 537 (1896).

15 *See, e.g.*, Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 284–87 (2007) (arguing that the *Insular Cases* established a "regime of de facto political apartheid").

Beginning in the 1970s, courts of appeals were called on to adjudicate the constitutionality of certain local laws and policies in the territories that wouldn't pass muster under metropolitan[16] constitutional scrutiny. Some territories have laws on the books limiting the sale of land to people without native blood.[17] American Samoa doesn't provide for jury trials in some felony cases.[18] And the Commonwealth of the Northern Mariana Islands (NMI) has a seriously malapportioned legislative house.[19] The Ninth Circuit and the D.C. Circuit parted ways (only to rendezvous later): The former applied a new and more lenient "fundamental rights" test from the *Insular Cases* themselves,[20] while the latter took up and elaborated on Justice Harlan's functionalist "impractical and anomalous" test.[21]

But it wasn't the method that mattered so much as the outcome. In most of the cases, the courts upheld the challenged practices. Whether the right in question wasn't "fundamental," or whether enforcing it would be "impractical and anomalous," the courts deferred to the majoritarian wishes of local peoples and governments to deviate, if only a little, from the chapter and verse of American constitutional norms.[22]

The through-line connecting the *Insular Cases* to Justice Harlan to the "modern" cases is sovereign flexibility. At bottom, the courts ratified the goals and policies of Congress and the executive with respect to the territories. In the early twentieth century, the goal was empire: The government wanted maximum flexibility to expand American influence around the world.[23] By the 1970s, these dubious aims had been replaced by "accommodationist" policies—encouraging local authority and self-governance in the territories to the greatest extent possible, while also seeking to protect local cultures.[24]

This Note argues that judicial ratification of the accommodationist project by the political branches is defensible, perhaps even imperative, from the perspective of democratic theory. Many of these territories did not choose to join the American constitutional regime;

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[16] The "metropole" is the parent state of a colony. *See* WEBSTER'S (THIRD) NEW INTERNATIONAL DICTIONARY 1424 (3d ed. 1993). I use the adjective "metropolitan" to describe the Constitution as applied in the fifty states because most other adjectives ("American," "mainland," etc.) are awkward or misleading.

[17] *See infra* notes 73, 97–104 and accompanying text.

[18] *See infra* notes 86–96 and accompanying text.

[19] *See infra* note 76 and accompanying text.

[20] Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984).

[21] King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975).

[22] *See infra* Section I.C.

[23] *See infra* Section II.A.

[24] *See infra* Section II.B.

they need group-differentiated rights to have meaningful equality in the republican system, rights many of which were explicitly promised to them when they became subject to U.S. sovereignty.[25] Hints of these arguments, I will show, play a role in the later courts' decisions. To the extent the manipulable *Insular* doctrine permitted courts to bless the maximum devolution of local governance authority to territorial governments—by ignoring small-scale constitutional divergences—we should have fewer qualms with it. Only by going outside the Constitution—the same move that enabled the U.S. to rule the territories as colonies—could Congress delegate the requisite authority to these territories to govern themselves as they see fit.

This Note further highlights the existence of a range of legal arrangements for governance in U.S. territories that would be impermissible under strict metropolitan constitutional norms. Such constitutional accommodation may seem contrary to our constitutional order, but in fact finds support in other domains of American law. The Supreme Court has long carved out a sui generis set of rules governing Indian tribes,[26] and its jurisprudence of forum non conveniens and due process incorporation also bolsters a notion of other legal arrangements that do not track ours but are nonetheless acceptable and solicitous of certain fundamental, inalienable guarantees of liberty.[27] These examples fortify the legitimacy of the heterogeneous extra-constitutional arrangements created by territorial governments and judicially blessed by the *Insular* doctrine.

Part I sketches out the development of the *Insular* doctrine, first in the Supreme Court and then as elaborated by the lower courts through the prism of Justice Harlan's concurrence in *Reid v. Covert*.[28] In Part II, I highlight the touchstone of all these cases—flexibility for the federal government's goals. Part III offers a qualified defense of this somewhat incoherent doctrine as applied in recent decades, arguing that Congress's accommodationist project maximizes local self-government in the territories and protects local cultures by permitting governments to experiment with group-differentiated rights. Part IV reaches outside territorial law to find analogues—instances in which the Supreme Court has acknowledged legitimate legal

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[25] *See infra* Part III.

[26] I use the terms "Indian" and "Indian law" according to convention in legal scholarship, aware that the terms describing North American native peoples are contested. *See, e.g.*, Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 803 n.7 (2008) (employing "American Indian" because of assimilationist overtones of "Native American").

[27] *See infra* Part IV.

[28] 354 U.S. 1 (1957).

processes and rights-protective frameworks not our own but nonetheless tolerable to American constitutional law.

I
FLEXIBILITY: THE *INSULAR* DOCTRINE AS COVER FOR THE POLITICAL BRANCHES

The story of the *Insular Cases* begins with empire but does not end there. The gravitational center of these cases, for their doctrinal strangeness to one another and the wildly different policies underlying them, is flexibility. This flexibility has been justified by courts with reference to particular aims or policies of the political branches. In 1901, these aims were colonial expansion and control. By the end of the century, they had radically shifted—the government, at least in word, sought increased self-governance for the territories. For all the serpentine shifts in the doctrine by the courts, then, it amounted to one thing: judicial ratification of the territorial policy du jour.

A. The Insular Cases*: Ratifying the Empire*

In 1898, the victorious United States found itself with a clutch of overseas possessions won from the Spanish; Guam, the Philippines, and Puerto Rico were now part of the United States.[29] Or were they—and what would that mean, anyhow? Unlike continental territories like the Utah Territory,[30] these spoils of war would not be peopled by white settler stock. Their populations looked different, spoke foreign tongues, and prayed to strange gods.[31] This raised alarm about what role the new peoples and lands would have in the body politic.[32] The

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[29] *See supra* note 6 and accompanying text.

[30] Territorial expansion wasn't new to the United States; the original 13 states had grown to 45 by the time of the *Insular Cases*, and growth followed a familiar pattern. First the land was organized into a territorial government—subject to near-plenary control by Congress, but whose residents were afforded economic protections and civil liberties—before eventually being admitted to the union on an equal footing with the other states. *See* SPARROW, *supra* note 6, at 14–29 (describing this pattern of political development).

[31] *See id.* at 29–30 (underscoring the ethnic, religious, and linguistic differences between most white Americans and the new territorial peoples); *cf. Genesis* 35:4 ("And they gave unto Jacob all the stange gods which *were* in their hand . . . ."). So too, of course, did the native peoples who inhabited the continent before the Europeans arrived. But nor had the Framers intended to bring them within the political community; they were "different peoples, different nations." SPARROW, *supra* note 6, at 20.

[32] *See* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 4 (summing up the political debate that stemmed from "[n]ot knowing quite what to do with these new 'possessions' and the culturally and racially different peoples who inhabited them"). William Howard Taft's views were not atypical. Sent to organize a civilian government in the Philippines, he described the locals as "a vast mass of ignorant, superstitious people . . . generally lacking in moral character." Letter from William Howard Taft to Elihu Root (July 14, 1900), *in* SPARROW, *supra* note 6, at 62.

luminaries of the academy debated whether and how these territories, and their peoples, could be fitted into the constitutional regime.[33]

The constitutional questions posed by empire arrived at the Supreme Court shortly enough, bundled inside crates of oranges. The United States had assessed foreign import duties on Samuel Downes's citrus from Puerto Rico.[34] He paid $659.35 under protest and then brought suit, arguing that disparate duties on Puerto Rican goods violated the Uniformity Clause of the Constitution[35] now that it was part of the United States.[36] *Downes v. Bidwell*, the progenitor of the *Insular* doctrine, is a scramble,[37] but five Justices agreed at least that the Uniformity Clause did not apply to Puerto Rico, and therefore Congress could tax Puerto Rican goods at different rates from mainland products.[38]

Justice Brown's "extension theory" from the majority opinion turned out to be a one-hit wonder;[39] it was the "incorporation theory" laid down by Justice White in his concurring opinion that had staying power, and soon captured the Court. When the United States acquired new territory, Congress could choose to "incorporate" the territory into the United States or to leave it in an "unincorporated"

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[33] *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, 404–06, 415 (1899) (arguing that the Constitution applies to States and territories alike, notwithstanding the "embarrassment" caused by affording constitutional protections to the "half-civilized Moros" and the "ignorant and lawless brigands that infest Puerto Rico"); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 388 (1899) (declaring the United States to be comprised of the States only and arguing that Congress exercises plenary power over non-state territories); Abbott Lawrence Lowell, *The Status of Our Possessions — A Third View*, 13 HARV. L. REV. 155 (1899) (proposing a middle ground in which Congress may be free to act outside normal constitutional constraints on territories not "incorporated" into the United States).

[34] *See* Downes v. Bidwell, 182 U.S. 244, 247 (1901).

[35] *See* U.S. CONST. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . . .").

[36] Downes's constitutional challenge was one of seven cases heard the same day concerning the new territories, all of them grouped under the heading of the "*Insular Cases*." *See supra* note 8 (explaining the debate over the *Insular Cases* nomenclature).

[37] Five opinions in total, two concurrences, two dissents, and a "judgment of the court," the logic of which was in the main rejected by every other Justice of the Court. *See Downes*, 182 U.S. at 247; *id.* at 287 (White, J., concurring); *id.* at 344–45 (Gray, J., concurring); *id.* at 347 (Fuller, C.J., dissenting); *id.* at 375 (Harlan, J., dissenting); Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 830 (1926) ("From some or all of [Justice Brown's] views, and from the general tenor of his discussion, I think it may fairly be said that the other eight Justices dissented.").

[38] *See Downes*, 182 U.S. at 287 ("We are therefore of opinion that the Island of Porto Rico is . . . not a part of the United States within the revenue clauses of the Constitution . . . .").

