

Third-Class Citizens: Unequal Protection Within United States Territories

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Imagine living in a community within the United States where the local government only permits people of the majority race to own land. Those who are not members of the majority race may vote in most elections, but county councils, in accordance with the customs of the majority race, elect the upper house of the bicameral legislature; furthermore, only the heads of families of the majority race—who fulfill their obligations as those customs require—may hold office. While outsiders perceive the community as welcoming and friendly, the view from within differs: The local government has enacted laws mandating preferential hiring for members of the majority race, making it more difficult for “outsiders” to enter certain licensed professions and turning a blind eye to factories staffed by hundreds of de facto slaves of minority races subject to corporal punishment. Although the Supreme Court of the United States has issued decisions holding many of these practices unconstitutional, the local government has publicly asserted that it will not follow those decisions because they are inconsistent with local culture.

The above is not a historical description of life in the Jim Crow South. Rather, it represents the current situation in American Samoa, a U.S. territory.

Judges and scholars routinely describe the people of American Samoa, the U.S. Virgin Islands, Puerto Rico, Guam, and the Northern Mariana Islands as second-class citizens within the United States.¹ At the turn of the twentieth

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1. See, e.g., *Segovia v. Bd. of Election Comm’rs*, 201 F. Supp. 3d 924, 938-39 (N.D. Ill. 2016) (observing inconsistencies in treatment between citizens living in United States and territories), *aff’d in part, vacated in part sub nom. Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018); Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J.F. 284, 286 (2020) (noting discriminatory impact of *Insular Cases*); Mónica Matos-Desa, Note, *Second Class Citizens: The Case Against Unequal Military Healthcare Benefits for Puerto Rican Veterans*, 16 CARDOZO J.L. & GENDER 291, 292 (2010) (considering Puerto Ricans second-class citizens in American society); see also Juan Torruella, *The Insular Cases: The Establishment*

century, the Supreme Court of the United States caused this characterization in the *Insular Cases* when it established them as “a sub-class of United States citizens, unequal in rights to the rest of the body politic” residing in “what amounts to a political *ghetto*” based on the premise that “the United States could hold territories and their inhabitants in a colonial status *ad infinitum*.”² It should come as no surprise that contemporary legal scholarship portrays the territories as “systematically forgotten and mistreated” and highlights the federal government’s perpetuation of economic, political, and other disparities on them.³

What has drawn virtually no attention, however, is the discrimination that territorial governments have perpetuated—and in some cases continue to perpetuate—against their own citizens based on gender, national origin, sexual orientation, religion, and other immutable characteristics.⁴ While territorial governments and their allies frequently urge the Supreme Court of the United States to overturn the *Insular Cases* in high-profile cases involving their relationship with the federal government, these same territorial governments often embrace the *Insular Cases* in the lower federal courts and use them as a shield to prevent judicial scrutiny of local legislation or other practices.⁵ In doing

of a Regime of Political Apartheid, 77 REV. JUR. U. P.R. 1, 7-11 (2008) (authoring overview of debate on how to determine governing authority over newly acquired territories); Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RESV. L. REV. 147, 148 (2006) (explaining territorial incorporation doctrine denied constitutional rights to inhabitants of territories acquired from Spain).

2. Torruella, *supra* note 1, at 43-44 (highlighting language used to describe people of American Samoa and situation in U.S. territories); see *Ballentine v. United States*, No. 1999-130, 2001 WL 1242571, at *5 n.11 (D.V.I. Oct. 15, 2001) (providing comprehensive list of opinions making up *Insular Cases*). *But see* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (questioning “continued validity” of *Insular Cases* but declining to overrule them). The *Insular Cases* are a series of Supreme Court decisions spanning from 1901 to 1922 that addressed whether the U.S. Constitution should govern overseas territory. See *Ballentine*, 2001 WL 1242571, at *5, *5 n.11 (explaining significance of *Insular Cases*). See generally *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States (Dooley I)*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States (Dooley II)*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

3. See Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1249 (2019) (describing “forgotten Americans . . . [and] longstanding political plight” citizens face in U.S. territories).

4. See, e.g., *American Samoa Holds Out Against Same-Sex Marriage Ruling*, KHON2 (July 10, 2015, 6:47 PM), <https://www.khon2.com/news/american-samoa-holds-out-against-same-sex-marriage-ruling/> [<https://perma.cc/2BT5-SC9E>] [hereinafter *American Samoa Holds Out*] (explaining American Samoa did not comply with Supreme Court’s 2015 same-sex marriage legalization).

5. Compare Brief for Virgin Islands Bar Ass’n as Amicus Curiae Supporting the Ruling on the Appointments Clause at 12-18, *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521), 2019 WL 4201256, at *20-26 (opposing ongoing viability of *Insular Cases*),

so, the oppressed become the oppressors and use the tools of their own oppression to establish a subclass within their own subclass—in effect, third-class citizens.

This Article attempts to fill this gap and draw attention to the territorial governments' discrimination perpetuated against women and other minority groups. The Article begins by briefly summarizing the history of federal equal protection law in territories under the common understanding of the *Insular Cases* and the territorial incorporation doctrine.⁶ It identifies historical and modern discriminatory practices territorial governments use against women and other minorities in voting rights and other areas and observes how territorial governments embrace the *Insular Cases* to justify this unequal treatment. It then examines the doctrinal justification for permitting certain territorial governments to withhold fundamental rights from certain populations—that the *Insular Cases* should be reconceptualized to protect indigenous cultures—and illustrates that this approach, in particular the lack of any meaningful limiting principles, permits territorial governments to establish a third-class citizenry.⁷ Finally, this Article concludes by proposing a new approach: Several principles that carefully balance individual rights with the need for cultural preservation to effectively preclude territorial governments from creating third-class citizens without meaningfully compromising their ability to maintain their traditional institutions and way of life.⁸

I. EQUAL PROTECTION IN LIGHT OF THE *INSULAR CASES*

A. *Territorial Status as a Tool to Discriminate Against Women*

The *Insular Cases* “hover[] like a dark cloud” over virtually all aspects of the relationship between the federal government and the territories.⁹ “As commonly understood,” these decisions stand for the proposition that “the Constitution applies ‘in full’ in incorporated territories, but only ‘in part’ in unincorporated territories like Puerto Rico,” the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.¹⁰ “Confusion over the *Insular Cases* framework has led many lower courts and litigants to misapply dicta from those

with Tuaua v. United States, 788 F.3d 300, 310 (D.C. Cir. 2015) (revealing American Samoan government feared greater equal protection scrutiny would threaten tradition, tacitly approving *Insular Cases*).

6. See *infra* Parts I-II.

7. See *infra* Part II.

8. See *infra* Parts III-IV.

9. See *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 855 (1st Cir. 2019) (observing use of *Insular Cases* to deny constitutional protections to unincorporated territories), *rev'd sub nom.* Fin. Oversight & Mgmt. Bd. for P.R. v. *Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

10. Cepeda Derieux & Weare, *supra* note 1, at 287-88; see Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797 (2005) (contrasting treatment of annexed Pacific Ocean and Caribbean Sea territories with incorporated U.S. States).

decisions to say only ‘fundamental’ protections apply in unincorporated U.S. territories unless Congress says otherwise.”¹¹

It did not take territorial governments long to utilize this confusion and uncertainty to discriminate against their own people. On August 18, 1920, the states ratified the Nineteenth Amendment to the U.S. Constitution, which is often celebrated as the date “the right of women to vote was extended to all citizens of the United States.”¹² History, however, belies this well-intentioned celebration. Despite the ratification of the Nineteenth Amendment, “[p]oll taxes, literacy tests, white primaries, and the threat of economic reprisals and violence kept African American women and men from vindicating their constitutional right to vote,”¹³ and thus “the Nineteenth Amendment left much ‘unfinished business’ with respect to Black women’s right to vote.”¹⁴

But the unfinished business of women’s suffrage was not limited to the Jim Crow South. Shockingly, it was two majority-minority U.S. territories—the U.S. Virgin Islands and Puerto Rico—that engaged in what was perhaps the most blatant and systematic disenfranchisement of women under the U.S. flag after the Nineteenth Amendment’s ratification.

At the time of its transfer to United States sovereignty in 1917, the U.S. Virgin Islands was 92.4% Black or mixed-race.¹⁵ While the southern states recognized the applicability of the Nineteenth Amendment but attempted to undermine it by erecting substantial and often insurmountable practical barriers to its full implementation, the U.S. Virgin Islands did not even pay lip service to the Nineteenth Amendment—it simply continued to enforce laws prohibiting all women from voting in territorial elections.¹⁶ The legal justification was quite simple: “[W]omen have no right to vote in the Virgin Islands of the United States” because the *Insular Cases* precluded application of the Nineteenth Amendment to the U.S. Virgin Islands.¹⁷

11. Cepeda Derieux & Weare, *supra* note 1, at 288.

12. Elizabeth M. Yang, *Looking at the Nineteenth Amendment Through a Twenty-First Century Lens*, A.B.A. HUM. RTS. MAG. (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/looking-at-the-nineteenth-amendment-through-a-twenty-first-centu/ [https://perma.cc/N9WC-C7XJ] (summarizing history of Nineteenth Amendment).

13. Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J.F. 512, 512 (2020) (explaining passage of Nineteenth Amendment left business unfinished).

14. Linda C. McClain, *What Becomes a Legendary Constitutional Campaign Most? Marking the Nineteenth Amendment at One Hundred*, 100 B.U. L. REV. 1753, 1759 (2020) (quoting Professor Serena Mayeri and discussing “painful truth” of Nineteenth Amendment ratification).

15. See SAM L. ROGERS, U.S. DEP’T OF COM., CENSUS OF THE VIRGIN ISLANDS OF THE UNITED STATES 44 (1917) (describing racial demographics of early twentieth century, with 7.4% of residents white in 1917).

16. Compare Mayeri, *supra* note 13, at 512 (chronicling restrictions on American suffrage), and Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RESV. L. REV. 727, 732-34 (1998) (describing disenfranchisement through white primaries and poll taxes), with *In re Richardson*, 1 V.I. 301, 309-11 (D.V.I. 1936) (explaining major facts and constitutional issues).

17. *In re Richardson*, 1 V.I. at 310-11, 331 (stating Town of Frederiksted’s arguments, which *Richardson* court held constitutionally abhorrent).

Perhaps most surprising, given the history of discrimination against women and other minorities stateside, the federal government was not the source of the disenfranchisement of women Virgin Islanders. Rather, it was Virgin Islander men serving on the elected Boards of Elections—one of which was chaired by famed civil rights activist D. Hamilton Jackson—who took the position that the Nineteenth Amendment did not apply to the U.S. Virgin Islands.¹⁸

These Virgin Islander men were themselves second-class citizens within the United States because they could not vote for the President of the United States and did not have voting representation in Congress.¹⁹ Yet they chose to exercise one of the few powers they possessed—the right to vote in territorial elections and to hold elected territorial office—to strip that precious right away from Virgin Islander women, establishing them as third-class citizens with no right to vote in any election.²⁰ And as the legal authority for doing so, they used the same tool that served as the basis for their own second-class status: the *Insular Cases*.²¹

Ultimately, the United States District Court of the Virgin Islands held that the Nineteenth Amendment did apply to the U.S. Virgin Islands and that the women of the territory were qualified to vote in territorial elections notwithstanding any territorial laws purporting otherwise.²² It did not do so until 1936, however, more than sixteen years after the Nineteenth Amendment had been ratified and made applicable—at least nominally—in the rest of the United States.²³

Nevertheless, the importance of this victory was somewhat diminished. Two years later, the United States District Court of the Virgin Islands, in a decision authored by William H. Hastie—a famed civil rights leader who would become the first African American federal appellate judge and Chief Judge of the U.S. Court of Appeals for the Third Circuit—affirmed the constitutionality of a Virgin Islands statute excluding women from jury service.²⁴ Judge Hastie wrote that “a constitutional or statutory mandate that women shall be allowed to vote does not,

18. See *id.* at 310-11 (explaining male defendant, Chairman Jackson, took position Nineteenth Amendment inapplicable based on *Insular Cases*); see also Astrid Nonbo Andersen, *The Reparations Movement in the United States Virgin Islands*, 103 J. AFR. AM. HIST. 104, 108 (2018) (identifying activist Jackson’s social and political viewpoints).

19. See Nonbo Andersen, *supra* note 18, at 111 (explaining Virgin Islands territory cannot cast vote for U.S. presidency).

20. See *In re Richardson*, 1 V.I. at 327-31 (explaining Elections Board’s reliance on outdated Danish procedural elections laws to justify denying franchise to women).

21. See *id.* at 331-37 (confronting whether U.S. Constitution and Nineteenth Amendment operative in Virgin Islands).

22. *In re Richardson*, 1 V.I. 301, 350-51 (D.V.I. 1936).

23. See *id.* (holding Nineteenth Amendment applies to women in Virgin Islands); U.S. CONST. amend. XIX (declaring franchise “shall not be denied or abridged by . . . any State on account of sex”).

24. See *Virgin Islands v. Caines*, 1 V.I. 413, 417 (D.V.I. 1938) (upholding law barring all women and men under twenty-six from jury service); see also Hastie, *William Henry*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hastie-william-henry> [<https://perma.cc/8AGS-7ZFB>] (outlining Judge Hastie’s tenure of judicial service); *Judge William Hastie, 71, of Federal Court, Dies*, N.Y. TIMES, Apr. 15, 1975, at 36 (highlighting significance of William Hastie’s appointments).

in itself, make women eligible for jury service,” that “[i]t still remains competent for the legislature to exclude women from jury service,” and that the court “must give effect” to the “existing provision of our local law that a juror ‘must be a male inhabitant.’”²⁵

The story of women’s suffrage in Puerto Rico largely parallels that of the U.S. Virgin Islands, with some key differences. The people of Puerto Rico initially believed that the Nineteenth Amendment applied to their territory.²⁶ It was the federal government, through its Bureau of Insular Affairs, however, that held ratification of the Nineteenth Amendment did not extend suffrage to the women of Puerto Rico due to its status as an unincorporated territory.²⁷ Although numerous enfranchisement bills were introduced in the territorial legislature, all were unsuccessful.²⁸ As would later occur in the U.S. Virgin Islands, a woman sued the electoral board for refusing to allow her to register to vote; nevertheless, the Supreme Court of Puerto Rico ultimately rejected the lawsuit, holding that laws denying women’s suffrage were not discriminatory since Puerto Rican men were not allowed to vote in federal elections, and Puerto Rico could define who was eligible to vote in its territorial elections.²⁹ It was not until 1935 that universal suffrage was achieved in Puerto Rico, which only occurred through local legislation enacted out of fear that Congress would legislate women’s suffrage for the territory if it did not do so on its own.³⁰

B. Modern Denials of Equal Protection by Territorial Governments

Decades later, in 1976, the Supreme Court of the United States would ultimately determine that equal protection is a fundamental constitutional right fully applicable to all U.S. territories.³¹ Based on this holding, it would appear that the *Insular Cases* should be wholly irrelevant to an equal protection analysis,

25. See *Caines*, 1 V.I. at 416 (quoting V.I. CODE ANN. tit. v, ch. 12, § 2 (1921) (amended 1971) (current version at V.I. CODE ANN. tit. iv, § 471)) (attempting to justify refusal to apply Nineteenth Amendment to sex-based discrimination from jury service).

26. See Rosalyn Terborg-Penn, *Enfranchising Women of Color: Woman Suffragists as Agents of Imperialism*, in NATION, EMPIRE, COLONY: HISTORICIZING GENDER AND RACE 41, 49 (Ruth Roach Pierson & Nupur Chaudhuri eds., 1998).

27. See TRUMAN R. CLARK, PUERTO RICO AND THE UNITED STATES, 1917–1933, at 43 (1975).

28. See *id.* at 42 (listing failed attempts in 1919, 1921, 1923, and 1927).

29. See LIZBETH L. RIVERA LÓPEZ, LAS APORTACIONES SOCIALES Y PERIODÍSTICAS DE LAS MUJERES EN PUERTO RICO: DESDE LA LLEGADA DE LA IMPRENTA EN LOS PRIMEROS AÑOS DEL SIGLO XIX HASTA EL PRIMER TERCIO DEL SIGLO XX [THE SOCIAL AND JOURNALISTIC CONTRIBUTIONS OF WOMEN IN PUERTO RICO: FROM THE ARRIVAL OF THE PRINTING PRESS IN THE FIRST YEARS OF THE 19TH CENTURY TO THE FIRST THIRD OF THE 20TH CENTURY] 525-26 (2016) (explaining enfranchisement for Puerto Rican women delayed to 1935 despite prior passage of Nineteenth Amendment).

30. CLARK, *supra* note 27, at 45 (discussing motivation for Puerto Rican legislature to adopt universal suffrage); Anne S. Macpherson, *The 19th Amendment Didn’t Grant Puerto Rican Women Suffrage*, WASH. POST (Aug. 26, 2020), <https://www.washingtonpost.com/outlook/2020/08/26/19th-amendment-didnt-grant-puerto-rican-women-suffrage/> [https://perma.cc/27P8-8YQ4] (noting date Puerto Rican women finally given franchise).

31. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976).

in that status as a territory—whether incorporated or unincorporated, organized or unorganized—should have no bearing as to whether a territorial law violates the right to equal protection, and that the federal equal protection analysis should be indistinguishable from the inquiry that would occur with respect to a comparable state law.

Despite this clear holding by the Supreme Court that equal protection fully extends to all U.S. territories, territorial governments continue to rely on the *Insular Cases* as a basis to withhold rights from women and other marginalized groups. Guam and the Northern Mariana Islands enforced legislation limiting the right to vote in certain elections only to so-called native inhabitants until courts overturned such restrictions within the last decade.³² In 1990, Guam enacted a statute, which the federal courts later invalidated, outlawing most abortions on the basis that the constitutional right to an abortion recognized by the U.S. Supreme Court in *Roe v. Wade*³³ did not apply to the territory.³⁴

But not all such discriminatory practices have been overturned. To this day, the Constitution of American Samoa limits membership in the upper house of American Samoa’s bicameral legislature—the American Samoan Senate—to individuals who are a “registered matai of a Samoan family who fulfills his obligations as required by Samoan custom.”³⁵ To hold a *matai* title, one “must be of at least one-half Samoan blood” and “must live with Samoans as a Samoan.”³⁶ While Samoan law does not prohibit women from holding a *matai* title, “the male descendant prevails over the female” unless custom provides otherwise in a particular family.³⁷ Moreover, such senators are not elected by popular vote, but “elected in accordance with Samoan custom by the county councils of the counties they are to represent.”³⁸

Some territorial governments have even asserted the authority to effectively nullify U.S. Supreme Court precedent within territorial borders. In 2015, the government of American Samoa publicly questioned whether the U.S. Supreme Court’s decision in *Obergefell v. Hodges*,³⁹ which extended the fundamental right to marriage to same-sex couples, applied in the territory.⁴⁰ The prohibition on same-sex marriage in American Samoa still exists.⁴¹ This public questioning

32. See *Davis v. Commonwealth Election Comm’n*, 844 F.3d 1087, 1089 (9th Cir. 2016) (holding local law restricting voting to “individuals of ‘Northern Marianas descent’” unconstitutional); *Davis v. Guam*, 932 F.3d 822, 825 (9th Cir. 2019) (invalidating “‘Native Inhabitants of Guam’ voter eligibility restriction”).

33. 410 U.S. 113 (1973) (establishing modern American right to abortion).

34. See *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th Cir. 1992) (extending constitutional right to abortion to Guam).

35. AM. SAM. CONST. art. II, § 3.

36. AM. SAMOA CODE ANN. § 1.0403(a) (2021).

37. *Id.* at § 1.0409(c)(1).

38. AM. SAM. CONST. art. II, § 4.

39. 576 U.S. 644 (2015).

40. See *American Samoa Holds Out*, *supra* note 4.

41. See Ian Tapu, Note, *Is It Really Paradise? LGBTQ Rights in the U.S. Territories*, 19 DUKEMINIER AWARDS J. 273, 279 (2020) (observing neither local government nor territorial judiciary has amended law despite

of *Obergefell*'s applicability was not the first time American Samoa decided to effectively nullify a decision of the Supreme Court. To this day, the High Court of American Samoa only admits residents to the practice of law in the territory,⁴² notwithstanding *Barnard v. Thorstenn*,⁴³ where the Supreme Court held it unconstitutional for the U.S. Virgin Islands to limit Virgin Islands Bar Association admission to only Virgin Islands residents.⁴⁴

It does not appear that any litigation has been brought to compel the government of American Samoa to comply with the *Obergefell* and *Barnard* decisions. Nevertheless, courts have largely supported the idea that territorial governments can nullify certain decisions of the Supreme Court. The High Court of American Samoa upheld the constitutionality of a statute providing for an "American Samoan preference" in government hiring and declined to find racial discrimination against a Caucasian plaintiff even when racial epithets were used in the underlying hearing.⁴⁵ Even the federal courts have declined to disturb race-based laws in American Samoa and the Northern Mariana Islands, which impose race-based restrictions on the right to own and transfer property.⁴⁶

II. THE *INSULAR CASES* AND THIRD-CLASS CITIZENSHIP

Why have territorial governments taken these positions despite clear Supreme Court precedent that equal protection constitutes a fundamental constitutional right? They are simply following the lead of the lower federal courts. Although the Supreme Court has repeatedly directed that the *Insular Cases* "should not be further extended,"⁴⁷ lower federal courts continue to do so.⁴⁸ Although the *Insular Cases* were unquestionably a product of blatant and unabashed racism,⁴⁹

five years since *Obergefell*); see also AM. SAMOA CODE ANN. § 42.0101(b) (2021) (contemplating marriage only between male and female).

42. *In re Bar Ass'n Membership Residency Requirement*, 29 Am. Samoa 2d 14, 15-16 (1995) (explaining American Samoa Bar Association accepts only American Samoan applicants).

43. 489 U.S. 546 (1989).

44. Compare *id.* at 558-59 (reasoning ban on nonresident applicants discriminatory and violative of Constitution), with *In re Bar Ass'n Membership Residency Requirement*, 29 Am. Samoa 2d at 16-17 (standing firm on residency requirement for bar admission, despite charge of discrimination).

45. See *Banks v. Am. Samoa Gov't*, 4 Am. Samoa 2d 113, 126-27 (1987) (basing decision to uphold racial preference on continued validity of *Insular Cases*).

46. See, e.g., *Wabol v. Villacrusis*, 958 F.2d 1450, 1463 (9th Cir. 1992) (affirming land alienation rights not subject to equal protection analysis in Northern Mariana Islands); *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 14 (1980) (justifying land alienation restrictions due to limited land availability).

47. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020); accord *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (distinguishing *Insular Cases* from application of Bill of Rights in noncontiguous United States).

48. See, e.g., *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (agreeing with American Samoan's position native-born American Samoans should not have natural citizenship rights); *Fitisemanu v. United States*, 1 F.4th 862, 874 (10th Cir. 2021) (agreeing "*Insular Cases*, despite their origins, allow us to respect the wishes of the American Samoan people").

49. See *supra* text accompanying note 2; *infra* notes 50-53 and accompanying text.

today the lower federal courts extend the *Insular Cases* for the purported *benefit* of the territories.

How could it possibly be that the *Insular Cases*—which described the people of the territories as “savage,”⁵⁰ “half-civilized,”⁵¹ “ignorant and lawless”⁵² “alien races”⁵³—benefit the territories? Some lower federal courts have begun to characterize the *Insular Cases* as a framework that “gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution,” which “permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course.”⁵⁴ These judicial decisions draw upon an emerging line of legal scholarship urging the territories to embrace or reclaim the *Insular Cases*.⁵⁵

That the people of the territories should retain the discretion to preserve traditional cultural practices is certainly appealing. In modern American society, “[t]he metaphor of America as a melting pot has been rejected in favor of a salad bowl in which the constituents retain their own identity,” with cultural differences celebrated and minority groups encouraged to continue to maintain their separate identities and customs.⁵⁶ On what basis, then, could someone seriously argue that the people of a given territory should not be able to do the same?

The key difference is that the territorial governments are just that—*governments*. Like the people of the fifty states, the people residing in the five territories are not homogeneous and do not share a common culture.⁵⁷ And just like the people who live within a given state are not culturally homogeneous, those who live within a single territory are also not homogeneous, even if most of them may share cultural or religious values.⁵⁸ The effect, then, of using the

50. *De Lima v. Bidwell*, 182 U.S. 1, 219 (1901) (McKenna, J., dissenting).

51. See Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899); see also Torruella, *supra* note 1, at 7-11 (describing how academics, including Baldwin, published racist legal theories laying theoretical groundwork for *Insular Cases*).

52. Baldwin, *supra* note 51, at 415.

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

54. *Fitisemanu v. United States*, 1 F.4th 862, 871 (10th Cir. 2021); see *Waboll v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992).

55. See, e.g., *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1649 (2017) (outlining benefits of preserving territorial federalism); Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1707 (2017) (arguing territorial federalism provides cultural agency to territories).

56. Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII*, 27 TEX. TECH L. REV. 33, 34 (1996).

57. See, e.g., *The World Factbook—Puerto Rico*, CIA, <https://www.cia.gov/the-world-factbook/countries/puerto-rico/#people-and-society> [<https://perma.cc/34W4-R5LZ>] (noting Puerto Rico population 76% white, 12% Black, 3.3% mixed, and 8.5% American Indian, Alaskan Native, Native Hawaiian, other Pacific Islander, and others); *The World Factbook—Guam*, CIA, <https://www.cia.gov/the-world-factbook/countries/guam/#people-and-society> [<https://perma.cc/6PQY-VPEH>] (describing Guam’s population of 37.3% Chamorro, 26.3% Filipino, 7% Chuukese, 2.2% Korean, and 2% other Pacific Islander, among others).

