INCLUDING THE U.S. TERRITORIES IN THE CONSTITUTIONAL LAW COURSE: IMPERATIVES AND CHALLENGES

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I. INTRODUCTION

For more than a century, the United States has held five territories[1] as colonies in an ambiguous, separate, and unequal status.[2] More than four million U.S. citizens reside in these territories and are ruled by the United States without the right to vote for the President or representation in Congress.[3] This is because the *Plessy v. Ferguson*[4]-era Supreme Court, in a series of nineteenth century cases known as the *Insular Cases*,[5] invented an incorporation doctrine that classified these territories as "foreign . . . in a domestic sense,"[6] such that they could be treated neither as states nor as independent nations (i.e., colonies).[7] Few

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1. R. SAM GARRETT, CONG. RSCH. SERV., IF11792, STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND (2024). Those five territories are American Samoa, the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands ("USVI"). *Id.*

2. Claribel Morales, *Constitutional Law—Puerto Rico and the Ambiguity Within the Federal Courts*, 42 W. NEW ENG. L. REV. 245, 245 (2020).

3. R. SAM GARRETT, CONG. RSCH. SERV., IF11792, STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND (2024).

4. 163 U.S. 537 (1896) (infamously holding that the Constitution supported "separate but equal" treatment of people based on race), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954).

5. *See infra* note 28 and accompanying text.

6. Downes v. Bidwell, 182 U.S. 244, 341 (1901) (White, J., concurring).

7. Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 775–76 (2022).

people in the United States, including lawyers, are aware of this colonial problem.[8] The *Insular Cases*' interpretation of the Constitution's Article IV, which set the stage for the colonial treatment of the territories,[9] is as invisible to most lawyers as it is untenable.[10] This invisibility relates in part to the general lack of coverage of the territories and the *Insular Cases* in law schools.

Law professors and advocates have noted this absence and advocated for raising the visibility of this issue by including the material in the law school curriculum in general and in constitutional law in particular.[11] Yet very few constitutional law courses in American law schools cover the territories.[12] Similarly, coverage of the Article IV Territorial Clause or its interpretation under the infamous *Insular Cases* or more recent caselaw remains rare.[13]

This Article offers rationales for and approaches to covering the territories and the *Insular Cases* in the standard constitutional law course. It contributes to the rich and growing scholarship in this area by noting areas of progress toward including the history of U.S. imperialism in constitutional law courses and in broader understandings of U.S. constitutional history and structure.[14] It also presents compelling rationales for including this material given recent and ongoing convulsive changes in constitutional law jurisprudence[15] amid a political backlash against teaching history

8. *Id.* at 776; *see* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 14–15 (2019).

9. *See* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The* Insular Cases *(1901-1922)*, 65 REV. JURÍDICA U. P.R. 225, 228 (1996).

10. Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the* Insular Cases *Should Be Taught in Law School*, 21 J. GENDER RACE & JUST. 395, 427 (2018).

11. *Id.* at 399; Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 250–51 (2000); N.Y. STATE BAR ASS'N, RESOLUTION AND REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON THE U.S. TERRITORIES—FIRST TASK FORCE REPORT (2022), https://nysba.org/app/uploads/2022/06/Insular-Cases-Task-Force-on-the-U.S.-Territories-9.28.2022-with-cover-9.30.2022.pdf.

12. Serrano, *supra* note 10, at 456–57.

13. *See id.*

14. *See generally* Levinson, *supra* note 11 (arguing that the *Insular Cases* deserve an important place within the constitutional law canon).

15. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling decades of constitutional protection of a woman's right to access abortion within certain parameters because it is not "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022) (holding that "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second

and current impacts of the United States' imperial past[16] and the role of racial exclusion in structuring the American democratic project.[17]

Part II will provide a brief background about the territories and the *Insular Cases*, noting the role legal academics played in the interpretations that yielded the *Insular Cases*' incorporation doctrine. It will examine scholarship explaining the Constitution's relationship with American empire and how that history shaped and contributed to the Constitution's development and most challenging and enduring contradictions.[18] It will explain how the current "territorial incorporation doctrine" is an anomaly inconsistent with the Constitution's text and history, which was invented to permit and mask the unequal colonial status under which unincorporated territories have been held for more than 125 years.[19] This Part also will briefly note the implications of the *Insular Cases* and subsequent legal developments in establishing and maintaining the arbitrary separate and unequal status of the U.S. territories.

Part III will explain why covering the territories in the law school constitutional law course matters, especially in the current constitutional moment. It will explain the relevance of the territories and the *Insular Cases* to the Constitution's history, development, and contemporary understandings.[20] It will illustrate scholarly and pedagogical opportunities for framing the Constitution and examining modes of constitutional interpretation.[21] This Part will also briefly discuss the benefits of educating law students, raising awareness about the history and

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Amendment's 'unqualified command'" (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961))); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023) (holding that race-based, university admissions programs violate the Equal Protection Clause); *see also* David Simson, *Methodological Gerrymandering*, 72 CLEV. ST. L. REV. 145, 146 (2023) (arguing "that a number of Justices are engaging in significant levels of methodological gerrymandering in an effort to reassert and bolster problematic social hierarchies along the lines of religion, race, and sex").

16. Sarah Schwartz, *Lawmakers Push to Ban '1619 Project' from Schools*, EDUCATIONWEEK (Feb. 3, 2021), https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02.

17. Juliana Kim, *Racial Disparities in Voter Turnout Have Grown Since Supreme Court Ruling, Study Says*, NPR (Mar. 5, 2024, 5:17 AM), https://www.npr.org/2024/03/05/1235521824/voter-turnout-race-disparities-supreme-court.

18. *See infra* pt. II.B.

19. *See infra* pt. II.C.

20. *See infra* pt. III.A.

21. *See infra* pt. III.B.

current plight of the territories, and moving forward in a way consistent with broader constitutional principles of equality, uniformity, the rule of law, and the consent of the governed.[22]

Part IV will discuss the benefits and challenges of including Article IV, the *Insular Cases*, and legal developments affecting the territories in the constitutional law course. It will note the uneasy state of constitutional law with current dramatic changes in constitutional jurisprudence at a time when teaching facts and history related to structural inequality is both urgent and under challenge. It will provide examples of pedagogical approaches to including this material in constitutional law textbooks and course syllabi.

II. BACKGROUND: U.S. EMPIRE AND COLONIALISM AMID LEGAL NARRATIVES OF FREEDOM AND EQUALITY

The United States has been a colonial power since its founding and remains one today.[23] From the founding until the Spanish-American War, the United States "only acquired territory with the understanding that it would eventually be incorporated into the Union in the form of one or more states, and that the people residing in those territories would be granted full citizenship rights and join the American polity."[24] Yet, given what were deemed unique circumstances in acquiring non-contiguous territory inhabited by "alien races"[25] and "savages,"[26] legal academics invented the "territorial incorporation doctrine."[27] The Supreme Court would later adopt this idea in a series of cases known as the *Insular Cases*.[28]

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22. *See infra* pt. III.C.

23. *See* Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 17–18, 24, 28–33 (2023).

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

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

26. *Id.* at 279.

27. *See* Alan Mygatt-Tauber, *Overruling the* Insular Cases *on Their Own Terms*, 33 GEO. MASON U. C.R.L.J. 201, 202 (2023); Gustavo A. Gelpí, *The* Insular Cases: *A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, FED. LAW., Mar.–Apr. 2011, at 22–23.

28. Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2249, 2458 (2022). *Downes* and *Balzac v. Porto Rico* are among the most frequently cited of the *Insular Cases*. *See* Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 799 n.7 (2010) (listing and explaining the holding of twenty-three cases regarded as the *Insular Cases*); *see also*

The current colonial condition[29] of Puerto Rico[30] and the other unincorporated territories[31] presents pressing constitutional and rule of law challenges.[32] Foundational constitutional notions of liberty, equality,[33] uniform application of the law,[34] representative democracy,[35] and rule by consent of the governed are not guaranteed to residents of the U.S. territories.[36] This Part will provide a brief overview of the current "unincorporated" U.S. territories, their position under Article IV as interpreted by the *Insular Cases*, the territories' place in the constitutional structure, and their relevance to the constitutional history of empire. It briefly explains the genesis of the *Insular Cases*' incorporation doctrine in legal academia and its adoption by the Supreme Court. It will also address the current Court's failure to overturn the legal basis for the territories' arbitrary and unequal treatment in what some have called the "new *Insular Cases*."[37]

Downes, 182 U.S.; Balzac v. Porto Rico, 258 U.S. 298 (1922). Some scholars also consider *Johnson v. M'Intosh* to be one of the *Insular Cases* because it established the doctrine of discovery, which "essentially legalized land theft." William J. Fife III & Beylul Solomon, *Indigenous Rights: A Pathway to End American Second-Class Citizenship*, 32 S. CAL. REV. L. & SOC. JUST. 59, 62 (2023); *see also Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

29. *See* Julie A. Werner-Simon, *America's Own Present-Day Colonialism*, AM. CONST. SOC. (Oct. 10, 2022), https://www.acslaw.org/expertforum/americas-own-present-day-colonialism/; IMMERWAHR, *supra* note 8, at 18–19.

30. *See generally* Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000) (explaining Puerto Rico's colonial status and how it has long been hidden in plain sight).

31. *See supra* note 1 and accompanying text.

32. *See, e.g.*, Vann R. Newkirk II, *Testing Territorial Limits*, ATLANTIC (Mar. 30, 2016), https://www.theatlantic.com/politics/archive/2016/03/territorial-limits/475935/.

33. *See, e.g.*, United States v. Vaello Madero, 142 S. Ct. 1539 (2022).

34. *See, e.g.*, Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 64 (2017).

35. *See, e.g.*, Amelia Cheatham and Diana Roy, *Puerto Rico: A Territory in Crisis*, COUNCIL FOREIGN RELS. (Sept. 29, 2022, 11:40 AM), https://www.cfr.org/backgrounder/puerto-rico-us-territory-crisis.

36. *See generally* José R. Cot, *The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898-Present)*, FED. LAW., August 2018, at 99–100 (reviewing GUSTAVO A. GELPÍ, THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898-PRESENT) (2017)) (noting the territories' "undemocratic predicament").

37. Willie Santana, *The New* Insular Cases, 29 WM. & MARY J. RACE GENDER & SOC. JUST. 435, 437 (2023).

A. Brief History of the "Inhabited and Unincorporated" Territories Under the Insular Cases

The unincorporated, inhabited territories include American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands.[38] They are governed by the Territory Clause:

> The 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[39]

The Territory Clause has been interpreted to mean that in the territories, "Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state."[40] Yet several scholars have noted that original, textual, and structural analyses demonstrate that the Territory Clause was intended to provide a means of temporary congressional oversight, pending either a territory's admission as a state or its de-annexation as a separate sovereign nation.[41] During the expansionist period, it was understood that all provisions of the Constitution applied to territories under U.S. control.[42] That understanding changed under theories propounded by legal academics[43] and adopted by the Supreme Court in the

38. Introduction, *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1617, 1617 (2017).

39. U.S. CONST. art. IV, § 3, cl. 2.

40. Simms v. Simms, 175 U.S. 162, 168 (1899).

41. *See* Carlo E. Zayas Morales, *On Equal Footing: Re-Examining the Doctrine of Territorial Incorporation in Light of the Northwest Ordinance of 1787 and America's Symbolic Constitution*, 3 REVISTA JURÍDICA DE LA ASOCIACIÓN DE ABOGADOS DE P.R. 141, 152 (2016); R. SAM GARRETT, CONG. RSCH. SERV., IF11792, STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND (2024); Christina Duffy Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005).