[39] *See id.* at 278–79 (endorsing the "long continued and uniform" interpretation that "the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct").

state.[40] If not incorporated, the clause requiring uniformity of taxes "throughout the United States" did not apply.[41] For Justice White, the question was "not whether the Constitution is operative, *for that is self-evident*, but whether the provision relied on is applicable."[42] This flexible framework made it into a majority opinion in 1904,[43] and by 1922 a unanimous Court had embraced the incorporation doctrine as the polestar for constitutional law in the territories.[44]

Which constraints of the Constitution were "applicable," then? Chief Justice Taft explained that though the Constitution "is in force" in Puerto Rico, only certain of its provisions applied.[45] Taft instead gestured at "guaranties of certain fundamental personal rights" like due process of law, noting that it had always been applicable in the territories.[46] This foundation of rights was based on "inherent, although unexpressed, principles which are the basis of all free government . . . restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."[47]

So while the Constitution was "operative" when and wherever the government acted, including the territories, not all of its provisions were "applicable" as constraints upon such action.[48] By contrast, some

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[40] *See id.* at 338–39 (White, J., concurring). White owed a heavy debt to Professor Lowell for the logic of "incorporation." *See* Lowell, *supra* note 33 (sketching out the concept of "incorporation" as a middle ground between the views that the Constitution applied fully, or not at all, in the overseas territories). It was understood that "incorporated territories" were on the path to statehood, while Congress could hold "unincorporated" ones in indefinite limbo. *See* Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 11–13.

[41] *Downes*, 182 U.S. at 341–42 (White, J., concurring).

[42] *Id.* at 292 (emphasis added).

[43] *See* Dorr v. United States, 195 U.S. 138, 143, 148 (1904) (denying that trial by jury is a "fundamental right" and thus applicable in the Philippines because the territory had not been incorporated into the United States). The Court gestured at the impossibility of empaneling juries in "territor[ies] peopled by savages." *Id.* at 147.

[44] *See* Balzac v. Porto Rico, 258 U.S. 298, 305–13 (1922) (describing White's framework as the "settled law of the court" and rejecting the argument that a grant of citizenship to Puerto Ricans had "incorporated" the island into the United States).

[45] *Id.* at 312.

[46] *Id.* at 312–13.

[47] *Dorr*, 195 U.S. at 147 (citing *Downes*, 182 U.S. at 291 (White, J., concurring)). Justice Brown's opinion for the Court in *Downes* is to the same effect: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but . . . by inference and the general spirit of the Constitution . . . [rather] than by any express and direct application of its provisions." *Downes*, 182 U.S. at 268 (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 44 (1890)).

[48] In addition to the Uniformity Clause, certain protections for criminal defendants "not fundamental in their nature, but concern[ing] merely a method of procedure" were

reservoir of "fundamental" rights—never defined because never enforced, so always in dictum—could not be abridged by Congress in governing the territories.[49] This liberating rule of constitutional law allowed the United States, observers thought, to participate on equal terms in empire-building.[50]

B. Mr. Harlan's Opus

On March 10, 1955, Clarice Covert—an unstable Air Force wife in the rural English countryside—hacked her sleeping husband to pieces and forever changed how the Constitution would apply outside the United States.[51] In a plurality opinion by Justice Hugo Black, Bill of Rights absolutist,[52] the Court vacated her conviction and came as close to wholesale repudiation of the *Insular Cases* as it ever would.[53] Justices Frankfurter and Harlan concurred individually on narrower grounds—that for capital cases involving American citizens overseas during peacetime, a trial by jury was required.[54] It was Justice Harlan's curious concurrence in this grisly case—which stated that the

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inapplicable in the territories. *See Dorr*, 195 U.S. at 144–45 (quoting Hawaii v. Mankichi, 190 U.S. 197, 218 (1903)); *Downes*, 182 U.S. at 282–83 (contrasting fundamental rights with "artificial or remedial rights . . . peculiar to our own system of jurisprudence").

[49] *See supra* note 47 and accompanying text (collecting statements in *Dorr* and *Downes* that certain fundamental rights could never be abrogated); *Balzac*, 258 U.S. at 312–13 (same for due process of law). *Compare Downes*, 182 U.S. at 298 (White, J., concurring) (suggesting that the Establishment Clause, Free Press Clause, and the Eighth Amendment guarantee against cruel and unusual punishment may not be displaced) (citing Chi., Rock Island & Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 546 (1885)), *with id.* at 306 (White, J., concurring) (describing as absurd a scenario in which "absolutely unfit" territorial residents must be granted U.S. citizenship).

[50] *See* SPARROW, *supra* note 6, at 100–04 (canvassing editorial reactions to *Downes v. Bidwell* couching response to the opinion in geopolitical terms).

[51] *See "We Want Them Accountable,"* TIME, Dec. 5, 1955, at 32 (reporting on the murder).

[52] *See, e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) ("It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'").

[53] *See* Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion) ("[N]either the [*Insular Cases*] nor their reasoning should be given . . . further expansion. The concept that . . . constitutional protections against arbitrary government are inoperative when . . . inconvenient . . . is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government."). The cases (two, actually) were up on rehearing; the previous Term, the Court had affirmed the convictions. *See* Reid v. Covert, 351 U.S. 487 (1956).

[54] *See Reid*, 354 U.S. at 64 (Frankfurter, J., concurring) (entertaining possibility of military jurisdiction over civilians overseas but "certainly not in capital cases . . . in time of peace"); *id.* at 65 (Harlan, J., concurring) (same).

Insular Cases "properly understood, still have vitality"—that gained traction.[55]

This "proper understanding" of the *Insular Cases*, curiously, makes no mention of "fundamental rights"—moreover, Harlan doesn't quote and scarcely refers to the *Insular Cases* at all.[56] If there are "conditions and considerations" and "circumstances . . . such that [the guarantee] would be impractical and anomalous"[57]—like a jury trial—there's no rigid rule that a jury trial must "*always* be provided."[58] The *Insular Cases* together "hold . . . that the particular local setting, the practical necessities, and the possible alternatives" are all relevant to "a question of judgment"—whether a constitutional guarantee "*should* be deemed a necessary condition of the exercise of Congress' power."[59]

The core of Harlan's "boundlessly flexible" inquiry was "government flexibility, not natural rights."[60] It replaced a foundation of consistently acknowledged, if ill-defined, fundamental rights with a pragmatic or functionalist approach that gave the government just as much leeway in acting outside the United States. This jurisprudential switcheroo represented not mere doctrinal tinkering but a substitution of the values motivating the inquiry.[61] Like the *Insular Cases*, it blessed an expansion of American power overseas, not as colonial overlord, but as guardian of the *pax Americana* and post-War stability.[62] Little could Justice Harlan have known that his concurrence would take on a life of its own, cohabiting with and rivaling and some-

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[55] *Id.* at 67 (Harlan, J., concurring).

[56] *See id.* at 74–77 (alluding solely to, but not quoting, *Balzac*).

[57] *Id.* at 74–75. In the same paragraph, he uses the phrase "*impracticable* and anomalous." *Id.* at 74 (emphasis added). At the risk of eliding differences between the two, I will use "impractical" because it is shorter. *But see* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1006 n.119 (2009) (noting that the two are not necessarily interchangeable).

[58] *Reid*, 354 U.S. at 75 (Harlan, J., concurring) (interpreting *Balzac*'s holding).

[59] *Id.* Harlan drew the obvious analogy to due process inquiries—the constitutional protections afforded to someone (to a citizen, at least) shifted based on the circumstances. *See id.* Gerald Neuman has dubbed this inquiry "global due process." GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 102–03 (1996). Later he would dub it a "functional approach" more generally. *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 261 (2009).

[60] *See* NEUMAN, *supra* note 59, at 102–03.

[61] *See id.* at 102–08 (highlighting the significance of the shift and some possible drawbacks of the "global due process" approach); *see also* Boumediene v. Bush, 553 U.S. 723, 834 (2008) (Scalia, J., dissenting) (characterizing Justice Kennedy's approach as a "functional" one).

[62] *See infra* Section III.A (positioning Harlan's rationale for congressional leeway overseas between the *Insular Cases* rationale and the accommodationist project).

times supplanting the "fundamental rights" test that supposedly governed these inquiries.[63]

C. The Sun Sets on Empire: Self-Determination for the Territories

By the 1970s, disco was in; colonialism and empire were out. Driven by the United Nations, member states were obligated to devolve power to "non-self-governing territories" as much as possible;[64] the shift from a "conquest paradigm" to a "consent paradigm"[65] necessitated greater self-government in non-State territories. As U.S. territories implemented local forms of governance,[66] some laws bucked up against metropolitan constitutional norms, and courts fell back on the *Insular Cases* to guide them.

1. Keeping the Covenant: "Fundamental Rights" in NMI and Beyond

Daniel Atalig was tried and convicted by a court in NMI for carrying five pounds of marijuana in two boxes on a commercial flight from Rota to Saipan.[67] The Appellate Division of the District Court for the Northern Mariana Islands overturned his conviction on the ground that *Duncan v. Louisiana* guaranteed him a jury trial for serious offenses.[68] The Ninth Circuit reversed the appellate division,[69] noting that "fundamental rights" and "incorporation" were, essentially, false cognates to their counterparts in the Fourteenth Amendment context—just because a jury trial was a fundamental right in the States for purposes of incorporation (against the States) didn't mean it

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[63] *See infra* Section I.C.2 (detailing the adoption of Justice Harlan's inquiry by the D.C. Circuit); *see also Boumediene*, 553 U.S. at 764 (embracing a functionalist approach to assessing extraterritorial constitutional application).

[64] *See infra* note 136 (referring to United Nations Charter obligations).

[65] *See* Chimène I. Keitner, *From Conquest to Consent: Puerto Rico and the Prospect of Genuine Free Association*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 77, 80–102 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (describing and denominating this paradigm shift).

[66] In addition to Puerto Rico and Guam, which the United States acquired after the Spanish-American War, the United States added, at various points in the twentieth century, American Samoa, the U.S. Virgin Islands, and NMI. *See Islands We Serve*, U.S. DEP'T OF THE INTERIOR: OFFICE OF INSULAR AFFAIRS, https://www.doi.gov/oia/islands (last visited Oct. 10, 2017) (listing islands served by the Office of Insular Affairs).

[67] Northern Mariana Islands v. Atalig, 723 F.2d 682, 683–84 (9th Cir. 1984).

[68] In *Duncan*, the Supreme Court concluded that trial by jury was "fundamental to the American scheme of justice"; it followed that the Due Process Clause of the Fourteenth Amendment "incorporated" this requirement against the States. *See* Duncan v. Louisiana, 391 U.S. 145, 149, 158 (1968) (enforcing the Sixth Amendment guarantee of trial by jury in states for all "serious offenses").