58. See UNESCO, ISLANDS AS CROSSROADS: SUSTAINING CULTURAL DIVERSITY IN SMALL ISLAND DEVELOPING STATES 11 (Tim Curtis ed. 2011) (mentioning “remarkable diversity of languages and cultural

Insular Cases as a vehicle “to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution”⁵⁹ is just that—the majority using the tools of government to withhold fundamental rights from minority groups within their territory.

The argument that interpretation of the U.S. Constitution should permit local governments to “preserve traditional cultural practices” at the expense of the rights of individuals is not new, nor is it unique to the territories. It is, in fact, this very reasoning that courts used for decades to justify state laws mandating racial segregation—that the culture of the southern states required segregation, and that “imposing” integration on these unwilling societies through a judicial decision would impermissibly rid an important aspect of southern cultural heritage.⁶⁰ In doing so, courts would cast segregation in a positive light, characterizing any decision ordering integration as one imposing harm on the society or the people. For instance, a judicial opinion from 1951 upholding the constitutionality of segregated schools in South Carolina stated “[t]he equal protection of the laws does not mean that the child must be treated as the property of the state and the wishes of his family as to his upbringing be disregarded.”⁶¹ More than a decade after *Brown v. Board of Education*, government officials continued invoking cultural preservation and similar arguments to resist efforts to implement that decision in their jurisdictions.⁶²

practices” in Pacific Islands). Now, more than ever, there are fewer tribally distinctive societies, and the threat of cultural disintegration amongst Pacific Island societies grows. *See id.* at 126 (describing current issues in understanding monolithic ideas of tribal identity).

59. *Fitise manu*, 1 F.4th at 871.

60. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (rejecting idea “separate but equal” signifies inferiority), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1955); *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 306 (1871) (stating no law allows enforcement of interracial marriage); *State v. Hairston*, 63 N.C. 451, 453 (1869) (declining to overrule statute voiding interracial marriages); *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (discussing constitutional implication of integration through forced association).

61. *Briggs v. Elliott*, 98 F. Supp. 529, 537 (E.D.S.C. 1951), *vacated*, 342 U.S. 350 (1952).

62. *See, e.g.*, *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 469 n.16 (M.D. Ala. 1967) (referencing officials’ cultural preservation arguments). In *Lee*, the Alabama State Superintendent of Education had circulated a “parable” to all local superintendents throughout Alabama to justify continued segregation in the school system:

Segregation is the basic principle of culture. The good join together to segregate themselves from the bad. Segregation is one of the principles of survival throughout the animal kingdom. Animals, in many instances, join their own kind to defend themselves by numbers against other animals that would destroy them without such segregated bond. Birds of a feather truly flock together. Wild geese fly across this continent in ‘V’ formation, but they never join any other flock of birds. Wild duck fly together and not with others birds. The wild eagle mates with another eagle and not with any other bird. Red birds mate with red [sic] birds, the beautiful blue birds mate with other blue birds, and so on through bird life. There can be segregation without immoral discrimination against anyone. Integration of all human life and integration of all animal life would destroy humanity and would destroy the animal kingdom. A time of reckoning must come in this United States of America on the fundamental principles of segregation and non-discrimination which can be achieved without destroying segregation in its true sense.

Certainly, the discriminatory laws that remain in certain U.S. territories may not appear to encompass nearly every aspect of society, as had been the case with segregation in the Jim Crow South. But *could* they? If American Samoa can nullify *Obergefell*, in the name of culture, and refuse to recognize same-sex marriages, could it also nullify *Loving v. Virginia*⁶³ and refuse to recognize interracial marriages as well? If it can nullify *Barnard* and restrict the practice of law only to residents, could it also prohibit women from practicing law? Likewise, if the Northern Mariana Islands are permitted to enforce race-based restrictions on land ownership notwithstanding the Equal Protection Clause, could the Commonwealth's government also segregate its schools based on race in the name of cultural preservation?

The idea that the *Insular Cases* should be reimagined “as a collective doctrinal vehicle for protecting indigenous peoples’ cultures or cultural practices” suffers from a critical flaw: It lacks any “certain limiting principles” that meaningfully delineate the point at which the desires of the collective majority must yield to the rights of individuals.⁶⁴ The lack of a clear limiting principle grounded in the text of the U.S. Constitution is precisely what has made the doctrine of territorial incorporation exceptionally difficult for courts to administer, leading to inconsistent adjudications as to whether certain constitutional rights apply to similarly situated territories.⁶⁵

The adverse effects of this deficiency have already surfaced multiple times in the context of cultural preservation. For example, the First Circuit held that *Obergefell* requires Puerto Rico to recognize same-sex marriages, while American Samoa continues to assert that *Obergefell* does not apply to it due to its territorial status.⁶⁶ While the Ninth Circuit endorsed the race-based land alienation laws in the Northern Mariana Islands, prohibiting those not of Chamorro descent from owning land,⁶⁷ both the U.S. Department of Justice and Congress took issue with a much more modest provision of the proposed U.S. Virgin Islands Constitution, which would have exempted ancestral Virgin

Id. (quoting statement of State Superintendent Austin R. Meadows).

63. 388 U.S. 1 (1967).

64. Rose Cuisson Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 132 (2018) (describing flaw in proposed reformed use of *Insular Cases*).

65. See Cepeda Derieux & Weare, *supra* note 1, at 288 (highlighting adjudication inconsistencies). For example, although the U.S. Virgin Islands and Guam are virtually indistinguishable from each other with respect to their constitutional status and have organic acts with largely identical language, the Third Circuit has held that the Dormant Commerce Clause extends to the U.S. Virgin Islands, while the Ninth Circuit reached the opposite result, holding that it does not apply to Guam. Compare *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985), with *JDS Realty Corp. v. Gov't of the V.I.*, 824 F.2d 256, 260 (3d Cir. 1987), *vacated*, 484 U.S. 999 (1988).

66. See *In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016) (holding same-sex marriage recognition constitutionally required); *American Samoa Holds Out*, *supra* note 4 (reporting American Samoan government questioning *Obergefell*).

67. See *Wabol v. Villacrusis*, 958 F.2d 1450, 1463 (9th Cir. 1992).

Islanders from paying property taxes.⁶⁸ As a result, the citizens of these territories are subject to a patchwork of different standards, resulting in unequal treatment even relative to each other.

Another significant concern exists with courts using the *Insular Cases* as a vehicle to permit territories to essentially nullify federal constitutional principles in the name of cultural preservation: The effect of such decisions is not limited to the borders of those territories and carries extraterritorial effect. Two federal courts of appeal have now held that the Citizenship Clause does not confer constitutional birthright citizenship on the people of the territories largely due to the objection of the government of American Samoa, which oversees nearly 50,000 people.⁶⁹ Those decisions, however, also deny constitutional birthright citizenship to the people of Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands, whose governments support constitutional birthright citizenship for their 3.45 million citizens.⁷⁰ The government of the few has effectively vetoed the rights of the many. Moreover, these judicial decisions largely overlook that those most harmed by the denial of rights are those who have left American Samoa for the mainland and clearly no longer desire to live under such a regime.⁷¹ To the extent that denial of constitutional birthright citizenship is somehow necessary to preserve the cultural traditions of American Samoa, it is unclear why that preservation should trump the desires of the people residing in other U.S. territories, or those who have chosen to reject the traditional Samoan way of life in favor of making a home in the mainland United States.

68. See S.J. Res. 33, 111th Cong. (2010) (noting concerns for proposed legal advantages); *The Proposed Virgin Islands Constitution from the Fifth Constitutional Convention: Oversight Hearing Before the Subcomm. on Insular Affs., Oceans & Wildlife of H. Comm. on Nat. Res.*, 111th Cong. 10-11 (2010) (statement of Jonathan G. Cedarbaum, U.S. Deputy Assistant Att’y Gen.) (raising equal protection concerns regarding property tax exemption for Native Virgin Islanders).

69. See *Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021) (holding extension of United States birthright citizenship impracticable and anomalous); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (holding “Citizenship Clause does not extend birthright citizenship to those born in American Samoa”); U.S. CENSUS BUREAU, POPULATION OF AMERICAN SAMOA: 2010 AND 2020 (2021), <https://www2.census.gov/programs-surveys/decennial/2020/data/island-areas/american-samoa/population-and-housing-unit-counts/american-samoa-phc-table01.pdf> [<https://perma.cc/YD63-RGHK>].

70. See Amended Brief Members of Congress et al. as Amici Curiae in Support of Petition for Rehearing En Banc at 3-5, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017 & 20-4019), 2021 WL 6135906, at *3-5 (arguing birthright citizenship must apply equally to territories or unequal treatment creates “second-class status”).

