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FORUM

[The Law of the Territories: Should It](https://www.yalelawjournal.org/forum/the-law-of-the-territories-should-it-exist)[Exist?](mailto:James.T.Campbell@yale.edu)

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[James T. Campbell \(/author/james-t-campbell\)](mailto:James.T.Campbell@yale.edu)[The](#)[Law](#)[of](#)[the](#)[Territories](#)[Should](#)[It](#)[Exist?](#)<https://www.yalelawjournal.org/forum/the-law-of-the-territories-should-it-exist>[law-](#)[of-](#)[the-](#)[territories-](#)[should-](#)[it-](#)[exist](#)

ABSTRACT. “The Law of the Territories” is becoming an increasingly prominent academic heading for legal scholarship concerning the liminal status of U.S. territories. This Essay argues that the incipient momentum of this “emerging field” presents an obstacle rather than a pathway to meaningful scholarly engagement, sidelining broader perspectives and more consequential inquiry. In questioning the would-be field’s unwitting formation and content, this Essay offers a preliminary exploration of how scholars might redirect the Law of the Territories toward more considered approaches to the study of U.S. territories and overseas imperialism in American law.

INTRODUCTION

Over the past several years, legal scholarship on the liminal status of Puerto Rico and other U.S. territories has started to appear under a newly recognizable academic heading: “The Law of the Territories.”¹ The term is attracting considerable academic interest amid a broader shift in American constitutional inquiry toward expansionism and empire—one in which scholars increasingly seek to reconcile domestic, “insider” accounts of emancipation, equality, and freedom with outward-facing realities of colonialism, conquest, and U.S. global power.² Maggie Blackhawk, for instance, spotlights “the law of the territories” among the “‘external’ constitutional fields” that she proposes to weave together into “the law of American Colonialism.”³ In the 2022–2023 academic year, more than a dozen U.S. law-review authors identified “the Law of the Territories” as a discrete body of U.S. law or “emerging field”⁴ within legal scholarship,⁵ even though that term—at least as a taxonomic device—appears nowhere in U.S. law journals before 2017.⁶

Remarkably, the Law of the Territories is winning acceptance as a standalone field even though its contours and purview are essentially undefined.⁷ While a growing number of articles purports to engage with this field, none has offered a considered view of what this term means or the basket of questions it might contain.⁸ Various commentators have implied parallels to federal Indian law, but they have not explained why that comparison is appropriate or useful.⁹ More importantly, no one has critically or extensively assessed whether this would-be new field aligns with—or diverges from—the much broader, increasingly vibrant law-and-empire discourse.

Among the few things immediately clear about the Law of the Territories is that the core conversation with which the “emerging field” is concerned is not actually new, at least in substance. From the moment the term surfaced in 2017, the Law of the

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This Collection critically examines legal issues in the U.S. territories and explores pathways for reform. These four Essays challenge the emerging “Law of the Territories” framework, document the ABA’s discrimination against territorial lawyers, address reproductive and economic injustices rooted in colonialism, and analyze Congress’s historical role in territorial taxation.

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Territories has claimed various strands of scholarship from a two-decade-long resurgence of scholarly interest in U.S. territories and the controversial *Insular Cases*—made visible in large measure by the work of scholars like Christina Ponsa-Kraus and the late Judge Juan R. Torruella.¹⁰ That preceding conversation, while not explicitly employing the term “the Law of the Territories,” nonetheless decisively framed and inflected ensuing scholarly efforts.

That work’s practical relevance surged at the turn of the millennium amid the Global War on Terror,¹¹ and again in the late 2010s as key developments in U.S. territories gained prominence in national (political) discourse: those were the devastating aftermath of Hurricanes Irma and Maria in 2017; widespread public opposition to Congress imposing an unelected oversight board over Puerto Rico’s government through the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) in 2016; and the ongoing reorientation of U.S. national-defense strategy toward Chinese influence in the so-called Indo-Pacific.¹² During this period, a 2017

Harvard Law Review special collection helped launch the term “Law of the Territories” into today’s legal-academic vernacular.¹³ Scholarly interest in the Law of the Territories has accelerated since then, bolstered by recent indications from Justices Gorsuch and Sotomayor that the Supreme Court may be prepared to overturn the *Insular Cases*—the doctrinal foundation of today’s U.S. territories’ uncertain relationship to the U.S. constitutional system.¹⁴ It is against this backdrop that the U.S. territories have returned to the foreground of U.S. law journals whose very first volumes theorized the *Insular Cases* nearly 130 years ago.¹⁵

In view of the U.S. territories’ apparent (if enigmatic) importance to contemporary legal thought,¹⁶ this Essay explores the early formation and trajectory of the so-called Law of the Territories, sketching the contours of the field from assumptions underlying the term’s contemporary usage. Insofar as it is used to describe an academic space, today’s Law of the Territories points generally to public-law conversation about “the complex and often-fraught relationship”¹⁷ between the U.S. government and its five permanently inhabited overseas colonies,¹⁸ or, in a different normative register, “the implications of the relationship between the U.S. and its territories” in the contemporary constitutional landscape.¹⁹ In 2021, this law journal characterized it as “an emerging field that explores novel legal questions” facing “[m]ore than 3.5 million people—98% of whom are racial or ethnic minorities—liv[ing] in American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands.”²⁰ At a more granular level, this body of scholarship—along with other academic work employing related terms like “Territorial Law”²¹—has produced a budding but persistently narrow constitutional conversation dominated by a specific set of doctrinal problems born of the *Insular Cases*.