42. Lopez-Morales, *supra* note 7, at 780. *But see* Ponsa-Kraus, *supra* note 28, at 2466 (claiming that there was uncertainty at the time regarding "whether the Constitution 'followed the flag' to the new territories").

43. *See, e.g.*, Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 291–315 (1898); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 393–416 (1898); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 365–92 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 464–85 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13

Insular Cases.[44] The *Insular Cases* refer to a series of cases decided during 1901 to 1922[45] that created the idea that certain non-contiguous territories were "unincorporated" and thus "foreign . . . in a domestic sense,"[46] such that certain constitutional provisions, like tax uniformity requirements, do not apply to them.[47]

Yet as Justice Harlan noted in his dissent in *Downes v. Bidwell*, the idea that certain territories could be held in a manner inconsistent with the principles articulated in the written Constitution had no basis.[48] The *Insular Cases*' incorporation doctrine placed territories deemed "unincorporated" in an ambiguous constitutional netherworld in which certain constitutional provisions could be applied, or not, to the detriment of territorial residents.[49] As Andrew Willinger explained: "The *Insular Cases* added a new layer of complexity regarding how the Constitution applied in unincorporated, non-continental territories with majority non-white populations which the United States did not intend to elevate to states."[50]

HARV. L. REV. 155, 155–76 (1899); George P. Costigan, Jr., *The Third View of the Status of Our New Possessions*, 9 YALE L.J. 124, 124–133 (1899); *see also* Mygatt-Tauber, *supra* note 27, at 202.

44. Ponsa-Kraus, *supra* note 28, at 2473 (noting that "the real problem with these decisions . . . [is] that they sanction the practice of maintaining perpetual colonies that are subject to congressional plenary power . . . but denied representation in the federal government").

45. Derieux, *supra* note 28, at 799 n.7.

46. Downes v. Bidwell, 182 U.S. 244, 341–42 (1901) (White, J., concurring) ("The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was . . . owned by the United States, it was foreign to the United States in a domestic sense, because the island has not been incorporated into the United States, but was merely appurtenant thereto as a possession.").

47. Adriel I. Cepeda Derieux, *To Lift a Dark Cloud: The* Insular Cases*' Stubborn Vitality, Their Place in Civil Rights Law, and the Need to Overrule Them*, 56 SUFFOLK U. L. REV. 503, 507 (2023) ("Unincorporated territories remained 'foreign to the United States in a domestic sense.'" (quoting *Downes*, 182 U.S. at 341 (White, J., concurring))).

48. *Downes*, 182 U.S. at 380 (Harlan, J., dissenting) ("This nation is under the control of a written constitution. . . . Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do. . . . To say otherwise is to concede that Congress may . . . engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution.").

49. *See* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 312 (2007) [hereinafter *The* Insular Cases] ("[T]he *Insular Cases* left the constitutional law to be applied in the newly created 'unincorporated territories' in an uncertain nebula.").

50. Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 WASH. U. L. REV. 1, 36 (2023).

The *Insular Cases* incorrectly interpret Article IV and violate the democratic principles of self-governance[51] and self-determination.[52] They place territorial residents in a position under which they are subject to U.S. power yet cannot vote for the President and do not have voting representation in Congress.[53] Nearly four million Americans live in these territories—with most of them representing one or more racial or ethnic minorities—and although they are U.S. citizens or nationals, the "federal government has historically treated them as second-class citizens."[54] Territorial residents cannot vote in federal elections, and no territory has "a federal representative with voting power in Congress."[55] Furthermore, territorial residents struggle to receive "equal access to . . . federal [benefits] programs."[56]

The *Insular Cases*' unincorporated classification continues to marginalize territorial residents by denying them sovereignty and self-governance and applying inconsistent constitutional rights.[57] The *Insular Cases* exemplify "'pure judicial legislation,' which ran contrary to longstanding constitutional jurisprudence and historical precedents."[58] Judges and legal scholars have explained and critiqued the arbitrary and untenable status of the territories

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51. *Id.*; Alvin Padilla-Babilonia, *Sovereignty and Dependence in the American Empire: Native Nations, Territories, and Overseas Colonies*, 73 DUKE L.J. 943, 997 (2024). The Supreme Court later acknowledged Article IV's "temporary" allocation of power in *Reid v. Covert*. 354 U.S. 1, 14 (1957) (explaining that the *Insular Cases* "involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions").

52. Carlos Iván Gorrín Peralta, *The Law of the Territories of the United States in Puerto Rico, the Oldest Colony in the World*, 54 U. MIA. INTER-AM. L. REV. 33, 75 (2023) ("A doctrine which contemplates that the United States may govern the people of a territory in perpetuity contradicts the founding values of the republic and violates the right to self-determination of peoples recognized by international law.").

53. Aaron Steckelberg & Chiqui Esteban, *More Than 4 Million Americans Don't Have Anyone to Vote for Them in Congress*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/fair-representation/.

54. Raúl Grijalva, *Advancing Equity in the U.S. Territories*, HOUSE COMM. ON NAT. RES. (Mar. 2021), https://democrats-naturalresources.house.gov/imo/media/doc/Advancing%20Equity%20in%20the%20US%20Territories.pdf.

55. *Id.*

56. *Id.*

57. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) ("[*Balzac*] is good authority for the proposition that there is no rigid rule that jury trial must always be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous.").

58. Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 69 (2013) [hereinafter *Ruling America's Colonies*] (quoting De Lima v. Bidwell, 182 U.S. 1, 198 (1901)).

stemming from the *Insular Cases* for decades.[59] For example, Judge Torruella devoted much of his life's work to educating U.S. lawyers, courts, and the public about the harsh and long-lasting consequences of the *Insular Cases*' interpretation of the Constitution.[60]

Many have called for the *Insular Cases* to be overruled, including the New York State Bar Association and the American Bar Associations.[61] Indeed, Supreme Court Justice Neil Gorsuch said directly:

> A century ago in the *Insular Cases*, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.[62]

Justice Gorsuch further noted that the positions of Justices Brown and White in the *Insular Cases* were founded on the belief that the United States had the right to exploit the territories because its people were "uncivilized," thereby justifying the denial of constitutional protections.[63]

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59. *See, e.g.*, *id.* at 59; *The* Insular Cases, *supra* note 49, at 285.

60. *See, e.g.*, Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the United States-Puerto Rico Relationship*, 100 MINN. L. REV. HEADNOTES 79, 80 (2016) ("[I]t does not appear that Puerto Rico is about to be released from the colonial grip of the plenary powers that were authorized by the *Insular Cases*."); *Ruling America's Colonies*, *supra* note 58, at 58; *The* Insular Cases, *supra* note 49, at 284; Stephen G. Breyer, *A Dedication to Judge Juan Torruella*, YALE L.J.F. (Nov. 2, 2020), https://www.yalelawjournal.org/forum/a-dedication-to-judge-juan-torruella.

61. *See, e.g.*, Letter from Deborah Enix-Ross, President, A.B.A., to Raúl Grijalva, Rep., U.S. House of Representatives (Apr. 17, 2023), https://democrats-naturalresources.house.gov/imo/media/doc/American%20Bar%20Association%20Insular%20Cases%20Resolution%20Letter.pdf; N.Y. STATE BAR ASS'N, *supra* note 11; H.R. Res. 279, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-resolution/279/text ("Acknowledging that the United States Supreme Court's decisions in the *Insular Cases* and the 'territorial incorporation doctrine' are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of *Plessy v. Ferguson* that have long been rejected, are contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.").

62. United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

63. *Id.* at 1553 (quoting Downes v. Bidwell, 182 U.S. 244, 306 (1901) (White, J., concurring)). However, Justice Gorsuch concurred in the judgment in *Vaello Madero* "[b]ecause no party ask[ed] [the Court] to overrule the *Insular Cases* to resolve today's dispute." *Id.* at 1557.

Despite repeated, sustained criticism as "anathema," the *Insular Cases* remain good law.[64] Litigants continue to invoke these cases—although the Department of Justice recently agreed to stop relying on them directly[65]—and courts continue to cite them.[66] In fact, the Supreme Court has reinforced their premises *sub silentio* in several recent cases, described by some as the "New *Insular Cases*."[67]

Several recent cases have provided the Supreme Court opportunities to overrule the *Insular Cases*.[68] However, the Court

64. Transcript of Oral Argument at 10, *Vaello Madero*, 142 S. Ct. (No. 20-303) ("The government's position on the *Insular Cases* is that some of the reasoning and rhetoric there is obviously anathema, has been for decades, if not from the outset."); *see* Colleen Walsh, *Reexamining the* Insular Cases. *Again*. HARV. L. BULL. (May 3, 2024), https://hls.harvard.edu/today/reexamining-the-insular-cases-again/.

65. Letter from Carlos Felipe Uriarte, Asst. Att'y Gen., U.S. Dep't of Just., to Raúl M. Grijalva, Rep., U.S. House of Representatives, https://s3.documentcloud.org/documents/24725373/20240530-out-grijalva-insular-cases.pdf. This happened after forty-three members of the House and Senate sent the DOJ a letter requesting that they cease relying on the *Insular Cases*. Letter from Raúl M. Grijalva et al., Member, U.S. Cong., to Merrick B. Garland, Att'y Gen., U.S. Dep't of Just. (Apr. 15, 2024), https://democrats-naturalresources.house.gov/imo/media/doc/Congressional%20Request%20to%20DOJ%20to%20Condemn%20the%20Insular%20Cases_4.15.24_Updated.pdf.

66. Federal courts have cited various of the *Insular Cases* in often confused and contradictory ways. *See, e.g.*, Fitisemanu v. United States, 1 F.4th 862, 869 (10th Cir. 2021) (citing *Downes v. Bidwell*, 182 U.S. 244 (1901), to support the proposition that citizenship is "the type of constitutional right that should not be extended automatically to unincorporated territories"); Igartua-De La Rosa v. United States, 417 F.3d 145, 167 (1st Cir. 2005) (noting the "double standard that has been used by the Court, and concomitantly by Congress, in determining the rights to which the U.S. citizens of Puerto Rico are entitled. . . . [W]hich has been repeated since *Balzac* was decided"); Ballentine v. United States, No. 1999–130, 2001 WL 1242571, at *6 (D.V.I. Oct. 15, 2001) ("[T]he Supreme Court and courts of appeals have continued, in knee-jerk fashion, to reiterate and apply this wholly judge-crafted doctrine to justify the unequal treatment of citizens based solely upon where they live in the United States."); United States v. Verdugo-Urquidez, 856 F.2d 1214, 1235 (9th Cir. 1988) (demonstrating the *Insular Cases*' contribution to confusion about the Constitution's "extraterritorial scope"), *rev'd*, 494 U.S. 259 (1990); King v. Morton, 520 F.2d 1140, 1142, 1146 (D.C. Cir. 1975) (citing *Balzac* for the proposition that the "constitutional right to a jury trial does not extend to territories which were not incorporated into the Union" and "that only 'fundamental' constitutional rights apply to unincorporated territories").