71. For instance, the majority opinion in *Fitisemanu* never mentions that the three appellants, although born in American Samoa, had all moved to Utah but could neither vote in Utah elections, run for federal or state office, nor serve on a jury because they were not classified as United States citizens; this relevant information was discussed only in the dissent. See *Fitisemanu*, 1 F.4th at 884 (Bacharach, J., dissenting) (addressing appellants’ status and lack of privileges in Utah).

III. PRINCIPLES TO BALANCE INDIVIDUAL RIGHTS AND CULTURAL PRESERVATION

There is substantial debate among scholars, judges, and the greater legal community as to whether and to what extent the law should elevate so-called group rights, such as cultural preservation, over individual rights.⁷² This tension appears in litigation involving the application of constitutional principles to U.S. territories, with territorial governments and territorial bar associations often taking diametrically oppositional positions in the same case while simultaneously claiming to advocate for territorial rights.⁷³ Such fundamental disagreements among those claiming to speak for the territories, combined with the preexisting uncertainty and confusion regarding the proper role of the *Insular Cases* in modern jurisprudence, has created an inconsistent and flawed doctrine.⁷⁴

For most who have already staked an extreme position, the path to consistency is obvious. To those who, as a normative matter, believe all provisions of the U.S. Constitution should apply in the territories in the same manner as in the fifty states, territorial laws discriminating based on race, gender, and other immutable characteristics should be reviewed under the same standards as such laws would be if they had been enacted by a state. By contrast, those who believe that the preservation and protection of traditional cultures must always take precedence over individuals would permit the territories to essentially enact whatever laws they see fit—free of federal intervention—even where it results in withholding the most fundamental rights from certain individuals.

A growing number of courts and scholars, however, support alternative approaches that attempt to balance safeguarding individual rights with permitting

72. See, e.g., Cuison Villazor, *supra* note 64, at 151 (arguing for cultural preservation); *Developments in the Law—The U.S. Territories*, *supra* note 55, at 1685 (discussing fundamental conflict between commitment to local self-determination and individual rights); Luis Rodríguez-Abascal, *On the Admissibility of Group Rights*, 9 ANN. SURV. INT'L & COMPAR. L. 101, 103 (2003) (arguing group rights possible and alike to fundamental rights).

73. In addition to the *Tuaua* and *Fitiseanu* cases, where territorial governments and others split on the question of applicability of the Citizenship Clause, the filings in *Puerto Rico v. Sánchez Valle* reflect deep-seated disagreement on the proper interpretation of the Double Jeopardy Clause as applied to the territories. Some territorial governments largely urged an interpretation providing themselves with greater autonomy, while territorial bar associations and scholars advocated for a contrary interpretation that would provide enhanced individual rights for the people of the territories. Compare Brief for Petitioner at 1, *Puerto Rico v. Sánchez Valle*, 579 U.S. 59 (2016) (No. 15-108), 2015 WL 7294879, at *1 (claiming independent sovereignty for Puerto Rico manifested by will of people), with Brief of Amicus Curiae Virgin Islands Bar Ass'n (VIBA) in Support of Respondents at 5, *Sánchez Valle*, 579 U.S. 59 (No. 15-108), 2015 WL 9488259, at *5 (arguing Puerto Rico and United States not separate sovereigns).

74. See Cepeda Derieux & Weare, *supra* note 1, at 294 (criticizing lower courts for frequent misapplication of *Insular Cases*).

the territories to maintain traditional practices that would not survive constitutional scrutiny.⁷⁵ Nevertheless, there remains no clear consensus as to the basis within the U.S. Constitution for such an approach, or what this approach would entail in practice. Most notably, these alternate approaches remain inconsistent on the continued role of the *Insular Cases* and fail to propose a clear framework for courts to adjudicate claims surrounding individual rights in the territories. These proposals consequently contribute to the development of an incoherent and internally inconsistent body of equal protection law within the territories.

The following six principles seek to provide some guidance to courts and other decisionmakers in this area. These principles acknowledge the inherent difficulty in balancing individual rights with cultural preservation in the context of U.S. territories, and that it will often be difficult to determine at what point the rights of an individual should yield. Nevertheless, they also recognize the need for some limiting principles and bright-line rules to prevent cultural preservation from being used as an excuse to effectuate a tyranny of the majority, as occurred in the Jim Crow South.

A. Principle 1: The Insular Cases Have No Applicability to the Relationship Between Territorial Governments and Their Own People

For decades, the *Insular Cases* were said to have “nary a friend in the world”⁷⁶ due to their unabashed racist reasoning that was “designed for the convenience of the conqueror”⁷⁷ and “anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda.”⁷⁸ As noted earlier, however, many scholars and courts have recently attempted to reconceptualize the *Insular Cases* as a shield for territorial governments, rather than a sword for Congress.⁷⁹

These attempts to reclaim the *Insular Cases* are problematic in several respects and, while it is beyond the scope of this Article to deconstruct all the flaws with this approach, one flaw is both obvious and fatal: The *Insular Cases* have absolutely no bearing on the powers of territorial governments. This is not surprising—at the time the Supreme Court decided the *Insular Cases*, all the insular territories were either under direct military rule or administered by

75. See, e.g., *Fitisemanu v. United States*, 1 F.4th 862, 889 (10th Cir. 2021) (declining to extend birthright citizenship because of tension between individual rights and Samoan lifestyle); *Developments in the Law—The U.S. Territories*, *supra* note 55, at 1649 (describing structure of territorial federalism); Rennie, *supra* note 55, at 1715 (defending *Insular Cases*).

76. Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008).

77. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 964 (1991).

78. *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting).

79. See, e.g., Rennie, *supra* note 55, at 1703-07 (arguing *Insular Cases* promoted territorial decolonization and self-governance); *Developments in the Law—The U.S. Territories*, *supra* note 55, at 1649-50 (discussing benefits of territorial federalism).

nonindigenous civilian governors appointed by the President of the United States.⁸⁰ Contrary to the common understanding, most of the *Insular Cases* did not involve constitutional issues, but rather mundane questions of statutory interpretation, like whether Puerto Rico or the Philippine Islands could be classified as a “foreign country” under federal tariff laws.⁸¹

Even in the cases adjudicating constitutional issues, the ultimate rule the Supreme Court adopted was not that Congress possessed plenary and unrestricted powers over the territories; in fact, this is a “fundamentally wrong” misconception.⁸² Rather, the Supreme Court simply reaffirmed the longstanding—and rather modest—principle that Congress may exercise the combined powers of a federal and state government when legislating for the territories.⁸³ Nothing in the *Insular Cases* stands for the proposition that Congress—or territorial governments exercising powers delegated by Congress—may constitutionally enact laws that are *sui generis* and exceed the lawful powers of a state government or the federal government.⁸⁴ As such, to the extent the U.S. Constitution authorizes the Northern Mariana Islands to restrict land ownership to members of a certain race or permits American Samoa to have a Senate whose members are not elected by the people, the basis for that authority necessarily lies outside of the *Insular Cases*.

Importantly, there are several doctrinal vehicles to permit territories to exercise such authority, without reliance on the *Insular Cases* or the Territorial Clause. The Ninth Circuit has already affirmed the land alienation laws of the Northern Mariana Islands by, in effect, treating the relationship between the territory and the United States as akin to an international treaty.⁸⁵ Moreover, very little attention has been devoted to examining the application of the Ninth and Tenth Amendments of the U.S. Constitution to the territories, both of which vest rights directly with “the people,” and would appear to encompass a right to

80. See Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 472, 488 (1992) (discussing political leadership of Puerto Rico and Guam after 1898 acquisition).

81. See, e.g., *De Lima v. Bidwell*, 182 U.S. 1, 2 (1901) (addressing whether Puerto Rico fits definition under tariff laws); *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 177 (1901) (noting effect of *De Lima* on same issue concerning Philippines).

82. Burnett, *supra* note 10, at 797.

83. See *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850).

84. The misconception that the *Insular Cases* granted Congress this authority appears rooted in the failure of scholars and courts to recognize that at the time the *Insular Cases* were decided, the Supreme Court had not yet incorporated the Bill of Rights against the states. On the contrary, the binding Supreme Court precedents at the time provided the opposite—that the Bill of Rights did not apply to state governments. See generally *Kelly v. Pittsburgh*, 104 U.S. 78 (1881); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). As such, by holding that certain provisions of the Bill of Rights did not extend to the states, the Supreme Court in effect held that Congress was under no obligation, when legislating for a territory in its capacity as a state government, to provide the peoples of the territories with greater protections than the minimum afforded to the people of the states.