[69] The Ninth Circuit has appellate jurisdiction over the final decisions of the NMI courts. 48 U.S.C. § 1823 (2012).

was "fundamental" for purposes of *territorial incorporation*.[70] In the territories, the Constitution only imposed on Congress "'those fundamental limitations in favor of personal rights' which are 'the basis of *all free government*.'"[71] Under this skim-milk sense of "fundamental," Atalig was undone by *Duncan* itself—the Supreme Court had described, in a footnote in that case, that "[a] criminal process which [is] fair and equitable but use[s] no juries is easy to imagine."[72]

In applying the test this way, the Ninth Circuit translated the general invocation of natural rights protection from *Dorr* into a falsifiable descriptive inquiry: Is the right in question necessary to every free government? Support for this reading came several years later, when the Ninth Circuit entertained a challenge to NMI's racially restrictive land laws.[73] Picking up the theme of accommodation from *Atalig*, the court in *Wabol v. Villacrusis* declared that "the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures."[74] In this narrow gauge, constitutional provisions only apply if they are "fundamental in this *international* sense."[75] Other courts fleshed out this inquiry, actually examining whether any "free government" in the world was not constrained by a particular protection enshrined in the Constitution. The federal court in NMI, applying *Atalig* and *Wabol*, rejected a one-person, one-vote challenge to NMI's malapportioned Senate because, the court noted wryly, the U.S. Senate is malapportioned.[76] The D.C. Circuit went a step further in deciding the right to an "independent" Article III court was not

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[70] *See Atalig*, 723 F.2d at 689; NEUMAN, *supra* note 59, at 83, 100 (noting the confusion caused by the word "incorporation" in distinct but not wholly dissimilar inquiries and the slight resemblance of the two "fundamental rights" inquiries). The inquiries serve different purposes. "The former serves to fix our basic federal structure; the latter is designed to limit the power of Congress to administer territories . . . ." *Atalig*, 723 F.2d at 689.

[71] *Atalig*, 723 F.2d at 689–90 (emphasis added) (quoting Dorr v. United States, 195 U.S. 138, 146, 147 (1904)).

[72] *Duncan*, 391 U.S. at 149 n.14. The NMI's jury scheme "easily fit within the reach of the Court's imagination," the Ninth Circuit surmised. *Atalig*, 723 F.2d at 690.

[73] *See* N. MAR. I. CONST. art. XII, § 1 (restricting ownership of land to "persons of Northern Marianas descent"); *id.* § 4 (defining "person of Northern Marianas descent" by blood quantum). Such a provision would all but certainly be struck down if enacted by a state. *See* Oyama v. California, 332 U.S. 633 (1948) (invalidating a California land law that discriminated on the basis of alienage).

[74] Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1990).

[75] *Id.*

[76] *See* Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1140 (D. N. Mar. I. 1999) ("Several countries that are considered to have 'free government' have a bicameral legislative in which one house is malapportioned. Amongst these is the United States."). *See also* Reynolds v. Sims, 377 U.S. 533 (1964) (requiring that State legislative districts be equally apportioned). The Supreme Court summarily affirmed the opinion in *Rayphand*. *See* Torres v. Sablan, 528 U.S. 1110 (2000) (mem.).

"fundamental" as it was not "a *sine qua non* for 'free government.'"[77] After all, in "parliamentary democracies that do not have a written constitution, such as the United Kingdom," the parliament may revisit judicial decisions.[78] Only two years ago, the D.C. Circuit—applying in part the "fundamental rights" test[79]—decided there was no right to *jus soli* birthright citizenship in American Samoa because "numerous free and democratic societies principally follow *jus sanguinis* . . . where birthright citizenship is based upon nationality of a child's parents."[80] While not pushing pins into an atlas itself, the court cites to secondary authority surveying which nations follow *jus sanguinis*.[81]

This "empirical, anthropological inquiry" by the courts lies well afield of the natural rights core of the *Insular* Court.[82] The United States and perhaps some parliamentary democracies have "free government,"[83] but the soundness of this inquiry ultimately remains untested, because no court has been forced too deep into the almanac to find a counterexample, nor to engage in the fraught, free-floating inquiry of sifting the free nations from the unfree. With such lax constraints, it is no surprise Congress's policy of maximum devolution of local governance has been affirmed by courts.[84]

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[77] *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 385 & n.72 (D.C. Cir. 1987).

[78] *Id.*

[79] The use of this inquiry in *Hodel* and Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), is notable and strange because the D.C. Circuit's own binding authority requires a different inquiry. *See infra* Section I.C.2.

[80] *Tuaua*, 788 F.3d at 308.

[81] *See id.* at 309 (noting that "*jus sanguinis* has traditionally predominated in civil law countries").

[82] *See* Robert A. Katz, Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 788–89 (1992) (describing the shift from a natural rights foundation to the Ninth Circuit's "descriptive" inquiry).

[83] The United Kingdom grants titles of nobility, and one of its constituent countries (England) has an established church. If we allow that it has "free government," as the D.C. Circuit suggests in *Hodel*, 830 F.2d at 385 n.72, then these guarantees are not "the basis of all free government." Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) (citing Dorr v. United States, 195 U.S. 138, 146, 147 (1904)). This is at odds with the understanding of Justice Brown in *Downes v. Bidwell*, who insisted those constitutional constraints apply forever and always. *See* Downes v. Bidwell, 182 U.S. 244, 277 (1901). *See also* Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 371 (2005) ("Take any one of the provisions . . . you can find at least one legal system in a country that is basically free that does not have that particular safeguard.").

[84] *See infra* Section II.B.

2. *"Impractical and Anomalous" Results in the Territories*

While the Ninth Circuit troubled itself with whether "all free government"[85]—rather than, say, the U.S. government—was constrained by various constitutional provisions, a parade of anthropologists, historians, and *matai* chieftains from American Samoa made their way to the witness stand in a courthouse in Washington, D.C. The saga began when Jake King did not pay his taxes in American Samoa in 1969.[86] He was tried without a jury and convicted.[87] He appealed in local courts, but also filed suit against the Secretary of the Interior, alleging a violation of his Sixth Amendment right to trial by jury.[88]

The appeals court dismissed King's "fundamental rights" argument and, in dictum, propounded a new test altogether.[89] The question did not revolve around the "simple words of the opinions King cite[d]" but rather "the contexts in which those cases were decided"—any decision in King's case would need to be grounded in the conditions in *contemporary* American Samoa.[90] The D.C. Circuit had revived Harlan's test and made it the centerpiece: Was trial by jury "impractical and anomalous" in American Samoa?[91] The determination

> must be based on facts. Specifically, it must be determined whether the Samoan mores and *matai* culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a case . . . without being unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practicable.[92]

In short: less John Marshall, more Margaret Mead. The court's demand for anthropological "facts" reflected a complex of concerns

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[85] *Atalig*, 723 F.2d at 690.

[86] King v. Morton, 520 F.2d 1140, 1142 (D.C. Cir. 1975). Unless otherwise noted, the case background comes from this opinion.

[87] *Id.*

[88] *Id.* at 1143. American Samoa, unlike the other territories, has no organic act passed by Congress; governance authority is vested in the President, who has delegated it by executive order to the Department of the Interior. The Secretary of the Interior approved the Samoan Constitution in 1967, which grants American Samoans some measure of self-government, but the executive branch retains plenary authority over the territory. *See Hodel*, 830 F.2d at 376 (describing the political arrangement with American Samoa).

[89] *See Morton*, 520 F.2d at 1146 ("[W]e think it proper to add a few words to assist the District Court on remand . . . ."). The district court originally dismissed for lack of jurisdiction, upon which ground the appeals court reversed. *Id.* at 1142.

[90] *Id.* at 1147. King's argument, like that in *Atalig*, was based on *Duncan v. Louisiana*. *See supra* notes 67–70 and accompanying text.

[91] *Morton*, 520 F.2d at 1147 (citing Reid v. Covert, 354 U.S. 1, 75, 77 (1957)).

[92] *Id.*

shared by the Courts in *Dorr* and *Balzac*, a mixture of paternalism and expedience.[93] Notably missing from the questions enumerated is whether American Samoans *wanted* jury trials;[94] even the *Insular* Courts acknowledged this as a factor—even if it was a veneer for other, more ignoble justifications.[95]

After an "extensive trial" on remand, the district court found that because American Samoans had already considerably assimilated mainland American culture, implementing jury trials would not "undercut the preservation of traditional values and harmonious relationships on the relatively small island."[96]

Local custom would never again be thwarted by the "impractical and anomalous" inquiry, neither in the D.C. Circuit nor the Ninth Circuit, where Justice Harlan's musings would next decide a case. In *Wabol v. Villacrusis*—a challenge to NMI's racially restrictive land laws[97]—the Ninth Circuit briefly nodded at its own precedent (the "fundamental rights" inquiry from *Atalig*[98]) before bypassing it wholesale in favor of the D.C. Circuit's test.[99] The court thought the latter approach was "more explicit" and struck "a delicate balance between local diversity and constitutional command."[100] The restrictions on the alienation of land attempted (paternalistically, they concede) to preserve land, a sacred touchstone of NMI culture, by

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[93] *See* Dorr v. United States, 195 U.S. 138, 145–48 (1904) (citing unfitness of residents to serve on juries, unworkability, and preference of locals as rationales for its holding); Balzac v. Porto Rico, 258 U.S. 298, 309–11 (1922) (same). For the *Insular* Courts, these *potential* issues were enough to permit convictions without jury trials; the D.C. Circuit would only go along if those suppositions were proven as *facts*, sometimes in a full-dress trial.

[94] *See Morton*, 520 F.2d at 1147 ("Nor is the answer [to the constitutional inquiry] to be found in the failure of the Samoan Constitution, *originated by the Samoan people*, to provide for trial by jury . . . .") (emphasis added).

[95] *See, e.g.*, *Dorr*, 195 U.S. at 148 (doubting that "the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept . . . a system of trial unknown to them and unsuited to their needs"); *Balzac*, 258 U.S. at 311 ("[T]he United States has been . . . sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it.").

[96] King v. Andrus, 452 F. Supp. 11, 12–16 (D.D.C. 1977). "The institutions of the present government of American Samoa reflect not only the democratic tradition, but also the apparent adaptability and flexibility of the Samoan society. It has accommodated and assimilated virtually *in toto* the American way of life." *Id.* at 15.

[97] *See supra* Section I.C.1 (mentioning the challenge).

[98] *See id.*

[99] In applying the "impractical and anomalous" test, the Ninth Circuit was paying lip service to its own precedent—*see supra* notes 67–76 and accompanying text—and applying the D.C. Circuit's test from *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975). *See* Wabol v. Villacrusis, 958 F.2d 1450, 1461 (9th Cir. 1990) (determining that *King v. Morton* "sets forth a workable standard . . . and one which is *consistent* with the principles we stressed in *Atalig*") (emphasis added).