67. *See* Santana, *supra* note 37, at 437–38.

68. *See, e.g.*, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020); Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115 (2016); Puerto Rico v. Sanchez Valle, 579 U.S. 59 (2016); *see also* Natalie Gomez-Velez, *De Jure Separate and Unequal Treatment of the People of Puerto Rico and the U.S. Territories*, 91 FORDHAM L. REV. 1727, 1751 (2023) ("[R]ecent Supreme Court cases have held that (1) Puerto Rican citizens may be treated unequally in the provision of direct federal SSI benefits; (2) Puerto Rico is not a separate sovereign from the U.S. for double jeopardy purposes; (3) Puerto Rico is a state for purposes of federal preemption under the U.S. Bankruptcy Code, but is not a state for purposes of accessing the code's reorganization provisions; (4) the FOMB, established by Congress under PROMESA and composed entirely of presidential

has not only declined to overturn the *Insular Cases*,[69] but it has continued to sanction the separate and unequal treatment of the territories by accepting the *Insular Cases*' interpretation of the Territory Clause, while claiming that the cases do not apply.[70] For example, in *United States v. Vaello Madero*, the Court denied an equal protection challenge to the federal government's unequal denial and clawback of Social Security benefits to an American citizen solely because he moved from the mainland United States to Puerto Rico.[71] The majority opinion, authored by Justice Kavanaugh, applied the *Insular Cases*' reasoning[72] while Justice Gorsuch denied that the parties asked the Court to overrule the *Insular Cases*.[73] Justice Kavanaugh then summarily concluded that the Constitution's Territory Clause empowered Congress's unequal treatment of U.S. citizens residing in Puerto Rico so long as it articulated a rational basis for doing so.[74] The Court used a similar sleight of hand to determine that Puerto Rico is not a separate sovereign for double jeopardy purposes;[75] to hold that Puerto Rico is a state for some purposes and not others;[76] and to apply novel exceptions to the Appointments Clause as applied to Puerto Rico, among other arbitrary actions.[77] The new *Insular Cases* exemplify the Supreme Court's repeated allowance and sanction of arbitrary and unequal treatment of Puerto Rico and the territories, underscoring the *Insular Cases*' irrational application and foundations in imperial notions of rule by force, which should "hav[e] no place" in U.S. constitutional law.[78]

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appointees, is exempt from the Constitution's Appointments Clause requirements because its power primarily concerns 'local matters.'").

69. Tom C.W. Lin, *Americans, Beyond States and Territories*, 107 MINN. L. REV. 1183, 1234 (2023).

70. *See id.* at 1234–35.

71. United States v. Vaello Madero, 596 U.S. 159, 190–98 (2022) (Sotomayor, J., dissenting).

72. *Id.* at 165 (majority opinion).

73. *Id.* at 189 (Gorsuch, J., concurring).

74. *Id.* at 165 (majority opinion). Not only did the Court fail to address the separate and unequal treatment wrought by the *Insular Cases*' interpretation of the Territory Clause, but it also may have weakened the "rational basis" standard. *See* Nelson Torres-Rios, *Racial Barriers to Equal Protection:* United States v. Vaello Madero, 49 RUTGERS L. REV. 102, 113 (2022).

75. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 78 (2016).

76. Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016).

77. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020).

78. H.R. Res. 279, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-resolution/279/text.

The *Insular Cases* continue to play a role in the subordinate and arbitrary treatment of the territories.[79] Yet such treatment is as invisible as it is egregious. This is because the history and current condition of the territories are rarely, or only summarily, taught in history courses[80] or law schools.[81] At the same time, the territories are trapped in a non-representative structure that thwarts their residents' ability to effect necessary changes by any governmental branch.[82] Meanwhile, mainland residents, including lawyers, remain largely oblivious to their plight.[83]

B. The U.S. Territories, the *Insular Cases*, and Constitutional Law

Constitutional law courses tend to focus on the Constitution's structure and the rights[84] guaranteed to "We the People"[85] under a written constitution that balances national, state, and individual rights. These studies generally cover the Constitution's origin story, the role of the judiciary to "say what the law is,"[86] and the Court's interpretations of Articles addressing the interplay among the three branches of the federal government.[87] The rights component of the constitutional law course generally includes coverage of the Bill of Rights and the post-Civil War Reconstruction Amendments that emphasize constitutional goals

79. *See, e.g.*, Gomez-Velez, *supra* note 68, at 1747–50; Ponsa-Kraus, *supra* note 28, at 2483–84.

80. *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 702, 707 (Cynthia Merman & Roslyn Zinn eds., 2009).

81. *See* Levinson, *supra* note 11, at 243–44; Serrano, *supra* note 10, at 413.

82. Serrano, *supra* note 10, at 411–12.

83. *See* Doug Mack, *Empire State of Mind*, SLATE (Mar. 15, 2018, 9:03 AM), https://slate.com/news-and-politics/2018/03/its-time-for-the-u-s-to-have-a-conversation-about-its-overseas-territories.html.

84. *See, e.g.*, Burt Neuborne, *Federalism and the "Second Founding:" Constitutional Structure as a "Double Security" for "Discrete and Insular" Minorities*, 77 N.Y.U. ANN. SURV. AM. L. 59, 59 (2022) ("The standard course opens with a review of the structural aspects of the Constitution—separation of powers, federalism, procedural due process, and the scope of judicial review—and then turns to the scope of substantive constitutional protection—religious freedom; free speech; privacy; and the equal protection of the laws."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES, at xv (5th ed. 2015).

85. U.S. CONST. pmbl.

86. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

87. *See, e.g.*, CHEMERINSKY, *supra* note 84, at ix; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1 (7th ed. 2013).

of equal protection, due process, and democracy by consent of the governed.[88]

However, the study of constitutional law rarely grapples with the consequences of empire, particularly as it relates to the territories that remain under what is fairly described as separate, unequal colonial status. The historical lack of attention to the status of the territories in legal academia is somewhat striking given the prominent role certain elite legal academics played in fashioning legal rationales for exempting certain territories from the full application of the U.S. Constitution.[89] As Susan Serrano notes, "[i]n wrestling with persisting questions about the status of the territories and the rights of their inhabitants, the justices' approaches were distinctly shaped by the academic and popular debates of the time."[90]

The plight of the territories should be included in academic, political, and popular debates today. The largely hidden and siloed treatment of the territories in American law has served neither their residents, descendants, or the country.[91] Currently, the United States is undergoing an era of stark inequity, political polarization, and jurisprudential upheaval. In this turmoil, there is a need for a complete understanding of U.S. constitutional history in order to set a foundation for progress—which includes realizing the implications of colonialism on minority groups like Native Americans, African Americans, and territorial residents.

The American Bar Association proposed a Resolution in August 2021 urging law schools to offer courses on the law of the territories and to teach the *Insular Cases*.[92] The report accompanying the Resolution notes:

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88. *See, e.g.*, CHEMERINSKY, *supra* note 84, at xvi–xviii; STONE ET AL., *supra* note 87, at 1.

89. *See* Serrano, *supra* note 10, at 427–28; Langdell, *supra* note 43, at 368–71. Theories set forth in the legal academy, including work at Harvard and Yale, derided principled views against colonialism and oppression. *See* Thayer, *supra* note 43, at 475. Although Thayer argued that the territories should be subject to whatever law the United States deigns to provide them, he did acknowledge that "children born in the territories and subject to our national jurisdiction are citizens of the United States," and that constitutional provisions like the right to a jury trial "and other personal rights are applicable to the territories." *Id.* at 479–80. Thayer, however, went on to claim that the judicial power does not apply to territories, which he used as justification to deny other rights to the "barbarous" territorial people. *See id.* at 482–83.

90. Serrano, *supra* note 10, at 404.

91. *See* Gomez-Velez, *supra* note 68, at 1753; Levinson, *supra* note 11, at 245.

92. AM. BAR ASS'N, *Resolution 300*, https://cdn.ymaws.com/www.usvibar.org/resource/resmgr/files2/digest_2021/ABA_Resolution_300.pdf (last visited Jan. 15, 2025).

> [A]lthough the legal academy played a pivotal role in developing the legal doctrines that the U.S. Supreme Court would adopt in the *Insular Cases*, for decades America's territories have been largely absent from the law school curriculum and mainstream legal scholarship. Constitutional law casebooks only make passing references to the *Insular Cases*, and few courses cover the topic.[93]

The Resolution "urges law schools to offer courses on the law of United States territories and to teach the *Insular Cases* . . . as part of existing courses on constitutional law."[94] It notes that "[t]he *Insular Cases* should be placed . . . in the context of American expansionism" and the history of American racism or "ascriptivism."[95] Finally, the Resolution notes that including study of the *Insular Cases* and the U.S. territories furthers its goals "to promote the highest quality legal education, the full and equal participation in the association, our profession, and the justice system by all persons, and increase public understanding of and respect for the rule of law and the legal process."[96]

As Sanford Levinson noted, few constitutional law courses cover the U.S. territories or the *Insular Cases*: "Just look at contemporary constitutional law casebooks or treatises, where one will find almost literally no mention at all of the [*Insular Cases*]. No casebook that I have examined has even the briefest reference to the cases and to the issues raised by them."[97] Levinson advocates for including the *Insular Cases* in legal education canon, whether conceived as a "pedagogical canon,"[98] a "cultural literacy canon,"[99] or an "academic theory canon,"[100] or a combination of these. Levinson explains how the *Insular Cases*, in particular *Downes v. Bidwell*,[101] can offer rich lessons in constitutional

93. *Id.*
94. *Id.*
95. *Id.* (defining ascriptivism as "the view that to be a 'true American,' one had to share certain racial, religious, or ethnic characteristics").
96. *Id.*
97. Levinson, *supra* note 11, at 245; *see also* Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism, and Self-Determination*, 46 STETSON L. REV. 233, 233 (2017) (noting the "power of Congress over the territories is absent from the canon of study of constitutional law").
98. Levinson, *supra* note 11, at 242 (quoting J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 975 (1998)).
99. *Id.* at 243 (quoting Balkin & Levinson, *supra* note 98, at 976).
100. *Id.* at 243, 250 (quoting Balkin & Levinson, *supra* note 98, at 976).
101. 182 U.S. 244 (1901).

interpretation, legal argument, and examination of the constitutional structure and the principles undergirding it.[102] But Levinson then goes beyond these pedagogical benefits, emphasizing the importance of including the *Insular Cases* as a matter of cultural literacy—particularly regarding the Constitution's origins in a context of expansionism and empire.[103]

The study of constitutional law is rarely placed in the broader context of U.S. imperialist history to include how acquired territories were treated prior to and in connection with the Constitution's enactment.[104] Typically, scholars and courts use the *Federalist Papers* and prominent constitutional debates to showcase how the Constitution evolved to its language upon ratification.[105] Indeed, constitutional law texts and materials often begin with an examination of the Articles of Confederation, focusing on the debates and structural issues within and among the then-existing states and territories.[106] They rarely place the Constitution's origin in the context of the initial conquest, settlement, expansion, and displacement of native peoples.