85. See *Wabol v. Villacrusis*, 958 F.2d 1450, 1460-61 (9th Cir. 1992).

cultural preservation in the territories.⁸⁶ Rather than attempt to stick the proverbial square peg of territorial rights into the *Insular Cases*' round hole, courts and other stakeholders should permit the constitutional law of territorial cultural preservation to develop unencumbered.

B. Principle 2: All U.S. Territories Should Possess an Equal Right to Enact Appropriate Legislation to Protect Their Own Cultural Traditions and Institutions

To the extent that the governments of the territories should have greater authority than those of the fifty states with respect to the power to enact appropriate laws to protect their indigenous cultures, there is little justification for treating one territory more favorably than another. For example, while Guam and the Northern Mariana Islands may be politically separated, they are part of the same island chain, share a common indigenous people and culture, and their capitals are separated by approximately 130 miles.⁸⁷ Yet the Ninth Circuit has affirmed the authority of the Northern Mariana Islands government to enforce land alienation laws based on race, while simultaneously striking down Guam's attempts to provide greater rights to its people, even in areas that would not run afoul of the U.S. Constitution.⁸⁸ While the federal government permits American Samoa to impose substantial race- and status-based restrictions on the right to vote and hold elected office, the federal government has disallowed significantly less restrictive measures in the U.S. Virgin Islands on grounds that it would violate equal protection.⁸⁹

Federal courts often justify this unequal treatment by emphasizing the different circumstances under which each territory joined the United States— noting that American Samoa and the Northern Mariana Islands voluntarily ceded their sovereignty to the United States, while Puerto Rico, Guam, and the U.S. Virgin Islands were involuntarily annexed as spoils of war or through purchase.⁹⁰ As a threshold matter, the presumption should be flipped: The territories that were involuntarily forced to become part of the United States against the will of

86. For instance, the Ninth Amendment provides “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. Similarly, the Tenth Amendment states “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST. amend. X. Since the Fourteenth Amendment, by its own terms, applies to the states, it would appear that the Tenth Amendment would reserve to the people of the territories the right to enact such legislation even if not permitted by the states. See U.S. CONST. amend. XIV, § 1 (stating no state shall make or enforce any law abridging citizens’ privileges or immunities).

87. See *Commonwealth of Northern Mariana Islands (CNMI) and Guam, PAC. ISLANDS BENTHIC HABITAT MAPPING CTR.*, <http://www.soest.hawaii.edu/pibhmc/cms/data-by-location/cnmi-guam/> [<https://perma.cc/589D-JGYT>] (describing geology and history of Mariana archipelago including ancestral Chamorro population).

88. Compare *Wablol*, 958 F.2d at 1451, with *Guam v. Guerrero*, 290 F.3d 1210, 1223 (9th Cir. 2002).

89. Compare AM. SAM. CONST. art. II, § 3, with S.J. Res. 33, 111th Cong. (2010).

90. See, e.g., *Tuaua v. United States*, 788 F.3d 300, 302, 311-12 (D.C. Cir. 2015); *Wablol*, 958 F.2d at 1458-59.

their people should receive substantially greater deference to deviate from the U.S. Constitution than those territories which voluntarily joined the United States, knowing full well what joining may culturally entail. After all, political theorists often cite the involuntary annexation of land as the primary reason for granting greater deference and autonomy to tribal governments.⁹¹

This simplistic attempt to draw a bright-line distinction, however, suffers from another critical flaw. By focusing on the means used to join the United States, courts elevate form over substance by ignoring the nuances. For example, while as a purely technical matter the United States purchased the U.S. Virgin Islands from Denmark effective March 31, 1917, a popular referendum on the sale was held in the islands, which overwhelmingly passed by a vote of 4,727 in favor and only seven against.⁹² In addition to this popular vote, the elected Colonial Councils of St. Thomas, St. John, and St. Croix unanimously passed resolutions supporting annexation by the United States.⁹³

Moreover, by focusing on the method of initial annexation, courts completely ignore and discount the significance of all events that occurred thereafter. It is true that “the traditional leaders of the Samoan Islands of Tutuila and Aunu’u voluntarily ceded their sovereign authority to the United States Government” in 1900.⁹⁴ But why should this decision by the traditional leaders of American Samoa in 1900 have greater effect than the decision of the people of Puerto Rico to adopt the Constitution of Puerto Rico in 1952 to create “a new political entity” within the United States?⁹⁵

Reasonable people can certainly disagree as to how much authority a territorial government may permissibly exercise in the name of preserving its culture. Nevertheless, the culture of Guam deserves no less protection than that of the Northern Mariana Islands. Nor does the culture of American Samoa deserve greater protection than the culture of the U.S. Virgin Islands. Because “no one culture is better than another . . . each [culture] has the right to form its own identity and nourish its own sense of what is rational and humane,” at least subject to the same minimal baseline standards.⁹⁶ As such, all territorial governments, regardless of when or under what circumstances they became part of the United States, should possess the same power to enact culturally

91. See Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 845-46 (1990) (observing deference to Native American tribes under U.S. law arose from involuntary annexation).

92. See Isaac Dookhan, *Changing Patterns of Local Reaction to the United States Acquisition of the Virgin Islands, 1865-1917*, 15 CARIBBEAN STUD. 50, 69 (1975) (describing local support for sale); see also *King Works for Harmony*, N.Y. TIMES, Aug. 18, 1916, at 1 (reporting voting results).

93. See Dookhan, *supra* note 92, at 69 (discussing Council approval in wake of popular votes).

94. *Tuaua*, 788 F.3d at 302 (citing instrument of cession by Chiefs of Tutuila Islands to U.S. Government).

95. See *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 65 (2016) (explaining new republican government to represent sovereignty of people of Puerto Rico).

96. See Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1119 (1996) (contrasting strong multiculturalism with boutique multiculturalism).

protectionist legislation, with no one territory possessing greater or lesser authority to preserve its culture than another.

C: Principle 3: U.S. Territories May Not Enact Any Laws that Would Violate Customary International Human Rights Law if Enacted by an Independent Country

Multiculturalism and cultural pluralism are largely celebrated in modern American society. But even the most ardent supporters of these values must recognize that culture has been used as a pretext to justify some of the most significant atrocities and human rights abuses in history, including, but certainly not limited to, slavery and genocide.⁹⁷ While these atrocities can never be justified under any circumstances—to preserve culture or otherwise—it nevertheless remains unanswered where precisely “to draw the line between appropriate and inappropriate means for the preservation of cultures.”⁹⁸

In the fifty states and the District of Columbia, the U.S. Constitution—and particularly the Bill of Rights—represents that line.⁹⁹ This line can be summed up, albeit somewhat unartfully, as the principle that “my rights end where your rights begin.”¹⁰⁰ Consequently, a state government cannot establish an official religion and actively advance or inhibit certain religions, even if the overwhelming majority of the state’s residents are members of the same religion.¹⁰¹ But if we accept that we should not “deal with Samoa as if it were Alabama or Michigan” with respect to drawing the line between permissible and impermissible cultural preservation laws, where exactly *do* we draw that line?¹⁰²

The High Court of American Samoa invokes customary international human rights law as an appropriate reference to determine when “some forms of racial discrimination . . . transgress the limits of what most of us today would regard as

97. See, e.g., Cecil J. Hunt, II, *No Right to Respect: Dred Scott and the Southern Honor Culture*, 42 *NEW ENG. L. REV.* 79, 82-83 (2007) (examining influence of southern culture on *Dred Scott* decision); Jack Achiezer Guggenheim, *Art & Atrocity: Cultural Depravity Justifies Cultural Deprivation*, 8 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 699, 729 (1998) (examining role of German culture in perpetuating Holocaust).

98. See Chaim Gans, *Individuals’ Interest in the Preservation of Their Culture: Its Meaning, Justifications, and Implications*, 1 *L. & ETHICS HUM. RTS.* 6, 15 (2007) (discussing potential examples to help clarify difference).

99. Cf. Brief for Lambda Legal Defense and Education Fund, Inc., and Others as Amici Curiae, *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2016) (No. 91615-2), 2016 WL 3552843, at *2 (arguing religious liberty ends where infringement on other protected rights begins).

100. See Maureen Johnson, *Trickle-Down Bullying and the Truly Great American Response: Can Responsible Rhetoric in Judicial Advocacy and Decision-Making Help Heal the Divisiveness of the Trump Presidency?*, 25 *AM. U. J. GENDER SOC. POL’Y & L.* 445, 507 (2017); see also *Douglas v. City of Jeannette*, 319 U.S. 157, 178 (1943) (stating “[t]he real question is where their rights end and the rights of others begin”); Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 *HARV. L. REV.* 932, 957 (1919) (quoting “[y]our right to swing your arms ends just where the other man’s nose begins”).

101. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (discussing well-established law regarding governmental establishment of religion).