One central focus of this discourse is the Supreme Court’s categorization of “unincorporated” territories—that is, those territories the Court has said are inhabited by “alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought . . . according to Anglo-Saxon principles.”²² Another is the Court’s cryptic pronouncement that those territories can be held as colonies deemed “foreign to the United States in a domestic sense,” at least “for a time.”²³ This scholarship is held together loosely by a shared recognition of a persistent liminal condition rooted in those decisions,²⁴ and a general consensus that the racialized and developmentalist logics underpinning the overseas colonies’ supposedly temporary constitutional limbo are, after 125 years, no longer defensible.²⁵

The *Yale Law Journal Forum* Collection to which this Essay belongs is an auspicious invitation to consider the stakes of embracing an incipient Law of the Territories on those terms—and to ask whether this would-be new field ought to exist in the first

[brief-history-of-us-territories-in-the-american-bar-association](#)).
Anthony M. Ciolli

[Intersectional Imperial Legacies in the U.S. Territories](#)
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Alex Zhang

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- 1 See Appendix: “The Law of the Territories”—Notable Recent Usages.
- 2 See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Constitution of Difference*, 137 HARV. L. REV. ...
- 3 See Blackhawk, *supra* note 2, at 21 (describing her Foreword as starting the conversation about a p...
- 4 See, e.g., *Special Issue on the Law of the Territories*, YALE L.J. 1 (Mar. 23, 2021), <https://www.y...>
- 5 See Appendix: “The Law of the Territories”—Notable Recent Usages.
- 6 The last notable usage of this term as an academic heading belongs to a collection of essays by Si...
- 7 In 2022, this journal dedicated an entire issue to it. See Rachel Valentina Sommers, *Introduction* ...
- 8 Cf. James T. Campbell, Aurelius’s *Article III Revisionism: Reimagining Judicial Engagement with* ...
- 9 See *infra* notes 37-45, 106-117 and accompanying text.
- 10 Other major figures of the late 1990s-early 2000s *Insular Cases* renaissance include Bartholomew H....
- 11 See, e.g., Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 5-14 (2004).
- 12 See, e.g., Ben Kesling, *U.S. Military Refocuses on Pacific to Counter Chinese Ambitions*, WALL ST. ...
- 13 *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616 (2017).

place. Insofar as it contains work that approaches the mired status of U.S. territories by mapping various institutional realities from the ground up, this Collection suggests some readily imaginable alternatives to the way that most Law of the Territories scholarship presently conceives its core questions, objects, and principles.

This Essay foresees that the present heading of the new field will pose an obstacle—not a pathway—to a sustained scholarly conversation of enduring practical or theoretical value. Building on existing pockets of commentary criticizing legal scholars’ fixation on the *Insular Cases*’ contemporary doctrinal application, this Essay observes that the dominant masthead in today’s (about the Yale Law Journal) scholarship is becoming increasingly detached from the lived realities and pressing concerns of the communities for whom they prescribe change. Moreover, they have turned away from important antecedent questions of sovereignty and political membership that have been bound up in the uncertain legality of U.S. territorial expansion and Native conquest from the very beginning. In doing so, this scholarship is constructing a frame that portrays those communities predominantly (if not exclusively) as common participants in a modern civil-rights struggle for political inclusion, rather than as constituents of distinct nations seeking to self-determine their relationship to another sovereign.

That this emerging field is headed down an unduly limiting path is further reflected in the striking disconnect between current scholarship and an almost entirely ignored body of nineteenth-century academic commentaries published under the very same moniker: “The Law of the Territories.” By exploring lost continuities between these two conversations, we can appreciate how today’s Law of the Territories privileges inquiry about the five “unincorporated” territories that strips away broader but deeply contested questions about the nature of our constitutional community; the relationship between and among rights, citizenship, and sovereignty; and the scope of the Constitution’s territorial reach—questions that came to a head in *Dred Scott*²⁶ and catalyzed the U.S. Civil War. Reconnecting the two conversations offers a starting point for considering how to channel this current wave of academic interest in U.S. territories into broader public-law understanding after a prolonged period of neglect. The work of field formation in this area should be to nurture, not cauterize, the tissue connecting the territories to American law’s theoretical and pedagogical mainstream.

To be sure, the Law of the Territories—even in its current, highly nebulous form—has served some useful functions. It has cast a spotlight on the *Insular Cases*’ troubled legacy and overtly racist methodologies. It has brought much-needed attention to the U.S. territories’ disenfranchisement, at least within elite academic circles that have long regarded them as an inconsequential backwater. It has spawned symposia, special collections, and new course offerings at institutions like Harvard, Yale, and Columbia, yielding work that federal judges are citing to voice an increasingly explicit skepticism about the *Insular Cases*’ continued viability. Much of that success is attributable to advocacy groups that have leveraged quite adeptly various trends in constitutional-law inquiry to link the *Insular Cases*’ historical and doctrinal content to other controversial decisions of the *Plessy* era, in academic and nonacademic settings alike. But those successes have also come at a high (and unnecessary) academic price, marginalizing other approaches and voices that would open doors to more consequential inquiry.