However, a growing number of constitutional law texts and historical treatments of the Constitution mention the settlement of territories, their incorporation as states, and the role of Indian tribes in the establishment of the contiguous United States.[107] For example, some note that "Native nations living in what became the United States in 1783 had their own legal systems and constitutions."[108] Other descriptions of the development of the Constitution at the founding acknowledge or discuss native peoples' contributions to forms and structures of governance and engagement with colonists in negotiating a "diplomatic constitution" and the betrayal of treaties and other agreements.[109] Still, this is a fairly recent phenomenon that remains more the exception than the rule in standard constitutional law accounts.[110]

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102. Levinson, *supra* note 11, at 248–50.

103. *Id.* at 251–52.

104. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5–19 (2005) (describing American constitutional origins outside of the context of territorial acquisition).

105. Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. CHI. L. REV. 813, 829–30 (2023).

106. *See, e.g.*, CHEMERINSKY, *supra* note 84, at 9–11.

107. *See, e.g.*, NIKOLAS BOWIE, FEDERAL CONSTITUTIONAL LAW 427–30, 451–53 (2022).

108. Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 256 (2023).

109. *See id.* at 256–58.

110. *Id.* at 247–48.

Despite increased attention on the positions and perspectives of indigenous populations, myths that the United States was established on large tracts of uninhabited territory largely prevail.[111] This mythology, originating in "doctrines of discovery"[112] and notions of *terra nullius*,[113] has operated to erase or diminish the experience of violent conquest and the taking of territory from indigenous inhabitants of what is now the continental United States.[114]

There also remain enduring myths that the United States is not an empire[115] but a "nation of immigrants."[116] Most discussions of the Constitution's origins avoid its relationship to U.S. history of conquest and empire,[117] focusing instead on questions of commerce, power, and security affecting powerful factions in the colonies from the Founders' perspective.[118] This approach follows from the constitutional narrative found in many high school

111. *See, e.g.*, Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 19 (2005); Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 56 (2021).

112. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 567 (1823) ("Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives."); Dieter Dörr, *The Background of the Theory of Discovery*, 38 AM. INDIAN L. REV. 477, 479 (2013).

113. Tiernan Mennen & Cynthia Morel, *From* M'Intosh *to* Endorois*: Creation of an International Indigenous Right to Land,* 21 TUL. J. INT'L & COMP. L. 37, 45 (2012).

114. *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 7–10 (2003); Ari Kelman, *Vanishing Indians*, *in* MYTH AMERICA: HISTORIANS TAKE ON THE BIGGEST LEGENDS AND LIES ABOUT OUR PAST 41, 42–47 (Kevin M. Kruse & Julian E. Zelizer eds., 2022); Blackhawk, *supra* note 23, at 17; *see also* THE PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT 2 (2021), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf (describing the U.S. founding without reference to imperialism or the taking of land from Native Americans or territorial residents).

115. Daniel Immerwahr, *The United States Is an Empire*, *in* MYTH AMERICA: HISTORIANS TAKE ON THE BIGGEST LEGENDS AND LIES ABOUT OUR PAST, *supra* note 114, at 85, 85–86, 91–94.

116. *See, e.g.*, ROXANNE DUNBAR-ORTIZ, NOT "A NATION OF IMMIGRANTS": SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION (2021). Scholars also have raised concerns about the lack of coverage of plenary power doctrine as it relates to immigration regulation. *See, e.g.*, Jennifer M. Chacón, *Legal Borderlands and Imperial Legacies: A Response to Maggie Blackhawk's the Constitution of American Colonialism*, 137 HARV. L. REV. F. 1, 9 (2023) ("The visible doctrinal thread that connects immigration law with the law of the territories and Indian law is the plenary power doctrine."); Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CAL. L. REV. 553, 556–57 (2008) (arguing that "the narrative of the American national identity, which has been used to justify racial discrimination and significant rights violations of citizens and non-citizens, also constitutes a type of canon").

117. *See* Akhil Reed Amar, *Founding Myths*, *in* MYTH AMERICA: HISTORIANS TAKE ON THE BIGGEST LEGENDS AND LIES ABOUT OUR PAST, *supra* note 114, at 25, 39–40.

118. *See, e.g.*, THE PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 114, at 7.

history books, which present "consistent, celebratory accounts of this period from the early twentieth century through today"[119] from the perspective of "wise and able"[120] Founding Fathers. Public education has played a significant role in "shaping popular constitutional culture" and transmitting the prevailing constitutional stories.[121] This, in turn, can shape the constitutional narratives students carry through college and law school.

Constitutional law courses tend to frame the study of the Constitution from this perspective. The most common constitutional origin story centers on pragmatic questions of governance confronting the leaders of colonial settlements: white, male property holders who, having declared independence from the English monarchy, sought to establish a new form of democratic governance to support their safety and prosperity.[122] Discussions of the Constitution itself generally summarize this background and then start with the Articles of Confederation, questions of governance involving federal versus local allocations of power, maximizing commerce among the emerging states, and providing for the common defense.[123] The course generally centers on the structures and effect of separation of powers as well as the checks and balances between the three branches.[124] The "rights" portion of the course centers on the implementation and development of the Bill of Rights and Reconstruction Amendments over time.[125]

Common constitutional law narratives emphasize progress, noting how the United States, through constitutional amendment and increasingly enlightened judicial interpretations, has over time evolved to accommodate greater and more inclusive notions of due process, equality, and representative government.[126] This constitutional tradition also has been described as having at its core "two fundamental values—liberty and equality."[127]

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119. Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 CLEV. ST. L. REV. 115, 129 (2010).

120. *Id.* at 132.

121. *Id.* at 125; *see also* STEPHEN J. BREYER, ACTIVE LIBERTY 133 (2005).

122. *See, e.g.*, THE PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 114, at 6.

123. *See, e.g.*, STONE ET AL., *supra* note 87, at 7–8.

124. *See, e.g.*, CHEMERINSKY, *supra* note 84, at 10.

125. *See, e.g.*, *id.* at 12–14.

126. *See, e.g.*, Laurence H. Tribe, *America's Constitutional Narrative*, 141 DAEDALUS 18, 22–24 (2012).

127. LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 457 (2019).

The study of constitutional law often uses the case method, examining the law's development on a case by case basis.[128] Such examination promotes essential discussion of *stare decisis*, concern for stability in the law, and how the law can change to address perceived injustice or reflect societal progress and needs.[129] Through the case method, constitutional law courses tend to present an overarching narrative of progress[130]—progress toward a more robust and inclusive constitutional function; progress consistent with an idea that the Constitution is a flexible or "living" document setting forth broad, longstanding governing principles while also being receptive to evolving developments and societal needs.[131]

That narrative has changed dramatically in recent years. Some developments in constitutional law might be described as incremental and shifts in traditional canons of constitutional construction and interpretation.[132] Even so, recent shifts, like the Court's lurch toward originalism[133] and privileging "history and tradition"[134] in constitutional interpretation,[135] cannot be characterized as either incremental or progressive.[136] Indeed, some commentators claim that "[o]riginalism is bunk,"[137] and the approach portends a continued radical upending of well-settled

128. Tribe, *supra* note 126, at 24.

129. *See id.* at 32.

130. *See, e.g.*, *id.* at 19 (describing the narrative of progress as a "perpetual project of fashioning and refashioning ourselves into 'We, the People,' guided by our Constitution").

131. *See, e.g.*, BREYER, *supra* note 121, at 115; Tribe, *supra* note 126, at 23.

132. JACK M. BALKIN, LIVING ORIGINALISM 7–8 (2011).

133. Originalism is a theory of constitutional interpretation based on "the idea that the Constitution's meaning is fixed at ratification and binds us today[.]" Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479 (2023); *see also* BALKIN, *supra* note 132, at 7.

134. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*'s fifty-year precedent providing constitutional protection of limited abortion rights because such rights are not "deeply rooted in this Nation's history and tradition"); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2128 (2022) (assessing the lawfulness of a state firearms statute by "scrutinizing whether it comported with history and tradition"); *see also* Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court; Thomas Wolf & Alexander Keyssar, *This Supreme Court's 'Originalism' Doesn't Have Much to Do with History*, BRENNAN CTR. FOR JUST. (Oct. 3, 2023), https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-originalism-doesnt-have-much-do-history.

135. *See* Kevin Frazier, *The Next Required Law School Course: History of America's Foundings*, 54 ST. MARY'S L.J. 1025, 1031 (2023) ("Contemporary Supreme Court jurisprudence frequently turns on an originalist approach.").

136. *See* Girgis, *supra* note 133, at 1479 ("The Court's reliance on such traditions has been described as a 'momentous shift.'").

137. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

doctrine.[138] Others observe a "widespread feeling that something has gone seriously wrong with constitutional democracy in the United States" during this cycle of "stark political and cultural polarization."[139]

Recent changes in the composition of the Supreme Court[140] and in significant swaths of previously settled constitutional doctrine[141] raise serious questions about how best to teach principles of constitutional law. Well-settled constitutional law doctrines—such as those relating to jurisdictional standing, free speech, due process, and the Second Amendment—have been radically changed or reversed.[142] Moreover, similarly settled understandings of constitutional structures related to the administrative state, checks on the Executive, and the scope of Congress's power are also in flux.[143]

These doctrinal changes offer a challenge and an opportunity to re-think how constitutional law is taught. This includes placing the Constitution in its broader context. While some constitutional law scholars and teachers reference constitutional law's relationship to principles of international law and human rights,[144] the United States has not robustly embraced such principles in its constitutional law or other policy.[145] Moreover, the law and legal education have tended to silo examinations of the constitutional approach to foreign relations, war and treaty powers, and the treatment of native people and territorial residents.[146] Yet examining the application of a so-called "plenary power"

138. *See id.* at 34–35; *see also* Ruth Marcus, *Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It.*, WASH. POST (Dec. 1, 2022, 9:21 AM), https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/; André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM. & MARY BILL RTS. J. 101, 138 (2017).

139. Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 IND. L.J. 253, 253 (2019).

140. *See id.* at 263.

141. *See supra* note 134 and accompanying text.

142. *See id.*

143. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Trump v. United States, 144 S. Ct. 2312 (2024).

144. *See generally* Gorrín Peralta, *supra* note 52 (discussing conflict between the United States's perpetual governance of territories and the international law principle of self-determination).

145. Gorrín Peralta, *supra* note 97, at 255 ("The constitutional law that evolved during the first half of the twentieth century is now in conflict with the international obligations that the United States has assumed during the second half of the century.").

146. Blackhawk, *supra* note 23, at 6, 12, 82.

doctrine[147] across these silos may provide important context about constitutional commitments and their limits at this crucial moment.

C. Implications of the *Insular Cases* for U.S. Territories, Residents, and the Constitution

The continued application of the *Insular Cases*, as well as subsequent legal developments maintaining and exacerbating the arbitrary, separate and unequal status of the territories and their residents, present more than just an academic exercise. The Court's allowance of continued arbitrary and incoherent constitutional interpretation[148] permits the existence of unincorporated territories in perpetuity, causing significant, practical harms to millions of people residing in the territories and relegating them to second-class status.[149]

Perpetual second-class colonial status has caused significant negative impacts on public health,[150] the environment,[151] the economy,[152] education,[153] workers,[154] and the ability to address these issues via self-governance.[155] Health advocates note how "systemic disadvantages of Puerto Rico's territorial status have

147. *See* Gorrín Peralta, *supra* note 97, at 255.