102. See *Banks v. Am. Samoa Gov’t*, 4 *Am. Samoa 2d* 113, 123 (1987) (stating Samoan discrimination cases not identical to discrimination claims arising in U.S. states).

a free and civilized society.”¹⁰³ While the Fourteenth Amendment would certainly prohibit a state from enacting a law that mandated favoring members of certain races in employment, the court recognized “it would be difficult to sustain the proposition that any society that uses a racial classification for any purpose is necessarily to be regarded as uncivilized or unfree,” and emphasized “many nations (including, for instance, Western Samoa, Fiji, Japan, Israel, and Ireland) discriminate in ways that would be forbidden in the United States,” yet are still regarded as liberal democracies.¹⁰⁴ While the government does not have “carte blanche to practice any form of racial discrimination,” the court determined that the law providing employment preference to American Samoans in government was necessary to remedy the discriminatory effects of several decades of American administration in which “there were practically no Samoans in responsible government positions.”¹⁰⁵

Certainly, this framework has flaws—after all, customary international human rights law is ambiguous, and there remains disagreement as to which rights are of such a fundamental nature that they cannot be infringed upon.¹⁰⁶ Yet considering international norms in this context certainly seems appropriate. Unlike the fifty states, which the federal government has firmly prohibited from seceding since the Civil War, the plain text of the U.S. Constitution permits Congress to “dispose” of a territory.¹⁰⁷ Congress has already exercised this power on several occasions, such as by granting independence to the Philippine Islands and returning the Canal Zone to Panama, and today it is largely taken for granted that Congress would willingly grant full independence to any territory that requested it.¹⁰⁸ To the extent the territories should be entitled to exercise greater autonomy than states due to the lack of a presidential vote and voting representation in Congress, customary international human rights law provides, at least, a workable framework territorial governments and courts can apply.

103. *Id.* at 126 (considering international human rights law governs in discrimination cases).

104. *See id.* (exemplifying propriety of race-based discrimination in relation to democratic ideals).

105. *See id.* at 127-28 (holding American Samoan preference law constitutional).

106. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1807-08 (2009) (highlighting ambiguity in international human rights law).

107. *Compare* *Sprott v. United States*, 87 U.S. (20 Wall.) 459, 464 (1874) (identifying importance of states’ allegiance to federal power), *and* David Kowalski, Comment, *Red State, Blue State, No State?: Examining the Existence of a Congressional Power to Remove a State*, 84 U. DET. MERCY L. REV. 335, 338-39 (2007) (addressing “indissoluble unity” created by Constitution), *with* U.S. CONST. art. IV, § 3, cl. 2 (stating “Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”).

108. *See* Manuel Rodríguez Orellana, *Puerto Rico and the U.S. Congress: The Road Ahead*, 21 TEX. HISP. J.L. & POL’Y 31, 42 (2015) (summarizing pro-independence and anti-statehood outcomes from 1991 Senate committee debates); *Philippine Independence Declared*, HISTORY (June 10, 2020), <https://www.history.com/this-day-in-history/philippine-independence-declared> [https://perma.cc/69PC-T48K] (discussing Philippines’ journey to independence); *Panama Canal Turned Over to Panama*, HISTORY (Dec. 21, 2021), <https://www.history.com/this-day-in-history/panama-canal-turned-over-to-panama> [https://perma.cc/323P-A7VD] (setting forth Panama’s history of gaining control of canal).

D. Principle 4: Discriminatory Laws Enacted by a U.S. Territory Must Have an Actual Basis in the Cultural Traditions of That Territory

It should go without saying that laws drawing distinctions based on race or other immutable characteristics in the name of cultural preservation should bear some legitimate connection to that culture and its traditions. Otherwise, a territory does not need a discriminatory law to preserve its culture, and the territory merely uses cultural preservation as a pretext to legally withhold rights from, or otherwise discriminate against, a minority group.

Some laws, such as those recognizing the *matai* system in American Samoa, preserve legitimate cultural traditions.¹⁰⁹ Several territories, however, have in fact enacted discriminatory laws having no such basis. For instance, the decision of American Samoa to refuse to follow the United States Supreme Court's ruling in *Barnard* by prohibiting nonresidents from obtaining a license to practice law serves no cultural preservation purpose whatsoever.¹¹⁰ That territory's nullification of the *Obergefell* decision likewise lacks basis, in that the stated reason for declining to recognize same-sex marriages is not American Samoan culture, but religious opposition based on the tenets of Christianity¹¹¹—a reason not unique in any way to American Samoa or any other territory and a reason that the *Obergefell* majority expressly rejected.¹¹²

E. Principle 5: Discriminatory Laws Enacted by a U.S. Territory Must Remain Under Continuing Examination to Account for Cultural Change

For much of history, culture has been viewed as a static concept.¹¹³ Under this approach, cultures are an ever present and unchanging constant, with other institutions, such as law, developing based on that culture.¹¹⁴ Today, most

109. See Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 76-77 (2001) (considering decision to preserve *matai* culture in American Samoa laws); see also *supra* notes 35-38 and accompanying text (explaining *matai* system).

110. See *In re Bar Ass'n Membership Residency Requirement*, 29 Am. Samoa 2d 14, 17 (1995) (expressing "desire to ensure that the onus of the profession in a very small and very isolated Bar is fairly shouldered by all who seek admission and the benefits of practice in the territory").

111. See *American Samoa Holds Out*, *supra* note 4 (noting conservative Christian doctrine extremely prevalent in American Samoan households). In fact, it may appear that legal recognition of same-sex relationships would actually be consistent with American Samoan culture, in that "the territory has a tradition of embracing *faafafine*—males who are raised as females and take on feminine traits." See *id.*

112. See *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015) (rejecting religious opposition in context of same-sex marriage and Constitution).

113. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 143 (1973) (criticizing sociological approaches treating cultures statically); CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 358 (Claire Jacobson & Brooke Grundfest Schoepf trans., Basic Books, Inc. 1963) (1958) (noting cultural anthropology's departure from static view of culture).

114. See Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 U. PA. J. INT'L ECON. L. 1235, 1275 (1997) (noting law stems from culture of society).

scholars recognize that this conception of culture is false, and that “the idea of unchangeable tribes frozen in time cannot stand the test of historical scrutiny.”¹¹⁵ Rather, like other societal institutions, culture changes as certain economic structures arise, new technologies improve, political revolutions occur, artistic styles shift, and neighboring cultures interact.¹¹⁶

Nevertheless, the law often attempts to “relegate[] Native communities to ‘museum piece’ status, forcing them to stay locked in a static, no-growth pattern of activity.”¹¹⁷ To their credit, some courts have recognized this principle; as one Canadian court aptly put it, “[t]he Indian right to trade his fish is not frozen in time [H]e is entitled . . . to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money.”¹¹⁸ This is no different than how courts treat other aspects of law, including the U.S. Constitution, which is not “frozen in time” even as applied to the territories.¹¹⁹ One scholar recently posited:

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

Further, cultural changes occur not only due to outside influences but also because of desired changes by members of the group. As Professor Madhavi Sunder notes, individuals engage in “cultural dissent” and thereby instill cultural changes from within. Cultural dissent practices may come from individuals who are members of an indigenous group as well as nonindigenous individuals who reside with or are related to members of indigenous groups. Courts that are analyzing claims to culture, whether through the *Insular Cases* framework or conventional analysis, must carefully consider the culture’s dynamic nature.¹²⁰

115. Willem Van Schendel, *The Invention of the ‘Jummas’: State Formation and Ethnicity in Southeastern Bangladesh*, 26 MOD. ASIAN STUD. 95, 104 (1992) (criticizing static conception of culture).

116. See J. Gordon Melton, *Religious Pluralism: Problems and Prospects*, 2001 BYU L. REV. 619, 622 (describing constantly changing nature of culture).

117. Jennifer L. Tomsen, Note, “Traditional” Resource Uses and Activities: Articulating Values and Examining Conflicts in Alaska, 19 ALASKA L. REV. 167, 185 (2002) (explaining static conception of culture perpetuates lack of growth).

118. *R. v. Vanderpeet*, [1991] 58 B.C.L.R. 2d 392, para. 22 (Can. B.C. Sup. Ct.) (noting ability of indigenous people to change their traditional practices with modern methods).

119. See *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1427 (D. Guam 1990) (holding “frozen in time” theory of applicability erroneous for Territory of Guam), *aff’d*, 962 F.2d 1366, 1370 (9th Cir. 1992).

120. Cuison Villazor, *supra* note 64, at 147.

Thus, to the extent the U.S. Constitution may permit territories to enact discriminatory laws in the name of cultural protection, the territories' authority to do so must be contingent on those laws serving that purpose, as well as the potential for continuing and meaningful judicial review, notwithstanding doctrines such as *stare decisis*, so that the law may change along with the culture.