[100] *Id.*

keeping it in the hands of NMI-born residents.[101] Overturning these restrictions would be "impractical and anomalous," wrote the court, because the negotiations between the U.S. and NMI would have broken down without these restrictions, frustrating the political union;[102] it would "hamper the United States' ability to form political alliances and acquire necessary military outposts";[103] it would endanger NMI culture and ownership of land; and it would break American promises made to protect NMI interests in land.[104] These factors—a mix of laudable, mercenary, and paternalistic—do not provide a ready blueprint for future courts weighing whether various constitutional provisions apply in the territories.[105] But the court's insistence on local custom and majoritarian will[106] *is* instructive—a constitutionally suspect law that embodies a local custom, especially one enshrined in the territorial constitution, may bear a presumption of validity. The overtones of cultural protection weighed heavily with the court as well.[107]

Fast forward to 2015: On one reading, majoritarian will—not enshrined in a law, much less a constitutional provision—was the decisive factor that defeated Leneuoti Tuaua's claim to citizenship. Tuaua, a U.S. "national" born in American Samoa, claimed that the

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101 *Id.* ("The land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain . . . ."). Land was "so scarce, so precious, and so vulnerable to economic predation." *Id.* at 1462.

102 *Id.*

103 *Id.*

104 *Id.* If the Constitution is a check on government power, many of these reasons beg the question: If Congress cannot permissibly allow a territorial government to implement such laws, then it seems irrelevant that this restriction would prevent such political arrangements or "force the United States to break [a] pledge," because it could not lawfully enter such arrangements or make such pledges in the first place. *Id.* The critique that this functionalist inquiry is entirely misplaced in deciding whether or not a constitutional provision *applies* in the first instance is well developed in Burnett, *supra* note 57, at 976–82.

105 For instance, a judge pondering whether a racial preference in local government employment "hamper[s] the United States' ability to . . . acquire necessary military outposts" is probably a confused judge. *Wabol*, 958 F.2d at 1462.

106 *See id.* at 1459 (noting the Covenant and the NMI Constitution were approved by plebiscites); *id.* at 1460 (stating that the incorporation analysis must have an "eye toward preserving Congress's ability to accommodate the unique social and cultural conditions and values of the particular territory"); *id.* at 1462 (giving weight to fact that the "islanders' vision does not precisely coincide with mainland attitudes toward property").

107 *See id.* ("Nor was [the Bill of Rights] intended to operate as a genocide pact for diverse native cultures. Its bold purpose was to protect minority rights, not to enforce homogeneity.") (internal citations omitted). "Genocide pact" is an odd locution, though the point is forcefully made. One could quibble with the last sentence: Wasn't the Bill of Rights meant to protect minority rights by creating a baseline of *homogeneous rights*?

Fourteenth Amendment made him a citizen of the United States.[108] The D.C. Circuit doubly rejected his claim, deciding there was no "fundamental right" to birthright citizenship *and* that it would be "impractical and anomalous" to enforce the right.[109]

After noting the Samoan people "have not formed a collective consensus in favor of United States citizenship," the court held it would be "anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives."[110] There could be little more anomalous than "forcible imposition of citizenship against the majoritarian will, . . . an exercise of paternalism—if not overt cultural imperialism . . . ."[111]

Leaving to the side other issues with the opinion,[112] the D.C. Circuit's approach to the "impractical and anomalous" inquiry has now shifted from giving little or no weight to majoritarian sentiment (in *King v. Morton*) to entitling it to dispositive weight.[113] If what matters is "the autonomy of Samoan democratic decision-making" per se,[114]

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[108] U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."). Non-citizen "nationals" are denied various rights and privileges conditioned on U.S. citizenship, including eligibility for federal work-study programs, qualification for some federal employment and political office, and—in some states—the right to vote. *See* Tuaua v. United States, 951 F. Supp. 2d 88, 91 (D.D.C. 2013) (enumerating the disadvantages of being a "national").

[109] *See* Tuaua v. United States, 788 F.3d 300, 308–11 (D.C. Cir. 2015) (finding that a claimed right to birthright citizenship failed under either inquiry). The court only resorted to the *Insular Cases* after determining that the phrase "in the United States" in the Fourteenth Amendment was ambiguous and so textual analysis alone could not resolve the geographic scope of the amendment. *See id.* at 302–06. The court's invocation of both inquiries highlights that at this point, courts may freely pick and choose the inquiry or combination of inquiries they prefer. This maximizes the discretion of courts, which has been the source of much critique. *See infra* note 158 (listing these critiques).

[110] *Tuaua*, 788 F.3d at 309–10.

[111] *Id.* at 311–12.

[112] For instance, the court's reliance on the opinion of amicus Governor Eni Faleomavaega as a yardstick for the "majoritarian will" of all American Samoans, and its unwillingness to grapple with the appellants' argument that the premise underlying the Governor's concern—that constitutional citizenship would subject Samoan land laws to greater scrutiny—is flimsy. *See id.* at 310–11 (citing the Governor's brief in support of appellee United States); *see also Wabol*, 958 F.2d at 1461 (upholding NMI's racially restrictive land laws).

[113] *Tuaua*, 788 F.3d at 312. It is possible to read the opinion more narrowly: that majoritarian preference may not usually be a relevant factor in the "anomalous" inquiry, but the substance of the right involved here—to get to be, or be forced to be, a U.S. citizen—is so bound up with consensual political association that it is perfectly sensible to include it in the calculus here. Perhaps, but this reading is less plausible in light of the numerous propositions in the opinion emphasizing this majoritarian factor *generally*, untethered to the specific right at issue. *Id.*

[114] *Id.*

and not democratic preference *qua* index of consent to full membership in the American polity—i.e., citizenship—then by what authority could a court "impose"[115] the First Amendment, say, on a territorial people who criminalize (otherwise) protected hate speech because they abhor it?[116]

II
Flexibility Explained: Turning Constitutional Questions into Political Ones

A century of case law has offered little clarity and two mutating inquiries that can yield opposite outcomes on the same question,[117] neither inquiry robust or developed enough to actually enforce a right. Some courts apply one, others conjoin them.[118] The early cases rested on the assumption that territorial peoples were in a state of "tutelage" and could not govern themselves;[119] the later cases justified the *Insular* doctrine on the opposite premise—the federal government's need to respect "the autonomy of [territorial] democratic decision-making."[120] So what are the courts doing? And why?

Squaring the old *Insular Cases* and the new requires framing them not around the loss of rights but rather the increase in government power unconstrained by those rights. Conceived this way, the *Insular* doctrine grants the political branches enormous flexibility in governing, or delegating the governance of, the territories outside the Constitution. Under the guise of "flexibility," the courts have essen-

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[115] *See id.* at 310–11 (decrying the prospect of the court "imposing" citizenship on American Samoans); *cf.* William Shakespeare, The Tragedy of Hamlet, Prince of Denmark act 3, sc. 2 ("The lady doth protest too much, methinks.").

[116] Professor Vladeck's critique of the opinion spurred my own thinking about it. *See* Steve Vladeck, *Three Problems with Judge Brown's Opinion in* Tuaua, Just Security (June 7, 2015, 2:47 PM), https://www.justsecurity.org/23572/three-problems-tuaua (arguing the D.C. Circuit misapplied Justice Harlan's test and highlighting the dangers to minority rights from this approach). "[A]llowing the 'impractical and anomalous' test to be resolved based upon majoritarian sentiment fundamentally devalues the importance of constitutional *rights* in the territories . . . ." *Id. See also* Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 U. Haw. L. Rev. 337, 380 (1980) ("Constitutional values are not determined by majority vote.").

[117] *Compare* King v. Andrus, 452 F. Supp. 11, 15 (D.D.C. 1977) (finding a constitutional right to jury trial in American Samoa because it would not be "impractical and anomalous" to enforce it), *with* Northern Mariana Islands v. Atalig, 723 F.2d 682, 689–90 (9th Cir. 1984) (rejecting a right to jury trial because it is not a "fundamental right" forming "the basis of all free government").

[118] *See supra* note 109 and accompanying text (noting that the D.C. Circuit engaged in both inquiries in the *Tuaua* decision).

[119] *See* Downes v. Bidwell, 182 U.S. 244, 263 (1901) (stating the territories were "under the direct control and tutelage of the general government").

[120] *See Tuaua*, 788 F.3d at 312.

tially re-purposed constitutional questions as political ones where adjudicating the constitutional question against the government would frustrate American geopolitical ambitions,[121] or restrain the government from delegating self-rule to territories, under which rule the laws of the territories sometimes run afoul of the Constitution.

A. Breathing Space for American Empire

The crate of citrus in *Downes v. Bidwell* was never the real issue. What the Court blessed, and what the oranges portended, was the ability of the United States to participate on an equal footing with European powers in empire—new markets for raw materials and American goods, military bases and coaling stations, guano islands and American greatness.[122] Cheerleaders for global expansion recognized that empire-building would have to face down "the constitutional lion in the path."[123]

The lion never pounced. The Justices were not coy about acknowledging these ambitions as the motivation for Congressional flexibility. "[N]o construction of the Constitution should be adopted which would prevent Congress from considering each [territory] upon its merits . . . . A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire," wrote the Court.[124] The Justices believed that the United States' power in holding and governing these territories should equal that of other nations.[125] Indeed, Justice White's entire argument was that enforcing constitutional provisions in the territories would de facto "incorporate" them and thereby produce such absurd results that doing so would, in effect, destroy the United States' ability to acquire

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[121] This is no calumny on the courts; I am not accusing them of "hiding the ball" when applying the *Insular* doctrine. The doctrines by their own terms do not purport to be garden-variety constitutional interpretation, but rather rules for deciding if a provision even applies to a given situation in the territories.

[122] *See* SPARROW, *supra* note 6, at 64–69 (giving background on the commercial, military, and political goals for American expansion).

[123] A.T. MAHAN, THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE 256–57 (1897).

[124] Downes v. Bidwell, 182 U.S. 244, 286 (1901).