148. *See* Santana, *supra* note 37, at 436.

149. Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017, 5:45 AM), https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html.

150. *See, e.g.*, Sara Mar, *The Trauma of Colonization*, PUB. HEALTH POST (May 18, 2021), https://www.publichealthpost.org/research/the-trauma-of-colonization/.

151. *See, e.g.*, Susan K. Serrano & Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories*: *Reckoning with America's Colonial Climate Crisis*, 110 CALIF. L. REV. 1281, 1282–26 (2022); Susan K. Serrano, *Reframing Environmental Justice at the Margins of U.S. Empire*, 57 HARV. C.R.-C.L. L. REV. 475, 515 (2022).

152. *See, e.g.*, Laura Merling, *Puerto Rico's Colonial Legacy and its Continuing Economic Troubles*, CTR. FOR ECON. & POL'Y RSCH. (Sept. 20, 2018), https://cepr.net/puerto-rico-s-colonial-legacy-and-its-continuing-economic-troubles/ (highlighting the stunted economic growth of Puerto Rico and its effects of the communities); Samantha Rivera Joseph et al., *Colonial Neglect and the Right to Health in Puerto Rico After Hurricane Maria*, 110 AM. J. PUB. HEALTH 1512, 1512–13 (2020) (discussing the political and economic crises affecting Puerto Rico).

153. *See, e.g.*, Kapil Dev Regmi, *The Enduring Effects of Colonialism on Education: Three Praxes for Decolonizing Educational Leadership*, INT'L J. LEADERSHIP EDUC., July 2022, at 1, 2–5 (noting how educational systems have avoided teaching the history of colonialism and racism).

154. *See, e.g.*, Daron Acemoglu, *The Economic Impact of Colonialism*, CENTER ECON. POL'Y RES. (Jan. 30, 2017), https://cepr.org/voxeu/columns/economic-impact-colonialism.

155. *See, e.g.*, Fife & Solomon, *supra* note 28, at 68–72 (discussing the "seemingly perpetual inequality" of unincorporated territories).

resulted in political and economic crises that exacerbate its vulnerability to poor health and reveal gaping inequities between Puerto Rico residents and individuals in the mainland United States."[156] For example, systemic disadvantages imposed on Puerto Rico by the United States include extremely high import taxes on goods, wages consistently below the federal minimum wage, and a lack of affordable education and employment opportunities.[157] Laws like the Merchant Marine Act of 1920 (the "Jones Act") "strangle Puerto Rico's economy" and lead to higher-cost consumer goods, hurting direct foreign trade.[158] Extractive structures imposed by the United States have led to neglect of infrastructure, including crucial access to potable water and reliable electricity.[159] Further, the United States fails to provide equitable access to public benefits, including health care or emergency aid following natural disasters.[160]

The failures of the U.S. legislative and executive branches to ameliorate the longstanding harms associated with "unincorporated" territorial status exemplify not only blatant neglect of core principles of equality and democracy but also structural power imbalances.[161] As some observers have noted, "[t]he dichotomy of being both American citizens and colonial subjects has situated Puerto Ricans in a political purgatory and makes them particularly vulnerable to exploitation of their land and resources by the United States."[162] Congress and the Executive Branch have little incentive to address the intolerable treatment of the territories, whose residents lack political power.[163] That is why ensuring broader public understanding of the shameful colonial status endured by territorial residents is an important step toward catalyzing change.

In addition, territorial study may help inform the debate about structural racism and inequality, including current effects of longstanding *de jure* and *de facto* subordination and

156. Joseph et al., *supra* note 152, at 1512.
157. *Id.* at 1513.
158. *Id.*
159. *See id.* at 1514.
160. *See id.* at 1514–15.
161. *See* Fife & Solomon, *supra* note 28, at 71.
162. Joseph et al., *supra* note 152, at 1513.
163. *See id.* at 1513 (explaining how Puerto Rican residents lack political power).

discrimination.[164] Some claim that "any conversation about reforming systemic racism is not credible without also including the foundational Doctrine of Discovery-based cases."[165] Complete education about history, current law, policy, and practice are necessary to address injustice, temper inequality, and push back on attacks against "critical" education.[166]

III. COVERING THE U.S. TERRITORIES BROADENS AND ENHANCES THE CONSTITUTIONAL LAW CONTEXT

Including territorial status vis-à-vis the Constitution educates future lawyers about the history and current impacts of empire that are largely invisible to most Americans. Such study broadens and enhances the contexts and frameworks for understanding the constitutional project. It also provides opportunities to shift perspectives and examine the constitutional project from the perspective of "those on the bottom" while supporting visions of self-determination and reparative justice.[167]

A. Imperialism and Constitutional Framing: Structures, Principles, and Contradictions

Exploring the territories' role in constitutional theory, structure, and practice opens critical insights into the nature and character of the Constitution. Recent scholarship demonstrates the potential richness of such inquiry to a more rigorous understanding of the history and current applications of constitutional text, doctrine, and principles.[168] This includes overarching questions of how the Constitution is framed: is it a product

164. *See* Melanie Kalmanson, *[A] History [of Discrimination] Only Goes So Far [in Equal Protection Litigation]*, 45 FLA. ST. U. L. REV. ONLINE 45 (2017) (explaining how *de facto* discrimination or segregation is insufficient to bring a claim under the Equal Protections Clause).

165. Fife & Solomon, *supra* note 28, at 61–62.

166. *See, e.g.*, Danielle M. Conway, *Antiracist Lawyering in Practice Begins with the Practice of Teaching and Learning Antiracism in Law School*, 2022 UTAH L. REV. 723, 738–39 (2022) (noting the importance of teaching antiracism in law schools, particularly in the wake of actions like the Trump administration's executive order falsely categorizing critical race theory as a divisive concept).

167. *See* Serrano, *supra* note 10, at 422–27, 451–56.

168. *See* Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1370–82 (2022).

of colonialism,[169] difference,[170] force,[171] or empire?[172] Does the Constitution need reformation to become "antiracist"?[173]

Including the U.S. history of empire and treatment of territories in constitutional study helps more deeply inform questions of constitutional interpretation, key principles, and issues of consistency and contradiction. It also facilitates a cohesive study of the relationship between the American history of empire and the treatment of Native American tribes, slaves, and the status of territorial inhabitants during the initial period of expansionism and following the Spanish-American War.[174] For example, in the *Constitution of Colonialism*, Maggie Blackhawk frames the Constitution as centered on colonialism, insofar as it applies liberal constitutional law to civilized "insiders" but treats citizens of the "borderlands," like Native Americans and territorial residents, as "outsiders," justifying suspension of constitutional principles and rights.[175]

In *The Constitution of Difference*, Guy Uriel Charles and Luis Fuentes-Rohwer challenge Blackhawk's categorization of the Constitution as one of "insiders" and "outsiders," asserting that the Constitution is one of contradictions—liberty *and* slavery, imperialism *and* sovereignty.[176] That is, "one constitutional system that contains a multiplicity of inconsistent and agonistic principles, as opposed to dual and separate constitutional systems governing 'insiders' and 'outsiders' differently."[177] While Charles and Fuentes-Rohwer acknowledge the differing experiences and opportunities that have been available to members of "outsider" groups and their descendants, they emphasize the agency accorded

169. Blackhawk, *supra* note 23, at 8, 23.

170. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Constitution of Difference*, 137 HARV. L. REV. F. 133, 141, 147 (2024).

171. Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1549 (2022).

172. Gregory Ablavsky, *Two Federalist Constitutions of Empire*, 89 FORDHAM L. REV. 1677, 1678 (2021).

173. Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 103 (2022) (observing that "[i]n recent years, some of the most egregiously racist cases have involved the Court resting on constitutional colorblindness to establish why it will not attempt to deal in reasoning or remedies focused on race").

174. *See, e.g.*, Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Race Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921, 921–36 (2001) (providing a brief history of the Spanish-American War and its connection to the annexation of Puerto Rico and Hawaii).

175. Blackhawk, *supra* note 23, at 42–45.

176. Charles & Fuentes-Rohwer, *supra* note 170, at 135–38.

177. *Id.* at 139.

to them and posit that these groups "have more of a say on the construction of the constitutional system and how it impacts them than ever before."[178] The challenge, they assert, is "whether one constitutional approach can address the various needs and demands of this diverse and multicultural people, some of whom consider themselves separate people and even separate nations."[179]

Gregory Ablavsky, in *Two Federalist Constitutions of Empire*, foregrounds the Constitution's imperial roots and examines competing impulses of constraint and empowerment originating from this history.[180] Farah Peterson, in *Our Constitutionalism of Force*, frames two forms of constitutionalism: one, "a constitutionalism of institutions created by text along with a practice of turning to those institutions to resolve political differences" and another, of force and violence where "violence has been an integral part of the American system of government from the Founding era."[181] Many of these scholars argue persuasively that the current colonial treatment of the territories is contrary to bedrock constitutional principles and rights, including birthright citizenship, uniform application of the law, and equal protection.[182] Others urge that territorial residents and other "outsiders" should reject constitutional framings altogether.[183]

Several scholars examine and critique the plenary power doctrine as a through line "that connects immigration law with the law of the territories and Indian law."[184] Some observe that "[w]ithin the courts, the constitution of American colonialism was replaced by the plenary power doctrine and constitutional silence."[185] They argue that the plenary power doctrine means that however Congress and the Executive decide to regulate colonized peoples, "the courts use their power to 'say what the law is'" and will recognize their actions as lawful.[186]

178. *Id.* at 173.
179. *Id.*
180. Ablavsky, *supra* note 172, at 1678.
181. Peterson, *supra* note 171, at 1548.
182. Charles & Fuentes-Rohwer, *supra* note 170, at 135–38.
183. *See, e.g.*, Blackhawk, *supra* note 23, at 12 ("Avoiding constitutional framing has also allowed Native advocates and their allies to craft limits to American colonialism that defy the logic of United States constitutional law writ large . . . .").
184. Chacón, *supra* note 116, at 9.
185. Blackhawk, *supra* note 23, at 54.
186. *Id.* at 63 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

As these examples demonstrate, exploring various framings and understandings of the Constitution that include its history of empire encourages a robust examination of its purposes, tensions, and practical effects. Exposing law students to the historical context may broaden and deepen students' understanding of the background principles and impulses—both laudatory and disturbing—behind the Constitution's structure, content, and interpretations.

Given the Supreme Court's recent turn to constitutional analysis based on "history and tradition,"[187] some scholars explain that an "originalist" understanding of the Constitution's reach extended full constitutional coverage to the territories.[188] That understanding was upended by the non-incorporation doctrine, which was invented by legal academics, espoused by the Court in the *Insular Cases*, and upheld for more than 125 years.[189]

B. The *Insular Cases*' Relevance to the Constitution's History, Structure, and Contradictions

Legal study requires an acknowledgment of American imperialist history, which shaped the Constitution and contributed to its most challenging and enduring contradictions. Incorporating these perspectives into the study of constitutional history is particularly relevant in light of racial reckoning following the police killing of George Floyd and other African Americans,[190] the ensuing political backlash seeking to limit teaching and learning the history of structural racism,[191] deepening political

187. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2128 (2022) (adopting a historical analogue test for determining the constitutionality of firearms regulations).