In fact, over the last several decades, certain cultural attitudes and practices have already changed in the territories. Part I of this Article began by briefly summarizing the history of discrimination against women in the U.S. Virgin Islands by its own locally elected territorial government institutions, most notably withholding the right to vote for nearly twenty years after enactment of the Nineteenth Amendment.¹²¹ Although the territorial government granted women's suffrage in 1936, the government withheld other rights—such as the right to serve on a jury—from women for quite some time.¹²²

Even decades later, courts in the U.S. Virgin Islands still routinely affirmed the constitutionality of discriminatory laws that treated men and women differently because “[t]hrough there are many who would say that in today’s world women seek to be considered the equal of men in any and all respects . . . there are basic differences” that warranted unequal treatment under the law.¹²³ Such “gendered justifications,” however, effectively served to “facilitate female subjectivity and objectivity,” and were unquestionably rooted in “the persistence of strong patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities, and identities of women and men.”¹²⁴

These attitudes, thankfully, have begun to wane in the U.S. Virgin Islands.¹²⁵ But rather than treat *stare decisis* as “an inexorable command”¹²⁶ and affirm these precedents, in recent years, the courts of the U.S. Virgin Islands have, within a relatively short period of time, issued strong decisions promoting full legal equality between men and women. This includes issuing decisions holding unconstitutional a gender-based criminal statute that prior courts had deemed constitutional;¹²⁷ abolishing the torts of alienation of affection and criminal conversation because they effectively treat women as the property of their

121. See *supra* Section I.A (discussing historical discrimination of women in U.S. Virgin Islands by its own locally elected government); *In re Richardson*, 1 V.I. 301, 346 (D.V.I. 1936) (granting women in U.S. Virgin Islands right to vote in Colonial Council elections).

122. See *Virgin Islands v. Caines*, 1 V.I. 413, 416-17 (D.V.I. 1938) (holding constitutional right granting women voting rights does not make women eligible for jury service).

123. See, e.g., *Gov't of the V.I. v. Prescott*, 18 V.I. 110, 111 (Terr. Ct. 1981).

124. See Stacy-Ann Elvy, *A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond*, 22 MICH. J. GENDER & L. 89, 112-13 (2015) (discussing perpetuation of common law spousal rape exception).

125. See *infra* notes 127-31 and accompanying text (summarizing decisions exemplifying recent legal and social changes in treatment of women).

126. See *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (stating *stare decisis* not “an inexorable command”).

127. See *Webster v. People*, 60 V.I. 666, 682 (2014) (holding statute making assaults by men against women automatically aggravated violated equal protection).

husbands;¹²⁸ overturning precedents authorizing consideration of adultery and fault in alimony determinations¹²⁹ and property distributions;¹³⁰ and recognizing the distinction between the terms “gender” and “sex.”¹³¹ Thus, the courts of the U.S. Virgin Islands effectively exercised robust judicial review to ensure that its law evolved together with cultural changes in traditional views towards women in the territory.

It may be difficult to imagine that the people of American Samoa, the Northern Mariana Islands, or other territories may one day move away from some or all aspects of their traditional cultures, but it is certainly not unthinkable that their cultures will evolve in unpredictable ways during the next century. Any system that would allow the territories to enact discriminatory laws in the name of cultural preservation must at a minimum recognize that such changes will likely occur. Even without knowing in advance what those changes will entail, a court in the twenty-second century should not be precluded from holding unconstitutional what a twenty-first century court permitted to preserve a tradition that no longer holds sway with the populace.¹³²

F. Principle 6: No Discriminatory Law or Practice by a U.S. Territory May Be Given Extraterritorial Effect

It is well-established that a strong presumption exists against giving extraterritorial effect to federal statutes.¹³³ States, however, are not required to follow this presumption with respect to their own state laws, although many of the states to consider the question have applied this presumption.¹³⁴ States need not adopt a presumption against extraterritoriality in part because “extraterritorial application of state law is subject to federal constitutional limits,

128. See *Matthew v. Herman*, 56 V.I. 674, 683-84 (2012) (justifying abolition of amatory torts partly due to historical origin of property view of wives).

129. See *Berrios-Rodriguez v. Berrios*, 58 V.I. 477, 484-85, (2013) (noting question of fault irrelevant for determining alimony).

130. See *Garcia v. Garcia*, 59 V.I. 758, 777 (2013) (stating courts may not consider fault when dividing homestead during divorce).

131. See *In re L.O.F.*, 62 V.I. 655, 658 n.4 (2015) (stating terms “gender” and “sex” not interchangeable).

132. For instance, the law mandating hiring preference for American Samoans in government employment, which the High Court of American Samoa upheld in 1986 because “there were practically no Samoans in responsible government positions” due to decades of American administration, may be subject to reexamination to the extent Samoans are now represented in greater numbers in political office. See *Banks v. Am. Samoa Gov’t*, 4 Am. Samoa 2d 113, 128 (1987).

133. See, e.g., *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337-38 (2016) (explaining scope of extraterritorial statute turns on limits imposed by Congress rather than statute’s focus); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115-17 (2013) (reasoning presumption governs when no clear indication of extraterritorial application); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454-56 (2007) (discussing extraterritoriality presumption applies with particular force to patent law); see also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (acknowledging presumption Congress does not intend to enforce statutes outside jurisdiction unless explicitly stated).

134. See William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1403-07 (2020) (discussing scope of presumptions of extraterritoriality among states).

most of which do not apply to federal statutes,” such as limits under the Due Process Clause of the Fourteenth Amendment and the Dormant Commerce Clause.¹³⁵

But these constitutional constraints often do not apply to the territories. The very basis for territorial legislatures to enact discriminatory legislation is that the Fourteenth Amendment does not apply to the territories in the same manner as the states.¹³⁶ And several federal appellate courts have held that the Dormant Commerce Clause does not apply to territorial governments because the territories are, in effect, exercising powers Congress delegated to them.¹³⁷

If territorial governments may permissibly enact legislation that discriminates against certain people or groups in the name of cultural preservation, such laws should not extend beyond that territory’s geographic borders. For example, to the extent the government of American Samoa can veto the grant of American citizenship to the people of its territory, that decision should not prevent such an individual from obtaining automatic United States citizenship after choosing to permanently move from American Samoa to Utah. To hold otherwise would effectively ratify the reasoning and result of *Dred Scott v. Sandford*,¹³⁸ and permit a territorial government to continue to discriminate against individuals who have left the territory in violation of both those individuals’ human rights and the authority of other states and territories to enforce their own laws within their own borders.

IV. CONCLUSION

Contemporary scholarship, judicial decisions, and the popular press portray the relationship between the United States and its territories as a simple one, with the territories as the oppressed and the federal government as the oppressor. As this Article has demonstrated, the reality is far more nuanced and complex. While the federal government has certainly treated the people of the territories as second-class citizens and withheld from them some of the most fundamental rights, territorial governments have done—and in many cases, continue to do—the same with minority or marginalized communities within their jurisdictions. These third-class citizens not only lack the rights that are withheld by the federal

135. *Id.* at 1433-34 (providing state court decisions applying state statutes extraterritorially after applying state conflict laws).

136. *See Banks*, 4 Am. Samoa 2d at 126 (asserting Fourteenth Amendment, on its face, applies to states rather than territories).

137. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) (noting Guam instrumentality to U.S. federal government); *United States v. Husband R. (Roach)*, 453 F.2d 1054, 1060 (5th Cir. 1971) (holding Canal Zone not subject to Dormant Commerce Clause limitations because merely plenary); *see also* Anthony Ciolli, *The Power of United States Territories to Tax Interstate and Foreign Commerce: Why the Commerce and Import-Export Clauses Do Not Apply*, 63 TAX LAW. 1223, 1244 (2010) (stating unincorporated territories instrumentalities of Congress).

138. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

government to all the people in the territories, but also are deprived of certain additional rights by their territorial government due to immutable characteristics such as race.

Although many of these actions are not justifiable, it is at least arguable that the unique circumstances of each of the five inhabited territories may in some cases justify certain discriminatory practices in the territories that would be unlawful in the fifty states. Yet without grounding in any constitutional doctrine, the law in this area has become incoherent and more closely resembles Swiss cheese than meaningful constitutional adjudication. The principles proposed in this Article attempt to fill this gap by crafting a balance between the rights of individuals and the collective rights of territorial peoples. In doing so, these principles provide a framework to permit territorial governments to enact necessary legislation to preserve and protect their cultures, but in a way that infringes on individual rights only to the extent necessary to meet that goal. It is only through such careful balancing that the territories may maintain their unique cultures while honoring and respecting, to the greatest extent possible, the American ideal of equal protection under the law.