This Essay sees little value in speculating about whether the Law of the Territories will germinate into a lasting academic field with its own casebooks or scholarly canon. The Law of the Territories (or whatever better-fitting term may yet emerge for the thing it contemplates²⁷) is just one of many new putative fields that have flirted with more durable inclusion in the catalog of American legal scholarship and pedagogy over the years. Be it the Law of the Territories, the law of the police,²⁸ the law of American

- 14 See *United States v. Vaello Madero*, 596 U.S. 159, 188 (2022) (Gorsuch, J., concurring); *id.* at 194...
- 15 See, e.g., Sam Erman, *Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. F. 105, 112 (2018) ...
- 16 While this Essay deals primarily with U.S. public-law scholarship, contemporary interest in the U....
- 17 See Sommers, *supra* note 7, at i.
- 18 The five remaining “unincorporated” territories are Puerto Rico, Guam, the Commonwealth of the...
- 19 Justin Burnworth, *The Curious Case of Justice Neil Gorsuch*, 44 PACE L. REV. 1, 31 (2023); see also...
- 20 See *Special Issue on the Law of the Territories*, *supra* note 4.
- 21 See *Spring 2024 Symposium: Territorial Law Across the Curriculum*, STETSON L. REV. (Mar. 22, 2024),...
- 22 *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).
- 23 *Id.* at 341 (White, J., concurring).
- 24 Cf. Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded A...*
- 25 See, e.g., Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated S...*
- 26 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

colonialism,²⁹ or the law of the horse,³⁰ asking whether a new line of particularized inquiry should exist takes us inevitably into an enduring thicket of questions surrounding the purpose and identity of *all* legal scholarship—questions from which this Essay takes a wide berth. This Essay simply proposes that this recent move in legal scholarship on U.S. territories is worth redirecting before it treads too far down the wrong path.

What follows proceeds in three Parts. Part I surveys the core body of scholarship—largely early-twenty-first-century critiques of the *Insular Cases*—that the Law of the Territories attempts to consolidate in the new journal. Part II describes the emerging contemporary interest in the “emerging field” since 2017 and defines its basic contours. It makes particular note of the field’s persistent narrowness and its development into a shorthand for conversations about the status of five inhabited overseas colonies under the troubled *Insular Cases* framework, a feature attributable, in large part, to the field’s origins. Part III begins the work of questioning the field’s unwitting formation and content, offering a preliminary exploration of how scholars might redirect the improvident momentum of the Law of the Territories toward more considered approaches to the study of U.S. territories and overseas imperialism in American law.

I. TERRITORIES AT THE TURN OF THE TWENTY-FIRST CENTURY

This Part surveys briefly the preexisting body of scholarship that the Law of the Territories envisions as its intellectual foundation and point of departure. Although frequently touted as substantively novel and newly emerging, the Law of the Territories is, in large measure, a header for assembling some two decades of legal scholarship about the origins and doctrinal significance of the *Insular Cases*.³¹ Conceptualized as a field “built on . . . the *Insular Cases*” and the “discriminatory doctrine of ‘incorporation,’”³² the Law of the Territories mobilizes that scholarship in its mission to “provide judges useful advice as to how to clean up the mess.”³³

Accordingly, sketching the Law of the Territories in its present form requires us to return first to the late 1990s and early 2000s—a moment in which the *Insular Cases* and American overseas expansionism caught fire in U.S. constitutional-law scholarship. Notwithstanding an even earlier assortment of deeply important scholarly work on the territories and the *Insular Cases*,³⁴ the turn of the twenty-first century inaugurated a new era in the study of the legal and constitutional condition of U.S. overseas possessions.³⁵ Between 1996 and 2002, a number of now-classic works began to converge on the notion that the *Insular Cases*, despite their near-total obscurity in the theoretical and pedagogical canon of the day, were centrally important to constitutional development and deserving of much closer study.³⁶ An influential 1998 symposium of constitutional-law casebook authors questioned the field’s failure to interrogate the reach of governmental power beyond territorial borders and, more fundamentally, “how territory was acquired.”³⁷ Sanford Levinson—who had recently admitted his unfamiliarity with the *Insular Cases* prior to that gathering, despite decades of teaching and studying the Constitution³⁸—made an impassioned appeal for study of the *Insular Cases* in particular, declaring them “central documents in the history of American racism” and integral to contemporary understanding of the U.S. constitutional system.³⁹ Meanwhile, Akhil Reed Amar, in one of the most-cited articles of the decade, remarked that the 1901 *Insular Cases*—along with the early law-review articles that theorized their prevailing approaches—were “receiv[ing] less attention than they deserve” in view of their methodological value for appreciating “the way that early legal scholars debated constitutional questions.”⁴⁰

(<https://papers.ssrn.com/sol3/cdbib.cfm?id=444444>)

- 27 Numerous commentators have viewed the prevailing nomenclature of “territories” as a euphemism ...
- 28 Rachel Harmon, *The Law of the Police* (2023).
- 29 See *supra* note 3.
- 30 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 207-08.