188. Willinger, *supra* note 50, at 33 ("Multiple Supreme Court decisions in the latter half of the nineteenth century confirmed that the Constitution, including the amendments in the Bill of Rights, applied directly in incorporated territories until statehood.").

189. *See id.* at 33–36.

190. Eliot C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html.

191. *See, e.g.*, Robert Samuels & Toluse Olorunnipa, *Four Years Later, Has the Racial-Justice Movement Lost the Fight?*, WASH. POST (May 25, 2024, 10:00 AM), https://www.washingtonpost.com/nation/2024/05/25/george-floyd-anniversary-retrenchment/ (reflecting on the dichotomy between support for discussions on race and ensuing controversy about teaching the topic); L.A. Times Editorial Board, *Four Years After George Floyd, the Backlash is Underway*, L.A. TIMES (May 24, 2024, 3:00 AM), https://www.latimes.com/opinion/story/2024-05-24/where-are-we-four-years-after-george-

polarization,[192] and current concerns about the impacts of settler colonialism across the globe.[193]

Such study is also particularly relevant given the current Supreme Court's recent determination that constitutional interpretation turns on history and tradition.[194] There is broad agreement that the *Insular Cases* and their reasoning are unsupported under any theory of constitutional interpretation, including those based on originalism, history, or tradition:

> [L]egal scholars with a wide range of views have criticized the *Insular Cases* and the territorial incorporation doctrine, with prominent originalist legal scholar Gary Lawson writing that "there is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories", and leading Constitutional Law Professor Sanford Levinson calling the *Insular Cases* "central documents in the history of American racism."[195]

The study of the *Insular Cases* and their blatantly racist rationale for inventing the non-incorporation doctrine is also particularly relevant amid efforts to erase U.S. history and its implications of structural racism and subordination.[196] Indeed, the unequal and arbitrary treatment of territorial residents has imposed a second-class status that reifies racial subordination and denies full and equal citizenship:

> [T]he territorial incorporation doctrine established by the *Insular Case*s is still used to perpetuate the second-class treatment of Americans living in the territories, from the denial of citizenship, to the denial of voting rights, to the denial of equality in Federal benefits programs . . . the time has come to expressly reject the *Insular Cases* as both contrary to the

floyds-murder ("[T]he ongoing battle between the George Floyd reckoning and the anti-reckoning blowback is a battle over the role of truth in our society and its institutions.").

192. *See* John A. Powell, *Overcoming Toxic Polarization: Lessons in Effective Bridging*, 40 MINN. J.L. & INEQ. 247, 248–50 (2022).

193. *See* Charles & Fuentes-Rohwer, *supra* note 170, at 143–44.

194. *See supra* note 134 and accompanying text.

195. H.R. Res. 314, 118th Cong. (2023) (quoting Levinson, *supra* note 11, at 245).

196. *See, e.g.*, Natalie Gomez-Velez, *What* U.S. v. Vaello-Madero *and the* Insular Cases *Can Teach About Anti-Critical Race Theory Campaigns*, N.Y. STATE BAR ASS'N (Feb. 14, 2022), https://nysba.org/what-u-s-v-vaello-madero-and-the-insular-cases-can-teach-about-anti-crt-campaigns/.

> Constitution's text and history and as incompatible with our Nation's core values . . . .[197]

An understanding of the *Insular Cases* and the untenable constitutional position of the territories based on a legacy of empire, political and economic subordination, and racial hierarchy can help law students confront, and hopefully work toward achieving, core values of liberty, equality, and self-determination.[198]

C. Including the Territories in Constitutional Law Enhances Understanding and Critical Engagement

Examining the history and legal status of the territories in constitutional law courses provides rich background for understanding the Constitution's origins and the enduring implications of U.S. empire on the descendants of indigenous people and current territorial residents. It also helps place colonial history and current colonies in a broader global context.

Learning the history and context of such material is a crucial step to reversing the erasure of this history and better understanding the arbitrarily separate and unequal status of the territories. Additionally, territorial study can inform broader global debates about deleterious post-colonial conditions and engender support for reparative efforts.[199]

Most people in the United States today are unaware that the country still holds colonies by design and this must be confronted.[200] The United States' self-concept is dominated by notions of freedom, equality, and self-governance. As Aziz Rana notes, "the contemporary framing of the United States as a civic polity . . . erases, almost entirely, the colonial structure of the

197. H.R. Res. 314.

198. It is important to note that some scholars warn against placing legal examination of the territories and Native American status in the context of "racial" equality given recent retrenchment toward a so-called "colorblind" treatment of efforts to address long-standing discrimination and structural inequality to the detriment of Black Americans and other people of color. *See, e.g.*, Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift Toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 156, 159 (2009).

199. *See* Serrano & Tapu, *supra* note 151, at 1305–13.

200. *See, e.g.*, Lopez-Morales, *supra* note 7, at 811.

American past." [201] According to this framing, "the country from its birth has been anti-imperial, conceived as an assault on an entire 'system of social hierarchy.'"[202] Rana notes that in the decades following the Civil War, a founding belief of the United States as a "white Republic" governed by the Constitution firmly persevered.[203] That self-concept did not change until people stopped settling in the mainland United States, making it more difficult to rule overseas colonies due to indigenous resistance and concerns about including non-white peoples into the U.S. polity.[204] Amid these challenges, a renewed international mission was put forth by the United States with a stance against imperialism,[205] which sought a more cooperative approach through "mutually advantageous commercial trade, democratic self-government, and above all international peace."[206] Elites who favored this new vision "stressed the shared benefits for all communities, regardless of race or ethnicity, of enhanced American power, and in the process de-emphasized the need for formal land acquisition let alone actual white settlement."[207] According to Rana, the Constitution played a central role in this civic account of American identity as inherently inclusive, egalitarian, and supportive of international peace, freedom, and self-determination.[208] Rana also maintains that the Constitution is "living proof" that American settlers produced a unified nation, full of diverse communities and "committed to inclusive civic values."[209]

This prevailing story of the Constitution effectively erases the U.S. history of empire and ignores continued colonialist practices in the territories.[210] Yet, as Rana notes, there are "two narratives of national identity—settler and civic."[211] The civic narrative is inspiring to many and may be responsible for progress toward racial equality and stated commitments to egalitarianism,

201. Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 267 (2015).
202. *Id.* (quoting JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 19 (2011)).
203. *Id.* at 271.
204. *Id.* at 272–73.
205. *Id.* at 273.
206. *Id.* at 273–74.
207. *Id.* at 274.
208. *Id.*
209. *Id.* at 274–75.
210. *Id.* at 277.
211. *Id.* at 268.

freedom, and self-determination at home and abroad. Yet, the failure to reckon with the full history of empire and settler identity—including its race-based impacts on Native peoples, Black Americans, and territorial residents—leaves intact structural inequalities that deeply undermine the country's professed commitment to democratic ideals.

This is an important moment to acknowledge, confront, and address the history of empire and its current colonies problem. With international attention focused on complex issues of sovereignty and self-determination across the globe,[212] the condition of the territories undermines the United States' commitment to sovereignty, self-determination, and decolonization. Concerns about systemic racism that surfaced in 2020 have led to backlash, including efforts to ban the teaching of U.S. history[213] and the belief that anti-discrimination curricula are "divisive concepts."[214] This underscores the need for support of accurate and contextual history education, including the U.S. history of empire. In a time of radical reversal of civil and human rights advances under the banner of colorblindness or originalism, recognizing the nation's imperialist past has never been more important.[215] Indeed, the current trend among several Supreme Court Justices to interpret the U.S. Constitution by examining "history" in a search for "original public meaning" makes understanding the history of U.S. empire in constitutional development particularly relevant.

Most law students receive little teaching about the territories.[216] Teaching territorial history can catalyze discussions

212. *See Palestinian President Urges International Community to Hold Israel Accountable for 'Full-Scale War of Genocide', on Day Three of Annual General Debate*, UNITED NATIONS (Sept. 26, 2024), https://press.un.org/en/2024/ga12635.doc.htm.

213. *From Slavery to Socialism, New Legislation Restricts What Teachers Can Discuss*, NPR (Feb. 3, 2022, 2:10 PM), https://www.npr.org/2022/02/03/1077878538/legislation-restricts-what-teachers-can-discuss.

214. *"Divisive Concepts" Legislation and Educational Censorship*, NAT'L COAL. FOR HIST., https://historycoalition.org/divisive-concepts/ (last visited Jan. 24, 2025).

215. Douglas S. Reed, *Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution*, 7 RUSSELL SAGE FOUND. J. SOC. SCIS. 148, 148, 157 (2021). Indeed, the originalist interpretation favored by several Supreme Court Justices makes understanding the history of U.S. empire in constitutional development particularly relevant. *See* Marcus, *supra* note 138.

216. Holger Droessler and Kristin Oberiano, *Teaching U.S. Territories,* ORG. AM. HISTORIANS, https://www.oah.org/tah/labor-history/teaching-u-s-territories/ (last visited Jan. 25, 2025).

about how to end centuries of classification-based inequality.[217] Territorial historians also note that the *Insular Cases*' treatment of the territories is based on racial assumptions about their inhabitants' fitness for self-government, which were used to justify new legal categories based on colonialism, anti-black racism, and nativism.[218]

But too many are unaware of the territories—the home to millions of U.S. citizens and nationals.[219] Some historians say the topic has been "persistently ignored"[220] and that the "American public sees a version of their nation in which authoritative voices have carefully obscured U.S. empire."[221] While a complete understanding of U.S. history is important for all people in the United States, it is particularly important for lawyers to be aware of this history and its constitutional law context.

IV. INCLUDING THE U.S. TERRITORIES IN THE CONSTITUTIONAL LAW COURSE: BENEFITS, CHALLENGES, AND APPROACHES

Teaching constitutional law in 2024 presents significant challenges.[222] Recent dramatic changes in Supreme Court jurisprudence[223] have caused several law professors to express

217. *Id.*

218. *Id.*

219. *See* IMMERWAHR, *supra* note 8, at 13–15.

220. Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1194 (2021) (quoting IMMERWAHR, *supra* note 8, at 18).

221. *Id.*

222. *See, e.g.*, Jesse Wegman, *The Crisis in Teaching Constitutional Law*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb; Erwin Chemerinsky, *Teaching Law in this Difficult Time*, AM. BAR ASS'N (July 26, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/teaching-law-in-this-difficult-time/.

223. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*'s fifty-year precedent protecting reproductive rights); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (applying an "originalist" approach that required historical analysis to severely restrict government's ability to regulate guns); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (ignoring a mootness issue, instead reaching the merits to change longstanding First Amendment Establishment Clause doctrine in order to favor religious speech); 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (finding standing in a lawsuit involving a claim in which a web designer worried she could face discrimination charges for refusing her services to same-sex couples despite no same-sex couple seeking her services). *But see* Richard M. Re, *Does the Discourse on* 303 Creative *Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. REFLECTION 67 (2023) (defending the *303 Creative* holding); Mark A. Lemly, *The Imperial Supreme Court*, 136

concerns about the difficulties of teaching constitutional law amid constitutional upheaval and hyper-partisanship at the Supreme Court level.[224] Some argue that constitutional law has always involved policy change[225] and hotly contested issues.[226] But others find the current climate to be particularly challenging given the country's political polarization[227] and the Supreme Court's change in composition.[228] One law professor responded with a sense of futility or despair:

> If we have lost faith in the law, how can we teach it to the next generation of lawyers? I have heard professors teaching constitutional law begin to ask this same question after recent doctrinal developments have destroyed long-settled constitutional rights. I can only begin to imagine what it must have been like to teach *Plessy v. Ferguson* before it was overruled by *Brown v. Board of Education*, though I suspect most law professors of the time did not lose any sleep over it. . . . The racist, xenophobic Chinese Exclusion cases—decided around the same time as *Plessy*—are still good law and were cited by the Supreme Court as recently as 2020.[229]

HARV. L. REV. F. 97, 97 (2022) (describing a "radical restructuring of American law across a range of fields and disciplines").