[125] *See id.* at 285 ("If it be once conceded that we are at liberty to acquire foreign territory . . . our power with respect to such territories is the same power which other nations have been accustomed to exercise . . . ."); *id.* at 302–03 (White, J., concurring) ("[T]he government of the United States, in virtue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation."). *Accord* Dorr v. United States, 195 U.S. 138, 146 (1904) (reiterating "the power of the United States, *like other sovereign nations*, to acquire, by the methods known to civilized people, additional territory") (emphasis added).

new territory by war or treaty.[126] To grant the power of acquisition but deny the power to govern outside the Constitution would render the United States "helpless in the family of nations."[127]

Justice Harlan, dissenting in many of these cases, pulled no punches in calling out the political considerations anchoring this lenience toward Congress. Under the "guidance of commercialism and the supposed necessities of trade . . . and to gratify an ambition to become the dominant political power in all the earth," he feared the United States would exercise "absolute dominion" over these territories, "engraft[ing] upon our republican institutions . . . a *colonial system* . . . ."[128]

These political goals did not factor into the "fundamental rights" inquiry *itself*, which merely envisioned some set of inviolable rights arising out of the primordial constitutional soup.[129] But they were the policy substrate underneath the positive grant of power to (or the removal of negative constraints from) Congress to govern outside the Constitution, the "why" that accompanied the "what" of the fundamental rights test.

While full-bore imperialism had given way by the 1950s,[130] the need for muscular overseas power was still a valid consideration for some members of the Court. Justice John Marshall Harlan II—more of a pragmatic constitutionalist than his grandfather—gestured at the United States' "far-flung foreign military establishments" and how unfortunate it would be "to foreclose . . . our future consideration of the broad questions involved in maintaining the effectiveness of these national outposts."[131] There is an echo of Justice Brown's warning about a "fatal step" hobbling American imperial ambitions;[132] unlike

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126 *See Downes*, 182 U.S. at 300 (White, J., concurring) ("The result of the argument [that the Constitution applies] is that the Government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States."). Could it be that "people utterly unfit for American citizenship" would immediately gain citizenship (on his assumptions) and "the whole structure of the government be overthrown"? *Id.* at 311–13.

127 *Id.* at 306 (White, J., concurring).

128 Hawaii v. Mankichi, 190 U.S. 197, 239–40 (1903) (Harlan, J., dissenting) (emphasis added).

129 *See supra* Section I.A.

130 *See* Keitner, *supra* note 65, at 82–84 (summarizing the decolonization movement in the twentieth century and the shift to a "consent paradigm").

131 Reid v. Covert, 354 U.S. 1, 77 (1956) (Harlan, J., concurring). The way in which Harlan's "impractical and anomalous" test might integrate the political aims of Congress or the President directly into the constitutional inquiry, unlike the "fundamental rights" test, is discussed in Section II.B *infra*.

132 Many contend that American "soft power" in the post-War context was the informal descendent of explicit extraterritorial colonial reach. *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN

the "fundamental rights" test, though, Harlan's open-ended functionalist inquiry could easily (and directly) incorporate policy concerns.[133]

All told, the *Insular Cases* gave judicial cover for nascent American expansion overseas. By creating the incorporated-unincorporated distinction, the Court gave Congress flexibility to disregard constitutional constraints in governing unincorporated territories, taming the "constitutional lion in the path."[134] Congress needed flexibility, or so the Court thought, to fully realize the United States' abilities and ambitions as an imperial player on the world stage.

B. The Anticolonial Constitution

But political orders change and crumble; constitutional sailcloth trimmed for one set of political breezes must be adjusted when the winds change. The *Insular* doctrine, ratifying a set of colonialist policies, turned out to be nimble enough to support the opposite aim: decolonization. By the 1970s, the Union Jack and the Tricolore had been run down flagpoles the world over—the World Wars fought in the name of freedom and the recognition of principles of self-determination made awkward any attempt by Western powers to maintain their own colonies.[135] International agreements formalized the drive toward decolonization and self-rule for peoples the world over;[136] the United States worked to make good on these promises in its own territories.[137] In making governments for themselves, some of the U.S.

LAW 128 (2009) (describing the United States' post-War global role as "a new and informal kind of empire").

133 *See infra* notes 151–52 and accompanying text.

134 MAHAN, *supra* note 123, at 257.

135 As Prime Minister of the United Kingdom Clement Attlee relayed: "[T]wice in 25 years India has played a great part in the defeat of tyranny. Is it any wonder that today she claims – as a nation of 400,000,000 people that has twice sent her sons to die for freedom – that she should . . . have freedom to decide her own destiny?" 420 Parl Deb HC (5th ser.) (1946) col. 1421 (UK).

136 *See, e.g.*, Atlantic Charter, U.S.-U.K., Aug. 14, 1941; U.N. Charter art. 73(b) (obligating member states to assist "non-self-governing territories" to "develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples"); Trusteeship Agreement for the Former Japanese Mandated Islands art. 6(1), July 18, 1947, 61 Stat. 3301, 8 U.N.T.S. 189 (directing the United States to "promote the development of the inhabitants of the trust territory toward self-government or independence" according to the "freely expressed wishes of the peoples concerned").

137 *See, e.g.*, Organic Act of Guam, 48 U.S.C. §§ 1421–1421r (2012) (creating limited self-government in Guam under the Department of the Interior); Puerto Rican Federal Relations Act, Pub. L. No. 600, 64 Stat. 319 (codified at 48 U.S.C. § 731(b) (1994) (allowing for greater self-government in Puerto Rico under new "Commonwealth" status); Revised Organic Act of the Virgin Islands, 48 U.S.C. §§ 1541–1645 (2012) (creating self-government in U.S.V.I.).

territories wanted to safeguard local customs or arrangements in their laws and constitutions—arrangements that did not, strictly speaking, align with metropolitan constitutional norms.[138]

The courts obliged them, and gone were the assertions of sovereign prerogative. The *Atalig* court—revisiting the very same jury trial issue the Court had adjudicated in the original *Insular Cases*, but 80 years later—explained the "fundamental rights" inquiry allowed courts to "afford Congress flexibility in administering offshore territories and to avoid imposition of the jury system on peoples unaccustomed to common law traditions."[139] Such traditions might be "inappropriate in territories having cultures, traditions, and institutions different from our own."[140] Adopting a more stringent standard would "deprive Congress of . . . flexibility" and make "[a]ccommodation of the particular social and cultural conditions of areas such as the NMI . . . difficult if not impossible."[141]

Such accommodation was not merely by the unilateral grace of an enlightened Congress, but "[i]n accord with the negotiated agreement defining the political relationship between the NMI and the United States . . . ."[142] The court detailed at length the bilateral covenant negotiated between the United States and NMI, a provision of which delegated to NMI the authority to determine for itself whether jury trials would be permitted.[143] "This flexibility permits the local legislature to mold the procedures in the NMI courts to fit local conditions and experience," it noted.[144] The Covenant, the court took pains to point out, was unanimously approved by the NMI legislature, a supermajority of NMI voters, and the United States Congress.[145] Moreover, the Covenant would not have been politically viable absent this provision, among others.[146]

In *Atalig*, the court picks up a thread from the *Insular Cases*—flexibility for Congress—and ties it not to the sovereign prerogative to

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138 *See supra* Section I.C.

139 Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984).

140 *Id.*

141 *Id.*

142 *Id.* at 688.

143 *See id.* at 684–86 ("The resolution of these issues requires an understanding of the unique political relationship between the NMI and the United States.").

144 *Id.* at 686.

145 *See id.* at 685 (noting Covenant was approved by 78% of NMI voters).

146 *See id.* at 685–86 ("The drafters of the Covenant noted that without [this provision], 'the accession of [NMI] to the United States would not have been possible.' "). *Atalig* also noted the United States' pre-Covenant obligation as trustee for NMI to "promote the development of the inhabitants of the trust territory toward self-government or independence" in view of the "freely expressed wishes of the peoples concerned." *See id.* at 685; Wabol v. Villacrusis, 958 F.2d 1450, 1458 (9th Cir. 1990) (noting same).

conquer new lands but to the ability of the federal government to accede to the democratically expressed and freely negotiated wishes of territorial peoples, in keeping with its promises as trustee.[147] The extensive chronicle of the Covenant negotiation process is not mere atmospherics; it was the flexibility in striking this accord the court recognized as paramount when justifying the "fundamental rights" inquiry in its new, stringent form.[148]

The court in *Wabol v. Villacrusis* built upon these rationales. A right could only be enforced if "fundamental in this *international* sense"—because our conception of rights "must narrow to incorporate the shared beliefs of diverse cultures."[149] Congress got a constitutional hall-pass not to build empires but instead to "accommodate the unique social and cultural conditions and values of the particular territory."[150] Applying Harlan's test, the court in *Wabol* explicitly factored in the role of land in NMI; the (paternalistic) goal of protecting it by restricting sale; the "solemn and binding undertaking" by the U.S. to protect it; and the desires of the NMI people to include such a provision in the Covenant.[151] The considerations foremost in mind are now foremost in the inquiry, too: the protection and accommodation of NMI culture and governance arrangements.[152]

Respect for local governance arrangements weighs heaviest in *Tuaua*, where the court suggested enforcing the Citizenship Clause in American Samoa would entail "the autocratic subjugation of free people"[153] and the "forcible imposition of citizenship against the majoritarian will."[154] Accommodation of the Samoans' desire to associate politically on their own terms is not merely one factor; it is *dis-*

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147 *See supra* notes 138–45 and accompanying text (spelling out this transition to an accommodationist rationale). *See also Wabol*, 948 F.2d at 1461 ("[W]e must be mindful also that the preservation of local culture and land is more than mere desideratum—it is a solemn and binding undertaking memorialized in the Trusteeship Agreement.").

148 *See supra* notes 139–46.

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

150 *Id.*

151 *Id.* at 1461–62. The *Wabol* court, like the *Atalig* court, discusses at some length the democratic process by which the Covenant came into being. *See id.* at 1458–59.

152 This "global due process" approach has been heavily criticized by commentators for its open-endedness and manipulability. *See infra* note 158. Indeed, its context-specific questions seem to offer courts substantial discretion in framing the analysis. To the extent the inquiry is conceived as balancing "local diversity and constitutional command" and "accommodat[ing] the unique social and cultural conditions and values of the particular territory," *Wabol*, 958 F.2d at 1460–61, courts may weigh how they please factors like local law, majoritarian preference, and a perceived need to protect local culture and institutions.