- 31 See, e.g., Anthony M. Ciolli, *Needful Rules and Regulations*, 77 VAND. L. REV. 1263, 1267-69 (2024)...
- 32 Tom C.W. Lin, *Americans, Beyond States and Territories*, 107 MINN. L. REV. 1183, 1187 (2023).
- 33 See Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 269 (2022) (quoting W...

This renewed academic interest in the *Insular Cases* and U.S. territories surged with the onset of the so-called Global War on Terror. Although the five unincorporated territories had limited tactical or operational relevance in that conflict, the history of U.S. overseas imperialism at the turn of the twentieth century became an analytical substrate for the uncertain legality of new military and intelligence activities overseas. In particular, the United States's nation-building endeavors in Iraq and detention of terrorism suspects at Guantanamo Bay, Cuba, spawned new legal questions about the extraterritoriality of U.S. citizenship, the relationship of citizenship to territorial sovereignty, and the limits on U.S. authority to project power across the globe. In this context, the *Insular Cases* and the history of U.S. imperialism became both a source of justification and an axis of critique.

It is worth noting that there is considerable uncertainty as to which Supreme Court decisions actually comprise the *Insular Cases*.⁴¹ Despite this, the scholarship of the early 2000s evinced widespread agreement about what, in substance, the *Insular Cases* raised for debate: a question reliably posed as “Does the Constitution follow the flag?”⁴² The moniker “*Insular Cases*” became a shorthand for two basic doctrinal propositions: (1) that the U.S. Constitution “applies” fully in places deemed “incorporated” into the United States, while (2) only “fundamental” provisions apply in so-called “unincorporated” territories, which the Court viewed as populated by culturally inferior “alien races.”⁴³ Only one leading scholar from this period, Christina Duffy Burnett (Ponsa-Kraus), resisted this “traditional story” of the *Insular Cases*—that they stand principally for the proposition that the U.S. Constitution does not “follow the flag” to unincorporated territories.⁴⁴ In her view, the standard account was a “familiar misunderstanding” that elided the “most important” doctrinal consequence of the *Insular Cases*: “[unincorporated] territories could be separated from the United States”—that is, “deannexed.”⁴⁵

Nonetheless, the consensus core question—whether the Constitution “follows the flag”—would take on a new life during the 2007 Supreme Court Term.⁴⁶ In the blockbuster Guantanamo-detention case *Boumediene v. Bush*, a narrow 5–4 majority turned to the *Insular Cases* for answers to the slippery question of when and whether the constitutional guarantee of habeas corpus operates beyond the territorial borders of the nation.⁴⁷ Justice Kennedy’s opinion in *Boumediene* grafted the *Insular Cases* onto the Court’s extraterritoriality jurisprudence as support for the novel “impractical and anomalous”⁴⁸ standard governing whether a given constitutional protection ought to apply abroad.

Scholars have critiqued *Boumediene*’s invocation of the *Insular Cases* on various grounds.⁴⁹ But perhaps even more significant than the legal legitimacy of their invocation was Justice Kennedy’s dramatic revision of the *Insular Cases*’ jurisprudential origins and purpose. Erasing the Court’s explicit rationale for inventing the incorporation doctrine—its anxiety about guaranteeing constitutional rights and protections to newly acquired “savage” peoples of an “uncivilized race”—Justice

For examples of these scholarly works, see generally JUAN R. TORRUELLA, THE SUPREME COURT AND

35 Although it is difficult to pinpoint which of several converging sparks ignited that flame, the on...

36 For examples of this scholarly attention, see generally FOREIGN

IN A DOMESTIC SENSE: PUERTO RICO, ... (https://books.google.com/books)

37 T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. ...

38 See Levinson, *supra* note 35, at 574; Levinson, *supra* note 36, at 243.

39 Levinson, *supra* note 36, at 245, 241.

40 Amar, *Intratextualism*, *supra* note 36, at 782-83; see also Amar, *Foreword*, *supra* note 36, at 88-89 ...

41 On this point, today’s conversation has progressed very little since the early 2000s. Without a ...

42 Whether the Constitution “follows the flag” has been an enduring question regarding the uncert...

43 Downes v. Bidwell, 182 U.S. 244, 286-87 (1901).

44 Burnett, *supra* note 41, at 797, 820 n.40 (adding that the “follow the flag” understanding of the ...

45 Burnett, *supra* note 41, at 797, 820 n.40. Her intervention continues to complicate the prospect of...

46 This question attracted new attention from numerous legal angles, most notably from the immigratio...

47 Scholars of the territories do not agree on how to properly read *Boumediene* on this point. Burnett...

Kennedy reframed that imperial moment as one motivated principally by *respect* for the peoples and legal traditions of the places the United States was determined to acquire.⁵⁰ At a time when commentators of all shades appeared to accept that the *Insular Cases* had “nary a friend in the world,”⁵¹ Justice Kennedy claimed that “it was never the intention of the people of the United States in the incipency of the War with Spain to make it a war of conquest or for territorial aggrandizement,” and that permitting a “transformation of the [Philippines] prevailing legal culture would have