224. *See* Wegman, *supra* note 222; Joel K. Goldstein, *Teaching Constitutional Law After the Trump Presidency*, 66 ST. LOUIS U. L.J. 409, 411 (2022) (characterizing the Trump presidency as an "assault on basic principles of American constitutional democracy").

225. *See, e.g.*, Renée M. Landers, *Teaching Constitutional Law, Administrative Law, and Health Law as Presidential Administrations Change*, 66 ST. LOUIS U. L.J. 449, 450 (2022) ("[T]he last two decades have brought shifts in policies and approaches four times when the political party occupying the White House changed.").

226. Willam Baude, *Teaching Constitutional Law in a Crisis of Judicial Legitimacy*, CHI.-KENT L. REV. (forthcoming 2025) (manuscript at 1, 4–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4739308.

227. *See, e.g.*, Angela Mae Kupenda, *Collaborative Learning in the Constitutional Law Classroom: Adapting the Concept of Inevitable Disagreement in Seven Steps*, 68 J. LEGAL EDUC. 284, 285 (2019) (noting challenges to collaborative learning in constitutional law given "different viewpoints and experiences seen in our larger society"); Keith E. Whittington, *Practice-Based Constitutional Law in an Era of Polarized Politics* 18 Geo. J.L. & PUB. POL'Y 227, 234–35 (2020).

228. Note, *Confusion and Clarity in the Case for Supreme Court Reform*, 137 HARV. L. REV. 1634, 1635 (2024) (noting that the "new era" of the Supreme Court "declined to protect abortion and voting rights and invalidated affirmative action, environmental protection, and gun control policies, among other cases with profound consequences for the nation").

229. Nicole Hallett, *How Do You Teach Immoral Laws?*, 67 ST. LOUIS U. L.J. 543, 547–48 (2023).

Given the challenges involved in teaching constitutional law in the current moment[230]—retrenchment with respect to racial justice,[231] voting rights,[232] reproductive rights,[233] and constitutional checks on agency power[234]—it is understandable that law professors might resist the notion of adding material such as the *Insular Cases* and the Territory Clause.

Yet incorporating discussions of the U.S. empire and the treatment of the territories in constitutional law courses is particularly apt in this moment of doctrinal upheaval and socio-legal change. As noted above, placing constitutional study in the context of U.S. empire can enrich students' understanding of the Constitution's origins, offer different framings, and explain constitutional contradictions.[235] Exploring foundations of explicit racial subordination at the Constitution's founding may help to contextualize and respond to current "colorblind" responses to entrenched and growing racial injustice[236] or with decisions overturning decades of settled precedent that expanded civil and human rights while failing to overturn the *Insular Cases*.[237]

Study of the *Insular Cases* and other "bad cases" that are "good law" can also encourage critical examination of the processes of constitutional interpretation and the implications of various theories and doctrines on government structures and societal experience. This Part will briefly explore that idea and then offer suggestions for adding material introducing students to the Constitution's history of empire and current "colonies problem."

230. Susan D. Carle, *Reconstruction's Lessons*, 13 COLUM. J. RACE & L. 734, 736 (2023) ("In the current moment in the legal struggle for racial justice in the United States, the Nation appears at risk of repeating its history.").

231. *See, e.g.*, Athena D. Mutua, *Reflections on Critical Race Theory in a Time of Backlash*, 100 DENV. L. REV. 553, 553–54 (2023).

232. *See* Joshua A. Douglas, *Today's Supreme Court is Anti-Voter*, WASH. MONTHLY (May 28, 2024), https://washingtonmonthly.com/2024/05/28/todays-supreme-court-is-anti-voter/.

233. *See* Len Niehoff, *Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in* Dobbs *Threatens Privacy and Free Speech Rights*, AM. BAR ASS'N (June 9, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-summer/unprecedented-precedent-and-original-originalism/.

234. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

235. *See* Rana, *supra* note 201, at 267–69.

236. Reed, *supra* note 215, at 164.

237. Niehoff, *supra* note 233; Santana, *supra* note 37, at 462.

A. Teaching "Bad Cases" that are Still "Good Law" amid Doctrinal Upheaval at the Supreme Court

The fact that the *Insular Cases* remain "good law" provides an avenue for discussing issues of structural inequality and the implications that historical legal structures have on current conditions. First, examining the bases for and outcomes of the *Insular Cases*' incorporation doctrine provides explicit examples of arbitrary and discriminatory law that emerged from a mindset steeped in imperial power and notions of racial subordination.[238]

The *Insular Cases* impose an arbitrary test that provides only those constitutional protections not deemed "impractical and anomalous."[239] Thus, although the Court over time has determined that several fundamental constitutional rights apply to the territories,[240] they continue to face ambiguous and arbitrary treatment that is detrimental to self-government and societal well-being.[241] A recent series of Supreme Court cases demonstrate the continued "arbitrary, unequal, and indeed, irrational treatment of Puerto Rico under U.S. colonial rule."[242]

For example, in *Puerto Rico v. Sanchez Valle*, the Court determined that Puerto Rico is not a separate sovereign for constitutional double jeopardy purposes.[243] The opinion by Justice Kagan dismisses the Constitution of the Commonwealth of Puerto Rico by stating that "[b]ack of the Puerto Rican people and their Constitution, the 'ultimate' source of prosecutorial power remains the U.S. Congress."[244] In holding that Puerto Rico is "not a separate sovereign for double jeopardy purposes," the 7–2 decision in *Sanchez Valle* "blithely ignored historical facts and mutually agreed upon laws" with respect to Puerto Rico's Constitution.[245]

That same year, the Court held in *Puerto Rico v. Franklin California Tax-Free Trust* that Puerto Rico could not reorganize its debt under the Puerto Rico Public Corporation Debt Enforcement and Recovery Act, nor could it use the U.S. Bankruptcy Code to do

238. *See* Santana, *supra* note 37, at 436–41.
239. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring); *see also* Robert A. Katz, Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 783–84 (1992).
240. *See* Santana, *supra* note 37, at 440.
241. *Id.* at 440–41, 455–56.
242. Gomez-Velez, *supra* note 68, at 1747.
243. 579 U.S. 59, 78 (2016).
244. *Id.* at 75–76.
245. Gomez-Velez, *supra* note 68, at 1748.

so.[246] The Court interpreted the Federal Bankruptcy Code as treating Puerto Rico as a state, thereby preempting its bankruptcy law; however, it did not consider Puerto Rico a state for the purposes of accessing the provisions of the Code that allow for municipal debt reorganization.[247] The Court's holding that Puerto Rico was a state for limited purposes prevented the island government from responding to its fiscal crisis through local or federal bankruptcy laws.[248]

In response, Congress did not amend the Bankruptcy Code. Instead, "Congress exercised its plenary territorial powers to the detriment of Puerto Rico,"[249] passing the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"),[250] which "established a Fiscal Management and Oversight Board [("FOMB")] with broad federal statutory powers to reorganize Puerto Rico's debt and manage its fiscal affairs but without any meaningful local representation."[251] FOMB was created by Congress under PROMESA, and its board members are appointed by the President, with no input by the Puerto Rican government or people.[252]

In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, respondents challenged the Board, arguing its members were appointed in violation of the advice and consent requirement of the Appointments Clause.[253] FOMB argued that the appointments were valid pursuant to the plenary powers granted by the Territorial Clause of Article IV.[254] The Supreme Court overturned the First Circuit's determination that FOMB members were not appointed in compliance with the Appointments Clause, holding that the Appointments Clause did not apply to FOMB because it was a "local" territorial entity.[255] Therefore, FOMB members were not "[o]fficers of the United States"[256]—a novel rationale.

246. 579 U.S. 115, 126–27, 130 (2016).
247. *Id.* at 127–29.
248. Gomez-Velez, *supra* note 68, at 1748.
249. Gorrín Peralta, *supra* note 97, at 251.
250. Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended throughout 48 U.S.C. §§ 2101–2241).
251. Gomez-Velez, *supra* note 68, at 1749.
252. Gorrín Peralta, *supra* note 97, at 251–53.
253. 140 S. Ct. 1649, 1654–56 (2020).
254. *See id.* at 1656.
255. *Id.* at 1656, 1662–63.
256. *Id.* at 1655 (quoting U.S. CONST. art. II, § 2, cl. 2).

The *Insular Cases* established an unincorporated colonial status for the territories. Analyzing the *Insular Cases* in the context of cases like *Dred Scott*, *Plessy*, and *Korematsu*—considered part of constitutional law's "anticanon"[257]—helps inform the historic trajectory and current status of constitutional practices. Teaching the tensions between formal legal doctrine and inclusive principles of justice, fairness, and equality is essential to understanding the development and impacts of current law, as well as how the law can and should change.[258] Encouraging students to think critically and strategically about how to improve the law is an essential legal skill.[259] Including caselaw involving the constitutional treatment of the territories contributes to these goals.

B. Approaches to Including the U.S. Territories in Constitutional Law When There Is "Too Much to Cover"

Given all that has been said about the current challenges facing both constitutional law and the territories, the prospect of including coverage of the territories may seem daunting. This Part offers ideas for how the material might be incorporated into the constitutional law course in a manner that does not require the allocation of too much additional class time and can dovetail with existing course coverage, including its "foundations in consent, its federal structure, its authorizations [and limitations] on power,"[260] the "major justifications for establishing political structures and individual rights by means of a written Constitution, and alternative methods and strategies of Constitutional interpretation."[261]

257. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

258. *See* Chemerinsky, *supra* note 222.

259. *See id.* ("Students need to be reminded that the law is not static, it will change, and it can be improved. They need to think about how to make it better and how to get there.").

260. *Constitutional Law: Section 001 Information*, COLUM. L. SCH., https://www.law.columbia.edu/academics/courses/32958 (last visited Jan. 9, 2025).

261. *Constitutional Law: Section 002 Information*, COLUM. L. SCH., https://www.law.columbia.edu/academics/courses/32926 (last visited Jan. 9, 2025).