153 Tuaua v. United States, 788 F.3d 300, 310 (D.C. Cir. 2015).

154 *Id.* at 311. The court cites to the United Nations Charter, the Atlantic Charter, and the Wilson's Fourteen Points—all embodiments of the principle of self-determination for all peoples. *Id.*

positive on the question of whether enforcing the Citizenship Clause would be "anomalous," "an irregular intrusion into the autonomy of Samoan democratic decision-making."[155] Accommodationist concerns—respecting local governance decisions and protecting local culture, no matter the constitutional deviation—are now at the heart of the *Insular* doctrine.[156]

The evolutions and contortions of doctrine, their ramifications and redefinitions in light of new congressional and executive policies, the adoption or mingling of a new functional test—all these worked to ratify the political branches' latter-day policy of promoting self-governance in the territories and protecting their cultures, just as the weak natural-rights limitations espoused by the *Insular* Court would allow Congress a free hand to govern its colonies as it pleased. By propagating thin, notional limits on government action, yet never finding government conduct to exceed these limits, the Court retained a role to rein in the political branches should they ever go too far.[157]

A constitutional doctrine that green-lights the territorial agenda of the political branches may be attacked as shoddy constitutional interpretation whether or not the outcomes of cases are ignominious or just,[158] but to stop there silences the intuition that empire-building and decolonization are not the same—that one may blacken the name of the *Insular Cases*, while the other may do it credit. I turn to that now.

III
Defending the *Insular Cases*: Maximizing Local Self-Determination

"No persuasive normative basis for the Insular Cases has been put forward . . . ."[159] This Note attempts to meet Professor Neuman's

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[155] *Id.* at 312.

[156] I concede that *King v. Andrus* cuts against the grain in its enforcement of the jury trial right in American Samoa over local majoritarian preference. *See supra* notes 85–96 and accompanying text (announcing a context-specific inquiry, under which the right to jury trial applies where practicable). It is, however, the only case to do so; all subsequent courts, including the D.C. Circuit (in applying it), have re-conceived the inquiry to more amenably and significantly account for majoritarian preference.

[157] Though one might doubt the ability or willingness of the courts to do this. *But see* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (holding the Suspension Clause applicable at Guantánamo).

[158] *See* Neuman, *supra* note 59, at 100–03 (criticizing the underpinnings of the *Insular* doctrine); Burnett, *supra* note 57, at 1014–15 (acknowledging that the "impractical and anomalous" test is not an "unreasonable way of dealing with the difficult problems raised by the U.S. relationship with its unincorporated territories" but leaves "much to be desired" as a mode of constitutional interpretation).

[159] Neuman, *supra* note 59, at 101.

challenge, at least in qualified fashion. I argue that the phenomenon described in Part II *supra*—where play in the constitutional joints allows greater and more meaningful self-governance in the territories—is, for its flaws, defensible and perhaps even necessary. Other scholars and commentators have defended the outcomes in the later *Insular Cases*,[160] but my account provides a broader set of defenses that better match the case outcomes to theories of modern, pluralistic republicanism.

A regime allowing territorial peoples different sets of rights and obligations, at the cost of perfect constitutional compliance, allows equal participation (in a meaningful sense) in the republic by territories that did not always voluntarily join (the "equality argument"). Moreover, it protects their ways of life and honors bargained-for deviations from the Constitution for those territories that *did* affirmatively join (the "historical argument").

A. Different But Equal—The Equality Argument

"Equality" does not mean much on its own, as it may embody any number of different *theories* of equality. In part because of its history of slavery and Jim Crow, the United States has come to embrace a universalist notion of equality that calls for largely identical "bundles of basic rights and duties" across all citizens.[161] For the most part, the United States' theory of equality, as embodied in its jurisprudence, rejects entrenched differentiation among groups of citizens—"group-differentiated rights"—as a legitimate long-term democratic arrangement.[162] Or does it? While this universalist model of liberal republics has prevailed as a paradigm since World War II and dominates Amer-

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[160] *See* Laughlin, *supra* note 116, at 388 ("Ironically, the incorporation doctrine which originally legitimated popular desire to fulfill America's manifest destiny now provides the theoretical basis for assuring a large measure of territorial self-determination."); Laughlin, *supra* note 83, at 374 (noting the approach from *King* and *Wabol* "recognizes that their cultures are substantially different . . . and allows some latitude in constitutional interpretation for the purposes of accommodating those cultures"). Professor Laughlin's articles defend the use of Harlan's test but do not thoroughly explore the normative justifiability of group-differentiated rights.

[161] *See* Rogers M. Smith, *The* Insular Cases*, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE, *supra* note 65, at 104 (explaining that in the wake of the civil rights movement, generic liberal and republican thought has "presumed that citizenship should . . . be a nearly or wholly universal status").

[162] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). *See also* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 4 (1995) (distinguishing between remedial differentiation, like affirmative action programs, and "permanent differentiation" for minority groups). *But cf.* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF.

ican rhetoric,[163] certain groups—territorial residents and Native Americans, namely—have always occupied a space apart.[164] I argue that while the assimilationist/universalist model of "equality" may be fair to govern (non-Indian) citizens of the States, group-differentiated rights are justifiable in the context of territorial peoples.

The argument that territorial peoples must be allowed "unequal" treatment in order to be equal begins with several premises: (1) territorial cultures are endangered by the application of universalist rights regimes,[165] and (2) many of the territories did not seek or consent to, in a significant way, American sovereignty and membership in the American political order.[166]

Both the value of local cultures *and* their vulnerability ring out from the opinions rejecting constitutional challenges to group-differentiated rights in the territories. This is clearest in the land restriction cases: "There can be no doubt that land in [NMI] is a scarce and precious resource," native ownership of which plays a "vital role . . . in the preservation of NMI social and cultural stability."[167] The court devotes an entire page to the importance of land to the people of NMI,[168] and the all-too-high risk of loss if ownership could be had on

147–56 (1976) (identifying a "group-disadvantaging principle" in the Equal Protection Clause rather than a colorblindness principle).

163 This contrasts with nations like Canada, whose large, entrenched minority nations have led them to embrace a group-differentiated paradigm. "[T]he accommodation of differences . . . is the essence of true equality . . . ." Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143 (Can.).

164 *See supra* Part I (surveying constitutional variations in the territories); *infra* Part IV (discussing constitutional law in the territories in light of Indian law).

165 I am assuming that cultural membership is deeply valuable. *See, e.g.*, KYMLICKA, *supra* note 162, at 84–93 (explaining why the necessity of culture and language to meaningfully participate in public life supports group-differentiated rights); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 313 (1983) ("A given society is just if its substantive life is lived . . . in a way faithful to the shared understandings of the members."); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87/9 J. PHIL. 439, 439–61 (1990) (arguing that membership in a "pervasive" societal culture creates the universe of possibilities for its members and that unprotected minority cultures are vulnerable for this reason).

166 For territories that opted to join the U.S. like NMI, the consent argument has less force, but the fact that NMI bargained for certain group-differentiated rights picks up the slack. *See infra* Section III.B.

167 Wabol v. Villacrusis, 958 F.2d 1450, 1461 (9th Cir. 1990).

168 *See also* Haleck v. Lee, 4 A.S.R. 519, 551 (Am. Samoa Trial Div. 1964) ("Land to the American Samoan is life itself. . . . The whole fiber of [American Samoan life] is woven fully by the strong thread which the American Samoan places in the ownership of land. Once this protection . . . is broken . . . the American Samoan way of life will be forever destroyed."). Fifty years later, this sentiment is little changed. "The American Samoan way of life, the *fa'a Samoa*, is of critical importance to the American Samoan people. . . . American Samoa's land-tenure system and its clan-based restrictions on ownership are longstanding and rooted in the very nature of insular life and the scarcity of land it entails." Brief for Intervenors, or in the Alternative, *Amici Curiae* the American Samoa

an equal basis.[169] "[E]qualization of access would be a hollow victory if it led to the loss of their land [and] their cultural and social identity . . . . The Bill of Rights was not intended . . . to operate as a genocide pact for diverse native cultures."[170] These same fears underpin the concern of some American Samoans about a constitutional grant of citizenship, which they worry would trigger greater constitutional scrutiny of their land laws.[171] Likewise, avoiding the "imposition" of jury trials on peoples with "cultures, traditions, and institutions different from our own" motivated the court in *Atalig*, placing NMI culture and its protection from unwanted legal norms at the center of its opinion.[172]

So it's not just advocates and scholars contending for the value of protecting local cultures through group-differentiated rights; the courts of appeals themselves are pressing such arguments in upholding these rights, though it rumple the edges of the Constitution. If the *fa'a Samoa*—an entire way of life—is not to be extinguished, then restrictions on land alienation must prevail there. As the Canadian Supreme Court noted, "identical treatment may frequently produce serious inequality . . . ."[173] What does it profit a person born in American Samoa or NMI that someone else—a mainlander American retiree—can be "equal" to him, that the retiree can buy a plot of land (or, more likely, every plot of land), if it comes at the cost of his culture and identity?[174] For American Samoans and other territorial residents, to co-

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Government and Congressman Eni F.H. Faleomavaega at 23–24, Tuaua v. United States, No. 13-5272 (D.C. Cir. Aug. 25, 2014).

169 *Wabol*, 958 F.2d at 1461–62. Commentators have noted that the people of NMI and American Samoa regard as cautionary tales Guam and Hawaii, where much of the land is now in the hands of non-natives. *See* Laughlin, *supra* note 116, at 369–70 nn.182–88 and accompanying text.

170 *Wabol*, 958 F.2d at 1462 (citing Laughlin, *supra* note 116, at 388).

171 *See* Brief for Intervenors, *supra* note 168, at 26–32 ("The traditional way of life in American Samoa would likely face heightened scrutiny under the . . . Constitution . . . . [T]he communal land system at the heart of the *fa'a Samoa* is protected by Samoan law restricting the sale of community land to anyone with less than fifty percent racial Samoan ancestry.").

172 *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) (reiterating that accommodation of NMI's cultural and social needs would be "difficult if not impossible" if Bill of Rights incorporation doctrine were to guide courts assessing constitutional claims in the territories).

173 Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143, 171 (Can.).

174 Such concerns obviously present difficult, fact-intensive assessments. One might counter that jury trials and equally apportioned legislatures and equal access to land won't *really* imperil native cultures, but this claim is dubious as a descriptive matter, *see supra* note 169 (the example of Hawaii), and it would be problematic not to listen to those best positioned to make this determination, who do believe it imperils their culture. *See supra* notes 168, 171 and accompanying text (highlighting the importance of land to American

exist meaningfully—to be equal, in a sense—in the American republican system requires a different set of rights and obligations for locals.