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independence.”⁵² On this account, the *Plessy*-era Court had declined to treat the residents of these new territorial acquisitions equally under the Constitution not because of racial concerns, but because the Supreme Court “was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories.”⁵³ To compound the

confusion, Justice Kennedy added a cryptic, tantalizing piece of dictum that called into question the durability of the *Insular Cases*, even as he relied on them: “It may well be

that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”⁵⁴

Boumediene therefore sparked a new wave of scholarship about the *Insular Cases*, this time folding into the conversation scholars from other substantive areas who wished to interrogate the sea change in extraterritoriality jurisprudence and the real-world implications for War on Terror detainees.⁵⁵ In *Boumediene*’s wake, scholars waded deeper into the *Insular Cases*’ contested morass of precedents to unpack the Court’s reliance on them in determining the Constitution’s extraterritorial reach, and to further challenge the assumed scholarly consensus that the *Insular Cases* stand principally for the proposition that the Constitution does not follow the flag.⁵⁶ The Court’s decision to inject the *Insular Cases* into the “impractical and anomalous” standard would not only “increas[e] . . . interest of a number of first-rate legal scholars” in “the status of the Constitution in the territories,” but it would also fundamentally transform the nature of “scholarship and commentary concerned with the future trajectory of the Supreme Court’s judicial doctrine.” The *Insular Cases* would now be understood primarily “through the lens of *Boumediene*’s interpretation.”⁵⁷

By the early 2010s, scholarly interest in the *Insular Cases* began to migrate from U.S. detention activities at Guantanamo to the long-running questions surrounding Puerto Rico’s status. Despite the emergence of new scholarly approaches eschewing the narrow doctrinal, juricentric, and “relatively limited” purview of the previous decades’ academic conversation,⁵⁸ the dominant constitutional commentary continued to center “on the reasoning of the *Insular Cases* and on how these rulings shaped America’s subsequent governance of the newly acquired territories.”⁵⁹ Anchored firmly in questions of judicial interpretation, this strand of constitutional-law scholarship on the territories would continue to “scrutinize the Court’s [*Insular Cases*] opinions, their internal consistency, and the distinctions the Court drew between ‘incorporated’ territories, which the Court expected to eventually join the Union as states, and ‘unincorporated’ territories, . . . where only the most basic provisions of the Constitution applied.”⁶⁰ This approach proved increasingly successful in “documenting the consequences of the Court’s rulings and recognizing the *Insular Cases* as part of broader historical trends” while elevating the *Insular Cases*’ visibility within the world of constitutional theory and pedagogy.⁶¹ However, some commentators began to recognize that this approach had left fundamental antecedent questions unaddressed, particularly those posed by evolving institutional arrangements within the territories and the judiciary’s relationship to other actors who shaped the constitutional future of the nation’s territories.⁶² It was at this point in the scholarship that proponents of the Law of the Territories would plant a flag, marking the center of an aspiring new field.

Confusingly, this test is at times articulated as the “impracticable and anomalous” test and a...
49 See, e.g., Kent, *supra* note 41, at 103; Malavet, *supra* note 47, at 182-84, 256.

(<https://www.facebook.com/territoriesjournal/>)

50 United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

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

52 *Boumediene*, 553 U.S. at 758.

53 *Id.* at 757.

54 *Id.* at 758.

55 For excellent discussions on the *Insular Cases*’ role in the evolution of twenty-first-century ex...

56 Kent, *supra* note 41; Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, *supra* not...

57 Burnett, *supra* note 35, at 1040; Kent, *supra* note 41, at 116.

58 See, e.g., Vignarajah, *supra* note 55, at 797; Efrén Rivera Ramos, *The Insular Cases: What Is There...*

59 *Id.* (discussing the work of Sparrow, Ponsa-Kraus, Ramos, Cabranes, and Torruella).

60 *Id.*; cf. Kent, *supra* note 41 (noting that the unduly narrow focus of the territories’ scholarshi...

The early materialization of the Law of the Territories as an academic field owes much to the editors of Volume 130 of the *Harvard Law Review*, who in 2017 assembled a collection of essays focused on the “five localities [that] make up what we know as the U.S. territories.”⁶³ That 2017 collection arrived on the heels of three paradigm-breaking legal developments. The previous year had seen the Supreme Court decisions *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*⁶⁴ and *Puerto Rico v. Sanchez Valle*,⁶⁵ as well as the advent of PROMESA⁶⁶—an unprecedented federal law

62 *Id.*

empowering, among other things, a federally appointed board of overseers that holds the power to nullify essentially every major decision made by Puerto Rico’s elected government. The three events played off each other. *Franklin California* paved the way for PROMESA by holding both that bankruptcy provisions of Puerto Rico’s Recovery Act were federally preempted and that Puerto Rico’s municipalities were ineligible for Chapter 9 bankruptcy.⁶⁷ *Sanchez Valle*—regarded at the time as “the most important case on the constitutional relationship between Puerto Rico and the United States since the establishment of the Commonwealth in 1952”⁶⁸—held that Puerto Rico was not a separate sovereign from the United States for Fifth Amendment double-jeopardy purposes, despite decades of jurisprudence recognizing Puerto Rico’s sovereign attributes by virtue of its “commonwealth” status.⁶⁹ And as the *coup de grâce*, PROMESA operationalized the once-theoretical specter of a congressional power to functionally revoke Puerto Rico’s democratic self-governing status, notwithstanding the federal government’s prior assent to the popularly ratified Commonwealth compact. These events would set the conditions for some of the largest public demonstrations in Puerto Rico’s history.⁷⁰

63 See generally *Developments in the Law*, *supra* note 13, at 1616 (announcing an edition of the *Law Re...*

64 579 U.S. 115 (2016).