1. Including the History of Empire as Part of the Constitution's Origin Story

One way to include the history of U.S. empire and the condition of the territories is as part of the unit on the introduction to the Constitution. Many constitutional law courses begin by assigning the Constitution and the Articles of Confederation in a discussion that centers on concerns about managing and balancing the interests of existing states and territories against the national government.[262]

For example, Nikolas Bowie's *Federal Constitutional Law* text begins its first chapter with reference to English colonization and empire.[263] In a brief opening section, Bowie notes that the Constitution "was drafted in 1787—more than two hundred years after British settlers began colonizing North America and eleven years after their descendants declared independence from Great Britain."[264] The text notes that those two hundred years of colonial settlement and revolution "heavily influenced why the Constitution was written and what it said."[265] The introductory section also acknowledges the millions of people who lived in North America, including tribes that "thrived in well-established political communities," and notes both their displacement and that "[m]ost of the first English colonies in North America were founded by large corporations."[266]

This short opening section places the Constitution origin story in the context of empire, settlement, and commerce. Though brief, it frames the background of the Constitution's development in a way that includes this broader history and structures it to inform material describing the First Constitutional Congress, the Articles of Confederation, and the process that led to the Constitutional Convention.[267] This framing opens space to consider the role of territorial expansion in drafting the Articles of Confederation and the Constitution, including how "territory" was conceived, how territories were treated vis-à-vis states, and the development of

262. *See, e.g.*, CHEMERINSKY, *supra* note 84, at 9–15; STONE ET AL., *supra* note 87, at 1–11 (discussing the origins of the Constitution with reference to several theories and starting with the Declaration of Independence).

263. BOWIE, *supra* note 107, at 3.

264. *Id.*

265. *Id.*

266. *Id.*

267. *See id.* at 4–14.

federalism, including its notions of state and federal sovereignty, the supremacy of federal law where it operates, and the extension of nascent "bills of rights" in early territories and states.[268]

2. Article IV: Adding the Territory Clause and the Insular Cases

Another avenue for including the Territory Clause and the *Insular Cases* is part of a broader discussion of Article IV. Usually, this covers just the Privileges and Immunities Clause,[269] but it can also serve as a helpful starting point for noting the differences between the treatment of states and territories. For example, following coverage of Articles I, II, and III, Article IV might be introduced by noting that the first three Articles create the federal government structure, but "Article IV does something very different," as all of its provisions "attempt to deepen the relationships between the component states in the Union, also known as 'horizontal federalism.'"[270] I introduce Article IV as part of the discussion of its Privileges and Immunities (or "comity") Clause.[271] As in most constitutional law courses, I explain the relationship and differences between Article IV's Privileges and Immunities Clause, the Fourteenth Amendment's Privileges *or* Immunities Clause,[272] and the scope and applicability of the Dormant Commerce Clause.[273] I then pan back and place Article IV in the broader context of the constitutional structure. I briefly note Article IV's scope, listing Section 1's Full Faith and Credit Clause; Section 2's Privileges and Immunities Clause, Extradition Clause, and Fugitive Slave Clause (nullified by the Thirteenth Amendment); Section 3's Admissions Clause and Property or Territory Clause; and Section 4's Guarantee Clause.[274] After

268. *See, e.g.*, *id.* at 393, 427–30, 451–53.

269. *See* Eric Biber, *The Property Clause, Article IV, and Constitutional Structure*, 71 EMORY L.J. 739, 760–61 (2022).

270. *See id.* at 743–44; *see also* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008) ("The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty coequal states that must peaceably coexist.").

271. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

272. *Id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

273. *Id.* art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

274. *Id.* art. IV.

briefly discussing Article IV's overarching function in managing relationships among the states,[275] establishing rules for the admission of states,[276] and managing non-state federal property,[277] I turn to focus on the Territory Clause.[278]

I first ask students if they are aware of the territories and show a map that includes the five unincorporated territories.[279] I then share the text of the Territory Clause and explain that in the *Insular Cases*, the Supreme Court established certain territories as unincorporated territories on a blatantly racist basis.[280] I pull excerpts from *Downes v. Bidwell* to demonstrate the rationales provided for the incorporation doctrine invented in the *Insular Cases*. I then briefly explain the implications of the *Insular Cases* and their progeny for the unincorporated territories,[281] often pulling excerpts from cases, scholarly articles, and briefs, like the following, to provide a compact explanation of the problems with the *Insular Cases*:

> The *Insular Cases*, in short, cannot be squared with what predated them, or with what followed. They are a glaring anomaly in the fabric of our constitutional law. The notion that "the political branches have the power to switch the Constitution on or off at will," in domestic territory under complete U.S. control is diametrically opposed to fundamental concepts of a limited federal government of enumerated powers.
>
> . . .
>
> More significantly, the Court should overrule the *Insular Cases* and their territorial incorporation doctrine because they rest on outmoded and pernicious racist assumptions that are plainly unacceptable today. Leaving these decisions standing taints the constitutional framework. Like *Plessy v. Ferguson* and

275. *See* Biber, *supra* note 269, at 743.
276. *See id.* at 743, 756.
277. *See id.* at 749.
278. U.S CONST. art. IV, § 3, cl. 2.
279. *See The United States Is an Ocean Nation*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf (last visited Jan. 25, 2025).
280. *See* Brief *Amici Curiae* of the American Civil Liberties Union and the ACLU of Puerto Rico, Supporting the First Circuit's Ruling on the Appointments Clause Issue at 1, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521) [hereinafter *Aurelius* Amici Brief].
281. *See* Blackhawk, *supra* note 23, at 48–49.

> *Korematsu v. United States*, they should be firmly and finally repudiated.[282]

I then explain that the Supreme Court not only has failed to overturn the *Insular Cases* but continues to adjudicate under their premises, often without relying on them explicitly.[283] During this discussion, it becomes apparent that the unincorporated territories are caught in a constitutionally ambiguous liminal status that denies them political power to incentivize Congress or the Executive to change that status.[284] This often leads to an engaging discussion of what that status means for the territories' residents and governments, the diaspora, and the Constitution.

The coverage of Article IV described here can be accomplished in one sixty- or ninety-minute class unit. Despite the brief coverage, students often respond by noting that they were unaware of the territories or their status under the Constitution. Including this material has also enriched conversations about constitutional interpretation, notions of plenary power, and ideas about federalism, state sovereignty, and the place of colonialism in the constitutional order.

3. Placing the Insular Cases *Among the Post-Reconstruction Civil Rights Cases*

For those who teach the "rights" (versus the "structures") component[285] of the constitutional law course, it may be helpful to consider the *Insular Cases* along a timeline with the post-Reconstruction cases to demonstrate how the Court evolved in

282. *Aurelius* Amici Brief, *supra* note 280, at 8, 18 (quoting Boumediene v. Bush, 553 U.S. 723, 765 (2008)).

283. *See, e.g.*, Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62–64, 78 (2016) (holding that, for purposes of the Double Jeopardy Clause, Puerto Rico and the United States are not separate sovereigns); Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 118–19 (2016) (holding that Puerto Rico's municipalities cannot file for Chapter 9 bankruptcy, but, at the same time, Puerto Rico cannot enact its own municipal bankruptcy law). I then note examples in which lower federal courts continue to apply the *Insular Cases*. *See* Tuaua v. United States, 951 F. Supp. 2d 88, 98 (D.D.C. 2013) (holding that American Samoans are not entitled to birthright citizenship); Segovia v. United States, 880 F.3d 384, 391–92 (7th Cir. 2018) (holding that law prohibiting former residents of Illinois, who now reside in the U.S. territories, from obtaining absentee ballots was not unconstitutional). Additionally, I briefly note arguments that have been made for "repurposing" the *Insular Cases* to preserve certain cultural norms or contractual relations. *See* Fitisemanu v. United States, 1 F.4th 862, 870 (10th Cir. 2021); Ponsa-Kraus, *supra* note 28, at 2456–60.

284. Ponsa-Kraus, *supra* note 28, at 2454–55.

285. *See* Neuborne, *supra* note 84, at 59.

some ways but not others and to examine the doctrinal implications. This approach might include a walk-through of key legal developments from *Dred Scott v. Sandford*,[286] the Civil War and Reconstruction Amendments,[287] and the continued imposition of racial hierarchy and resistance through the *Chinese Exclusion Cases*,[288] *Plessy v. Ferguson*,[289] the *Insular Cases*,[290] and *Korematsu v. United States*,[291] among others.[292] Here, noting that unlike *Plessy* (and, to a limited extent, the *Chinese Exclusion Cases* and *Korematsu*), the *Insular Cases* remain "good law" and continue to be cited today.[293]

Such coverage illuminates the United States' historic and continuing struggle to reckon with issues of both race and empire. Some scholars view the study of the territories and the *Insular Cases* as providing a potent and persuasive response to recent efforts to attack critical race theory and the teaching of America's systemic racism.[294] Others take a different approach and argue that the *Insular Cases* provide a crucial foundation upon which to advocate for sovereignty and self-determination for all colonized peoples while cautioning against arguments based on racial equality given the current Court's vision of a "colorblind" Constitution.[295]

4. Additional Approaches

In addition to weaving discussion of the U.S. history of empire and the territories into the constitutional law course through additions or modifications to existing course material, this

286. 60 U.S. (19 How.) 393 (1857).

287. U.S. CONST. amends. XIII–XV.

288. *See* Hallett, *supra* note 229, at 548 n.18 (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), as the *Chinese Exclusion Cases*).

289. 163 U.S. 537 (1896).

290. *See* Derieux, *supra* note 28, at 799 n.7.

291. 323 U.S. 214 (1944).

292. *See, e.g.*, Allen E. Shoenberger, *Freemen and the Constitution: Monstrous Decisions of the United States Supreme Court*, 18 S.J. POL'Y & JUST. 214, 215–16 (2024).

293. *See* Walsh, *supra* note 64.

294. *See, e.g.*, Stacey E. Plaskett, *The Left and Right's Blind Spot in Systemic Racism: The US Colonies*, GRIO (June 24, 2020), https://thegrio.com/2020/06/24/stacey-plaskett-us-colonies-racism.

295. *See* Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2744 (2022); Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589, 590 (2004).

material can be incorporated through various experiential approaches.

For example, the professor might invite a guest speaker to speak to the class. In some years I have done this in lieu of covering the material by braiding with the existing doctrinal coverage. I have invited an attorney who has worked in this area of law or a legal scholar of the territories who can explain the *Insular Cases* and their current impacts and relate the material to constitutional history, structure, recent legal developments, and current implications.

Another approach I have taken is to encourage incorporating this material through the assignment of a short analytical piece on an issue of interest that relates to constitutional law. For the assignment, students select a specific issue of interest that implicates constitutional structures and use it as a vehicle to explain, in layperson's terms, the application of one or more of the doctrines covered in the course. The students may identify their own topic of interest or choose a topic from a list of proposed constitutional law topics of which the territories are an option. The students research and analyze the topic, explain how it relates to a constitutional law doctrine covered in the course, and present the analysis and explanation to the class. For several semesters, this approach has yielded student-led discussions of the role of U.S. empire in constitutional doctrine as related to Native Americans, the territories, and other matters. In several classes, it has yielded generative discussions about the legal and practical impacts of the territories' colonial status along with critical analyses of their constitutional position.

V. CONCLUSION

The history and current condition of the territories present urgent concerns about the constitutional order, including bedrock commitments to liberty, equality, rule by consent of the governed, and self-determination. Yet these concerns receive little meaningful attention in legal or public discourse. An important step toward addressing this invisibility is to educate law students and lawyers about this aspect of constitutional history and current operation. An important place to start is by incorporating study of the territories, the *Insular Cases*, and the history of empire in required constitutional law courses. My hope is that this Article

makes a persuasive case for including this material to enrich constitutional law courses in a manner that fellow law professors find manageable in this challenging moment for constitutional law.