One might counter that States have made the same arguments, and nor do we permit large immigrant groups to have different rights or duties than other citizens. But this overlooks the third premise: that the territories either came involuntarily under U.S. sovereignty (Guam, Puerto Rico, and the U.S. Virgin Islands) or did so on the explicit condition that they could retain group-differentiated rights.[175] The decision to join, or emigrate to, the United States is freely taken—consent to the American political and constitutional regime, with all the obligations and rights it entails. Citizens of new states (and immigrants) accept the potential loss of culture through universal enforcement of the law; this question was never put, however, to the people of Guam or Puerto Rico.[176] For the territories that consented, they bargained for group-differentiated rights and moreover were not contemplated as future states.[177] Enforcing equal rights, or prohibiting group-differentiated rights, in the States has its own logic and justifications,[178] which do not apply to the territories. And as the case of the Constitution's application to American Indians suggests (the notable

Samoan culture, and pointing out that equal treatment runs the risk of diluting local control over land in American Samoa).

175 *See infra* Section III.B (describing these conditions).

176 Slavery fits somewhat uncomfortably into this schema. Slaves obviously made no choice to come over in shackles, much less buy into a constitutional regime that protected the rights of their "owners" to the "property" of their bodies. The argument from involuntariness thus might apply with equal force to claims for enduring group-differentiated rights for the descendants of slaves. As discussed *supra* in notes 161–63, the United States took a different fork in the road, pursuing equality and justice through a universalist approach. *See* KYMLICKA, *supra* note 162, at 24–25 (exploring the complicated position of African-American descendants of slaveowners in group-rights theorization). The deployment of this "colorblind"/universalist approach to *defeat* efforts at group-differentiated rights in favor of African-Americans has not transpired without some bitter commentary. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 866 (2007) (Breyer, J., dissenting) (decrying as "a cruel distortion of history" the plurality's equation of race-conscious integration efforts to Jim Crow discrimination). These issues merit greater attention but are beyond the scope of this Note.

177 *See* SPARROW, *supra* note 6, at 42–43 (quoting a prominent commentator who contrasted the fitness for statehood of the Northwest Territory with that of a "cannibal island").

178 To begin, membership as a State is mutually consented to—the peoples of the States have bought into an already-defined system of rights and obligations under the Constitution. This mutuality is lacking in territories that didn't choose to join, or whose people bargained for other rights. This assumes, of course, that a homogeneous or universalist set of rights and duties is already more justifiable in the State context, a debatable proposition. *See supra* notes 161–63, 176 and accompanying text (contextualizing the universalist paradigm within the United States as a legacy of the history of slavery and the civil rights movement).

exception to that universalist regime),[179] there is room for heterogeneous rights and duties in the American system.

B. Political Contracting at the Creation—The "Historical Argument"

Many of these constitutional departures for group-differentiated rights were baked into territorial political arrangements from the very beginning. The Samoan chiefs who signed the deeds of cession to the United States specifically bargained for protection of their lands.[180] The Covenant between NMI and the U.S., negotiated 70 years later, provided for racially restrictive land laws, local determination of jury trials, and a malapportioned Senate.[181]

Will Kymlicka argues that honoring differentiated rights bargained for by the minority group "respect[s] the self-determination of the minority,"[182] and protects the legitimate reliance interests of the group. Group members "come to rely on the agreements made by governments, and it is a serious breach of trust to renege on them."[183] The first point assumes that such creative contracting around the Constitution is legitimate in the first place; to this Kymlicka answers that "these agreements define the terms under which [the sovereign] acquired authority over these groups."[184] He points out that French Canadians chose to join Canada instead of "exercis[ing] their self-determination in other ways,"[185] and his argument applies with equal, if not greater, force to NMI.[186] These territories were not necessarily going to be admitted as sovereign states;[187] why shouldn't they be per-

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[179] *See infra* Part IV (exploring Indian law and the Constitution).

[180] The instruments ceding the islands required the United States to "respect and protect the individual rights of all people . . . to their land" and would recognize such rights "according to their customs . . . ." *See, e.g.*, Deed of Cession of Manu'a Islands (July 26, 1904), http://www.asbar.org/images/unpublished_cases/cession2.pdf; Deed of Cession of Tutuila and Aunu'u (April 17, 1900), http://www.asbar.org/images/unpublished_cases/cession1.pdf; *see also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 386 & n.79 (D.C. Cir. 1987) (chronicling longstanding "Congress[ional] policy of respecting Samoan traditions concerning land ownership").

[181] *See supra* Section I.C.

[182] KYMLICKA, *supra* note 162, at 119.

[183] *Id.*

[184] *Id.* at 117.

[185] *Id.*

[186] While the other options available to Quebec are historical and counterfactual, other parts of the Trust Territory of the Pacific Islands (Micronesia, Palau, Marshall Islands) opted for free association with the United States—full sovereignty with close ties and certain governance functions "outsourced" to the metropole. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1458 (9th Cir. 1990). NMI could have gone this route but did not.

[187] *See supra* note 33 (relating opinions as to how the new territories won in the Spanish-American War would fit into the constitutional regime).

mitted, then, to customize their political arrangements with the sovereign? Section II.A *supra* addresses the legitimacy of group-differentiated rights as a matter of equality; the "historical agreements" argument merely emphasizes the particular keenness of this argument when the rights are freely and fairly bargained for at the outset and memorialized in an agreement.[188]

The courts weighing constitutional challenges in NMI and American Samoa have bought into this logic. The *Atalig* court stressed the bilateral process and ratification of the Covenant,[189] and that without the carve-outs from the Constitution, "the accession of [NMI] would not have been possible."[190] The *Wabol* court parroted *Atalig* on the Covenant ratification process and added that "[t]he Covenant defines the relationship between [NMI] and the United States."[191] Similar to the jury trial proviso, "the political union of [NMI] and the United States could not have been accomplished without the [land alienation] restrictions."[192] Applying a colorblind, universalist version of the Equal Protection Clause would "ultimately frustrate the mutual interests that led to the Covenant."[193] And on and on—"without the express condition of equal representation [and thus malapportionment] in the Senate, the islands of Rota and Tinian would not have agreed to join the union with Saipan."[194] Factoring into the D.C. Circuit's opinion on a complicated land case in American Samoa was Congress's policy "of preserving the Fa'a Samoa by respecting Samoan traditions concerning land ownership," citing specifically to

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188 *See* Villazor, *supra* note 26, at 826–31 (chronicling negotiations between the United States and American Samoa and NMI for racially restrictive land laws to be included in the territories' laws).

189 *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 684–86 (9th Cir. 1984) (covering in some detail the history, ratification, and terms of the Covenant); *see also* Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1134 (D. N. Mar. I. 1999) ("The Covenant was approved unanimously by the Mariana Islands District Legislature, by an overwhelming majority vote of the people of the Northern Mariana Islands, and by a joint resolution of the United States Congress.").

190 *See Atalig*, 723 F.2d at 685–86 (citing MARIANAS POLITICAL STATUS COMMISSION, REPORT OF THE JOINT DRAFTING COMMITTEE 3 (1975), *reprinted in Hearing to Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands," Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 376 (1975)).

191 *Wabol*, 958 F.2d at 1459; *see also Rayphand*, 95 F. Supp. 2d at 1134 ("[The Covenant] consists of ten articles setting forth the agreement governing the relationship between [NMI] and the United States as its sovereign.").

192 *Wabol*, 958 F.2d at 1461 (citing REPORT OF THE JOINT DRAFTING COMMITTEE, *supra* note 190, at 3).

193 *Id.* at 1462.

194 *Rayphand*, 95 F. Supp. 2d at 1136.

the deeds of cession signed by the United States and Samoan leaders.[195]

These courts recognize that the peoples of NMI and Samoa, through their leaders and representatives—and directly through their plebiscites[196]—chose the terms on which they would accept U.S. sovereignty. Those terms were accepted, and bargained for in the shadow of constitutional law that suggested the terms were fair. If a court were to second-guess this agreement—striking down the land laws and making land available to all on equal terms, say—it would not merely be failing to "respect the self-determination of the minority."[197] It would be striking at the foundations of the political union between the territory and the United States, and putting at risk the patrimony and the way of life of the Samoan and NMI peoples. In the language of contract, there is no putting the parties back in the places they were ex ante; the reliance interests of the Samoan people are nothing less than their place in the world and the world they know.[198] The "historical agreement" argument draws on the same intuitions that underlie contracting—that the world is a better-off place when we are kept to our promises, especially when the stakes are high.

IV
NOT SO UNIQUE: INDIAN LAW AND EXTRACONSTITUTIONALITY

The arguments from equality and history contend that group-differentiated rights are justifiable on their own terms; this Part highlights that there is already space in the American constitutional order for the territories to deviate from metropolitan constitutional norms. The Court has long permitted this in the realm of Indian law, where both Congress and the tribal governments may act outside constitutional strictures otherwise imposed on them or analogous local governments.

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[195] *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 386 & n.79 (D.C. Cir. 1987) (okaying non-independent courts for American Samoa because it was "rationally designed to further a legitimate congressional policy"). The D.C. Circuit was not applying either of the *Insular* tests, but rather using the "rational basis" standard for differential treatment of territories outlined in *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) ("Congress . . . may treat Puerto Rico differently from States so long as there is a rational basis for its actions.").

[196] *See, e.g.*, *supra* notes 145 & 189 and accompanying text (identifying supermajority approval of NMI Covenant by voters).

[197] KYMLICKA, *supra* note 162, at 119.

[198] *See supra* note 168 and accompanying text (underscoring importance of land in American Samoa).

The constitutional regime governing Indians could charitably be called "complicated."[199] Among the doctrinal oddities is the proposition that Indians retain residual sovereignty to govern themselves, except when Congress decides otherwise, in which case their sovereign prerogatives are completely defeasible by Congressional enactment.[200] This plenary power afforded to Congress permits deviation from certain otherwise-applicable constitutional norms. In 1974, the Supreme Court upheld an employment preference for Indians at the Bureau of Indian Affairs in *Morton v. Mancari*, holding it was not a racial preference (but rather an "employment criterion") and moreover that it was "reasonable and rationally designed to further Indian self-government."[201] Whatever the validity of the Court's claim that the law did not depend on racial classifications,[202] a later Court read *Mancari* to mean that the unique status of Indians allowed "the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."[203] The tribes themselves—like the territorial governments[204]—are likewise not constrained by constitutional guarantees because "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes."[205] Congress has superimposed parts of the Bill of Rights on tribal governments by statute, but not all guarantees are included.[206] Guarantees of equal protection and due process *are*

199 *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 37–38 (1996) ("Indian law is doctrinally chaotic, awash in a sea of conflicting, albeit often unarticulated, values . . . .").