65 579 U.S. 59 (2016).

66 See Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. ...

67 Petition for Writ of Certiorari at 1, *Sanchez Valle*, 579 U.S. 59 (No. 15-108).68 *Sanchez Valle*, 579 U.S. at 78.69 See Campbell, *supra* note 8, at 2546 n.2.70 *Developments in the Law: The U.S. Territories*, *supra* note 13, at 1621.

Those *Harvard Law Review* editors deserve credit not only for recognizing so immediately the significance of 2016’s developments, but also for appreciating that the new constitutional landscape was in fact even “more complicated than [what] initially appears” from those groundbreaking legal developments affecting Puerto Rico.⁷¹ Widening their vision to include other overseas territories’ “unique histories and political perspectives,” as well as their individually unique “legal relationships with the United States,”⁷² the collection hypothesized the value of constructing a more complete picture of “the current law of the territories” that might otherwise be mistaken for the “law of Puerto Rico.”⁷³ Much more importantly, the editors suggested that for such inquiry to prove valuable, it would need to go much further than a “mere recounting of the *Insular Cases* and the academic discourse that has surrounded them” since the late 1990s.⁷⁴ In appreciating the shortcomings of the existing *Insular Cases* discourse, the collection lighted a potential new path for the Law of the Territories.

71 *Id.* at 1617.72 *Id.* at 1626.73 *Id.*

This vision for a Law of the Territories was thus broader in scope than the existing “*Insular Cases* scholarship” and suspicious of the reflexive assumption that the United States–Puerto Rico relationship could be extrapolated to understand “the territories” as a conceptual whole. Nevertheless, the scholarship that followed under this heading did not pivot significantly on either of those dimensions. With few exceptions, the dominant threads of the previous decade—the doctrinal incoherence of the *Insular Cases* and the legal formalisms that attend the United States–Puerto Rico relationship—have not only remained in the foreground but have, in many ways, intensified. Thus, while some have described the emergence of the Law of the Territories as a “renaissance” in legal scholarship concerned with U.S. overseas imperialism⁷⁴—ostensibly because it is “explor[ing] novel legal questions”⁷⁵—other scholars have rejected that characterization.

For example, Carlos Iván Gorrín Peralta cautions us not to oversell the emerging field's novelty, insisting that the core questions that the Law of the Territories seeks to naturalize beneath its banner are decidedly *not* new.⁷⁶ In his view, legal scholars' newfound "concerns regarding the 'law of the territories'" cannot properly be described as "emerging issues" principally because those issues self-evidently have been a "constant concern in law schools [] within the territories for many decades," even if those concerns have remained a "well-kept secret" in "the academic and political

PRINT ARCHIVE (vissl) United States / 77 Gorrín Peralta, *Unincorporated Territories* (2022) (https://www.yalelawjournal.org/forum/insular-cases)

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While a worthwhile reminder that to the extent we are commenting on "breakthroughs" from the *Insular Cases*' persistent invisibility—or of the "emerging" relevance of Puerto Rico's colonial condition to U.S. law more broadly—we are invariably commenting, at least to some extent, on the legal establishment's prolonged indifference to learned voices who have long urged their centrality. More concretely, Gorrín Peralta's point underscores that today's scholarship on the legal and constitutional condition of U.S.

territories belongs to a contiguous scholarly movement that predates the appearance of the Law of the Territories in the academic catalog.

These challenges to the "newness" of the aspiring field ultimately confirm that the conversations coalescing as the Law of the Territories—perhaps more accurately described as the Law of the *Unincorporated* Territories—have held fast to questions that constitutional-law scholars have reliably posed since the new millennium. Most participants in these conversations continue to articulate the core debate as some version of "Does the Constitution follow the flag?" But they also *interpret* that question as inquiring after the federal government's *de jure* authority over five specific overseas territories maintained in the fictive temporary status the Supreme Court invented for lands it viewed as inhabited by "savages" and persons of "uncivilized race"—rather than the machinations of empire more broadly.

The post-2017 period brought into the scholarship's peripheral vision at least one new question of where the *Insular Cases* fit within an emerging notion of a constitutional "anticanon."⁷⁸ Commentators have repeatedly framed the *Insular Cases* as a companion to *Plessy*, and the bulk of the territories scholarship since 2017 spurred the academy and the national civil-rights community into action after the Supreme Court, in 2018, overruled the last of Professor Jamal Greene's four paradigmatic "anticanon" cases: the 1944 Japanese internment decision in *Korematsu v. United States*.⁷⁹ Andrew Kent noted that during this period, the "scholarship about the *Insular Cases* and the doctrine of territorial incorporation" continued to coalesce around the view that these largely overlooked relics of U.S. constitutional law were important principally as "examples of discrimination, domination, and denial of rights" and examples of "the Supreme Court allow[ing] the U.S. government to 'totally disregard the Constitution in governing the newly acquired territory.'"⁸⁰ But looking back on the previous decade, Kent also observed that this persistent tendency to "fram[e] the *Insular Cases* solely in terms of discrimination, subordination, and racism" was repetitive and limiting.⁸¹ That framing, while certainly "not inaccurate," was also "incomplete," if only for ignoring the important "variables, motivations, and contexts" beyond judicial engagement with the *Insular Cases* as a strictly civil-rights problem.⁸²

Consequently, as the Law of the Territories gained traction as a recognizable academic field, it became increasingly apparent that its theoretical center was a civil-rights conversation about whether and how to overturn the *Insular Cases*' doctrinal formalisms, especially after the Supreme Court handed down *United States v. Vaello Madero*⁸³ in 2022. In *Vaello Madero*, the Court upheld Congress's power to exclude low-income, disabled persons in Puerto Rico from nationwide benefits programs like Supplemental Security Income—the nation's largest income-assistance program—

74 Anthony M. Ciolli, *Microaggressions Against United States Territories and Their People*, 50 S.U. L....

75 *Special Issue on the Law of the Territories*, *supra* note 4, at 1.

(https://www.yalelawjournal.org/forum/insular-cases)
76 See Carlos Iván Gorrín Peralta, *The Law of the Territories of the United States in Puerto Rico*, th...

77 Peralta, *supra* note 76, at 35-36.

78 Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 384, 389-90 (2011) (centering on four cases: D...

79 *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) ("Korematsu was gravely wrong the day it was decided, ha...

80 See Kent, *supra* note 24, at 381; see also GUSTAVO A. GELPI, THE CONSTITUTIONAL EVOLUTION OF PUERT...

81 Kent, *supra* note 23, at 393.

82 *Id.*

without relying (at least expressly) on the *Insular Cases*.⁸⁴ But of far greater academic interest were the opinions of Justices Sotomayor and Gorsuch, who wrote separately (from the majority and from each other) to suggest that they were prepared to do away with the troubled *Insular Cases* framework once and for all, should the right case present itself.⁸⁵ The 2021–2022 academic year saw another dramatic increase in the number of law-review publications on the territories and the *Insular Cases*—including three more influential symposia⁸⁶—nearly all of it animated by Gorsuch and

83 596 U.S. 159 (2022).

84 *Id.* at 166.

(<https://www.facebook.com/freedomofinformationact/>)

85 *Id.* at 189 (Gorsuch, J., concurring) (“[T]he *Insular Cases* rest on a rotten foundation. And I ho...

86 *HRLR 2022 Symposium*, COLUM. HUM. RTS. L. REV. (Apr. 8, 2022), <https://hrlr.law.columbia.edu/symposium/>

87 1 F.4th 862 (10th Cir. 2021), cert. denied, 143 S. Ct. 362 (2022) (mem.).

88 788 F.3d 300 (D.C. Cir. 2015), cert. denied, 579 U.S. 902 (2016).

89 See *Insular Cases Resolution: Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 170th Cong....

90 Petition for a Writ of Certiorari, *Fitisemanu v. United States*, No. 21-1394 (U.S. Apr. 27, 2022), ...

91 See Sommers, *supra* note 7, at i.

92 *Id.* (noting the possibility of Supreme Court review in *Fitisemanu*).

93 *Id.*

94 Rolnick, *supra* note 2, at 2748; Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against C...*

95 See *supra* notes 87–90 and accompanying text.

96 See Ponsa-Kraus, *supra* note 94, at 2455–64.

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Fitisemanu v. United States—a Tenth Circuit rebuke of the 2016 test case *Thaana v. United States*,⁸⁸ which had unsuccessfully challenged the lack of birthright citizenship in American Samoa as a vehicle for overturning the *Insular Cases*.⁸⁹ With seemingly knowing timing, the *Fitisemanu* plaintiffs filed their petition for certiorari six days after Gorsuch published that opinion.⁹⁰

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In 2022, the *Yale Law Journal* announced that it would dedicate a rare special issue to “the Law of the Territories,” a term it made no attempt to define, other than to describe generally the component essays as shedding light on the “complex and often-fraught relationship between the U.S. government and its territories,” and, separately, some “recently decided cases involving the territories.”⁹¹ Readily apparent from that framing, however, was that the *Journal* perceived the timeliness and importance of the Law of the Territories as deriving from the imminent possibility of an opportunity for the Court to overrule the *Insular Cases* in the manner suggested by Justice Gorsuch’s *Vaello Madero* concurrence—and in the *Fitisemanu* case specifically.⁹² With an eye to the upcoming Supreme Court term, the *Journal* styled the collection explicitly as a “call to arms.”⁹³ However, most of its authors ultimately did not embrace that framing. If anything, they appeared to converge on the proposition that even if the Court were inclined to overrule the *Insular Cases* in *Fitisemanu*, it would remain highly unclear what, if anything, would change about the territories’ status quo relationships in substance—calling to mind the Court’s ceremonious but largely symbolic overthrow of *Korematsu* in *Trump v. Hawaii*.⁹⁴ The Court ultimately denied certiorari in *Fitisemanu*, leaving the *Insular Cases* undisturbed and the *Journal*’s prefatory rhetoric rather hollow.