200 *See* United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) (expressing skepticism about these "two largely incompatible and doubtful assumptions").

201 Morton v. Mancari, 417 U.S. 535, 553, 555 (1974).

202 "[T]he Court's reliance on a political-racial distinction may be no more than an imprecise reference to the special status of Indian tribes under the Constitution and laws." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 656 (2d ed. 1982). Indeed, the Court's opinion in *Mancari* seems just as motivated by consequentialist concerns. "If [federal Indian statutes] . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Mancari*, 417 U.S. at 552.

203 Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500–01 (1979) (internal quotation marks omitted).

204 In a functional sense, but not formally: the tribes' ability to act outside the Constitution stems from their sovereign nature, while the territorial governments' comes from the *Insular Cases*.

205 Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

206 *See Hicks*, 533 U.S. at 383–84, 384 n.5 (noting that the Indian Civil Rights Act only partially reproduces the Bill of Rights). For instance, there are no equivalents to the Establishment Clause or the Second Amendment. *See* 25 U.S.C. § 1302(a) (2012) (enumerating personal guarantees against tribal governments). This is reminiscent of the statutory provisions that ensure fundamental rights for some of the territories. *See, e.g.*, 48 U.S.C. § 1421b (2012) (codifying the Guamanian Bill of Rights).

included, but tribes needn't interpret them in the same fashion that federal courts have.[207]

The resonances between Indians and territorial residents have not gone unnoticed[208]—two sovereign groups brought unceremoniously under U.S. control, now entitled to a measure of self-government and the constitutional solicitude such arrangements entail. And indeed—the sui generis constitutional flexibility for Indian tribes even from the Founding,[209] much of which was drawn from extratextual international law understandings,[210] legitimates heterogeneous arrangements within the American system outside the strict metropolitan understanding of the Constitution.

While Indian law—like territorial constitutional law—might be distinguished as another arcane branch of the law, its oddities the product of historical contingency, courts regularly make rough reckonings about whether certain non-metropolitan legal arrangements are good enough. The doctrine of forum non conveniens (FNC), for instance, allows a court to decline jurisdiction and dismiss a case when an alternative forum exists and adjudication in the American forum would be inconvenient for various prudential and logistical reasons.[211] In doing so, courts must satisfy themselves that the foreign forum is adequate. "The adequacy of a foreign forum for purposes of transfer of venue turns . . . on the soundness and procedural fairness of that

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[207] *See Hicks*, 533 U.S. at 384 (Souter, J., concurring) (noting that tribal law is frequently unwritten and based on tribal norms and values) (citing Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 343–44 (1998)).

[208] *See, e.g.*, Laughlin, *supra* note 116, at 342 (noting the author's proposed approach to territories may be "transferrable to quasi-sovereign groups of Native Americans within the States"); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 245 n.1663 (2002) ("The differential treatment of both Indians and territorial inhabitants is justified on the grounds of their semi-sovereign status and the United States' trust obligation towards them."); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1352 (1969) (suggesting the courts treat tribes as "unincorporated territories" to provide some measure of constitutional restraint on tribal government action). The parallels are too numerous and nuanced to fully discuss in this Note.

[209] *See* Frickey, *supra* note 199, at 53–58 (tracing the foundation of Indian law jurisprudence to early opinions by John Marshall).

[210] *See id.* at 37 (arguing that "plenary power in federal Indian law, like that in immigration law, arose from conceptions of the inherent sovereignty of nations under international law"). The justification for the *Insular Cases* was also premised in international law. *See* Downes v. Bidwell, 182 U.S. 244, 300–02 (1901) (White, J., concurring) (drawing on international law and the law of nations' treatment of sovereignty and acquisition to justify Congress's treatment of the territories).

[211] *See* Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429 (2007) (holding a court need not determine its jurisdiction over a case before dismissing on grounds of forum non conveniens).

society's court system."[212] The bar is not terribly high: A court might pause before dismissal if the non-movant could show the case is being "remitted . . . to a judicial system *wholly devoid of due process*."[213] Judicial notice (which might simply be "common knowledge") and "[p]rinciples of comity" similarly favor not inquiring too deeply into the adequacy of a foreign nation's legal regime.[214] In between the American system and those "wholly devoid of due process"[215] is a galaxy of legal regimes with different rules of evidence, provisions (or lack thereof) for jury trials, and systems of remedies, all of which have constitutional implications in the United States—yet the courts recognize their validity as legal fora.[216] While FNC is a non-merits venue decision at heart, the prospect of American courts making retail judgments on the procedural adequacy of foreign courts, even cursorily, assumes a set of legitimate alternative regimes to be available and our courts' ability to weigh them.

From early on, the Supreme Court has recognized legal regimes outside "our system of ordered liberty" that may nevertheless undergird "temperate and civilized governments."[217] In *Duncan v. Louisiana*, the Court asked whether the right to a jury trial was "fundamental to the *American* scheme of justice"[218] while acknowledging that "[a] criminal process which was fair and equitable but

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212 Murty v. Aga Khan, 92 F.R.D. 478, 482 (E.D.N.Y. 1981).

213 *See* Alcoa S. S. Co. v. M/V Nordic Regent, 654 F.2d 147, 159 n.16 (2d Cir. 1980) (en banc) (emphasis added) (affirming dismissal for forum non conveniens when plaintiff could sue in Trinidad and Tobago).

214 *See Aga Khan*, 92 F.R.D. at 482 (dismissing so plaintiff could file suit in France); *see also* Sussman v. Bank of Israel, 801 F. Supp. 1068, 1076 (S.D.N.Y. 1992) (Israel); Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 928 (S.D.N.Y. 1977) (Iran). *But see* Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir. 1966) (reversing lower court's dismissal on FNC grounds because dismissing would relegate plaintiffs to Venezuelan court in which "the procedural remedies are far less conducive to the fair administration of justice" and the "model of trial, the lack of adequate pretrial procedures, and [other factors] do not comport with our concepts of fairness").

215 *Alcoa*, 654 F.2d at 159 n.16.

216 *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254–55 (1981) (affirming dismissal of products liability claims on grounds of FNC notwithstanding less favorable relief available in Scottish courts); *see also supra* notes 213–14 (canvassing various applications of FNC by lower courts).

217 McDonald v. City of Chicago, 561 U.S. 742, 760, 778 (2010). These cases concern the "incorporation" of the Bill of Rights against the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

218 Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (emphasis added). Justice White notes that this may constitute a "new approach" to incorporation, based on a recognition that the right to jury trial was intimately bound up with the criminal process that had been adopted in all 50 states. *Id.* at 149 & n.14.

used no juries is easy to imagine."[219] Fifty years later, Justice Alito forcefully underscored this point in rejecting the city of Chicago's efforts to uphold its handgun laws against a Second Amendment challenge in *McDonald v. City of Chicago*.[220] The right to bear arms was central to "our system of ordered liberty,"[221] even if other free nations did not safeguard it.[222] Indeed, this recognition of a spectrum of "free government" in the incorporation cases justified the decision in at least one latter-day *Insular* case. The court in *NMI v. Atalig*, in denying Atalig his jury trial, drew on *Duncan v. Louisiana* to satisfy itself that a non-American criminal process in the territories was acceptable, so long as it was fundamentally fair.[223]

So group-differentiated rights resting on the *Insular Cases* are not so strange after all, as the American constitutional order has—from its very creation—contemplated extra-constitutional arrangements in the example of Indian law. The Supreme Court has, in finding the contours of due process, envisioned free and just systems not our own. Meanwhile, courts routinely make calls on whether other procedural systems can pass muster as basically fair and adequate.

Conclusion

Justice White's paradox—that Puerto Rico was "foreign . . . in a domestic sense"[224]—contained more wisdom than perhaps it seems, as it captured the need to confer rights against the new sovereign while permitting "foreign" cultural arrangements and understandings some play in basic legal ordering. The *Insular Cases* bear the unmistakable taint of racism and the apologetics of empire, and the doctrines offer little in the way of coherence or consistency. Nevertheless, this Note has offered an accommodationist understanding of the later *Insular* doctrine, putting forward a qualified defense of the cases based in Harlan's functional understanding and modernization of the doctrine. This pragmatic inquiry into whether enforcing certain constitutional

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[219] *Id.* at 149 n.14. But because no state had actually employed any such system, this argument could not be reasonably made. This argument doomed Atalig's argument that *Duncan* required NMI to give him a jury trial. *See supra* note 72 and accompanying text.

[220] 561 U.S. 742 (2010).

[221] *See id.* at 778. The Court notes that many constitutional guarantees are unique to the American legal system. *See id.* at 781 n.28. It also disposed of the argument that the Anglo-American-specific inquiry applied only to *procedural* rights by pointing out that if so, the Establishment Clause would not apply against States because countries like England and Finland have established churches. *Id.* at 782 & n.29.

[222] *See id.* at 781 ("England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership . . . .").

[223] *See supra* Section I.C.1.

[224] *See supra* note 11 and accompanying text.

guarantees would be "impractical and anomalous" in the territories recognizes the need for political flexibility in territorial relations. While this originally may have meant colonial hegemony, "flexibility" grew to embrace much-needed accommodation of territorial autonomy—leeway enough for territorial peoples to stake out an equal, if different, place in the national order, to protect their ways of life from the risks of constitutional imposition, and to enjoy the promises made by the United States early on to let them live according to their own lights, while still ensuring basic freedoms.

Much work remains to be done in rationalizing and cabining the *Insular Cases*,[225] but this Note has attempted, if not to redeem them, then at least to complicate their legacy. So long as we have territories awkwardly bundled into the folds of the republic yet maintain committed to affording them any measure of self-determination, the *Insular Cases* may provide the way.

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[225] Further work would explore the risks of loose *Insular* doctrine being used to ratify arbitrary or oppressive action by the federal government; the dangers of a new territorial paradigm less solicitous of local self-determination; the contours of which rights are truly "fundamental" and may not be transgressed; refinements to the substance of the "impractical and anomalous" test that would assist courts in sussing good accommodation from bad; and the complex interrelationship between the Harlan inquiry in the territorial context and its new application in purely foreign contexts, as in *Boumediene*.