Coinciding with the *Yale Law Journal*’s Law of the Territories issue were numerous other symposia and curated publication opportunities inviting contributions geared toward the same themes—including at Columbia Law School, Fordham Law School, and the New York State Bar Association. Shepherded by the common orientation of attractive publication opportunities, the broader scholarship rallied around the idea that theorizing a judicial death knell for the *Insular Cases*, irrespective of what might replace those precedents, was the most fundamental and urgent concern of the emerging field. In this way, the *Vaello Madero* moment both catalyzed broad scholarly recognition of the Law of the Territories as an academic framework while simultaneously dragging the conversation back to the place from which the *Harvard Law Review* imagined the Law of the Territories might depart. Although contemporary flourishes have brought the conversation from Puerto Rico to American Samoa⁹⁵ and rekindled some debate over the proposition that the *Insular Cases* might be reclaimed or repurposed to the territories’ benefit,⁹⁶ the resulting conversation is in substance the same one that scholars of the previous decade already perceived as unduly narrow and limiting. Shrouded still in threshold dissensus over which cases actually are the *Insular Cases* and which points of law they purportedly stand for, today’s Law of the Territories scholarship continues to pit “standard accounts” of an unknown number of *Insular Cases* against the proposition of “territorial deannexation”; to explore civil-rights parallels to *Plessy*; and to advocate generally for the legal mainstream to pay more attention to the “segregated system of legal dualism, one preferential set of rules

for States and one subservient set of rules for Territories.”⁹⁷ Across each of these axes, the terms of the academic conversation have arguably grown more confused over time.⁹⁸

The persistent narrowness of the Law of the Territories can be traced in part to a complex interplay between elite academic space, impact litigation, and the influence of nonprofit advocacy. Advocacy groups have been credited with engineering the *Tuaua* and *Fitisemanu* cases and recruiting American-Samoa-born plaintiffs,⁹⁹ and they have also been fairly transparent about their efforts to enlist the academy in marketing their case of generational and intergenerational impact, legalizing the center of change centered on judicially overruling the *Insular Cases*.¹⁰⁰ Through both formal sponsorship and informal narrative shaping, the academy’s close relationship to litigation efforts has steered the thematic direction of prominent, largely student-organized academic events. The calls for papers or front matter for the aforementioned symposia frequently aligned with those litigants’ goals of bringing attention to the constitutional status of U.S. territories through a civil-rights and formal-equality lens, often using parallel verbiage.¹⁰¹ This influence has been further evinced in the selection of speakers, panelists, and other contributors aligned with those litigants, as well as in the conspicuous absence of Indigenous voices that have publicly denounced such efforts for lack of dialogue with or connection to impacted communities.¹⁰²

To be clear, this endeavor to leverage academic space has been rather successful, both in increasing the visibility of U.S. territories in elite law schools generally and in advancing the narrative that overturning the *Insular Cases* is a pressing imperative at the center of a discrete academic field. Its success is a byproduct of efforts to marshal a particular set of fashionable constitutional-law arguments that cast the *Insular Cases* in the mold of *Plessy* and frame the territories’ subordinate condition as one of de jure legal exclusion, “separate and unequal.”¹⁰³ By framing the *Insular Cases* as part and parcel of a broader civil-rights movement toward the end of political and social inclusion, this narrative feeds the perception that the territories’ legal status survives as an unconstitutional anomaly that stands apart from an otherwise redemptive constitutional tradition. Perhaps facilitated by what Levinson and Sparrow presciently termed the “professional deformation” in the constitutional-law field to disregard or underestimate the importance of actors other than the federal judiciary with regard to American constitutional development,¹⁰⁴ this lens has unsurprisingly gained traction within elite American law schools by portraying residents of U.S. territories as common aspirants to equal citizenship in the mold of the U.S. civil-rights movement and *Brown v. Board of Education*. But as the next Part observes, this has come at the high cost of sidelining broader, and potentially more fruitful, discussions of U.S. territories’ aspirations for self-determination, nationhood, and political recognition.

There is a need for more thorough examination of the external nonacademic influences leveraging academic spaces to construct and constrict the Law of the Territories to align with a particular reform agenda. What is readily apparent, however, is that this constrained scholarly debate is gaining legitimacy in American legal scholarship, with potentially harmful implications for the future of territorial governance and U.S. constitutional-law inquiry. The Law of the Territories is increasingly recognizable in connection with ascendant constitutional-law discourse challenging the “[c]onventional wisdom [that] generally draws a distinction between constitutionalism and empire.”¹⁰⁵ That conversation—one of the most prominent threads in public-law scholarship today—appears to regard scholarly engagement with the Law of the Territories as essential to advancing public understanding of the U.S. constitutional system.¹⁰⁶ It is crucial, then, that the inchoate problems in the formation

⁹⁷ Lin, *supra* note 32, at 1187; see Kent, *supra* note 24, at 378; Samuel Issacharoff, Alexandra (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010101)

⁹⁸ See also Amy McMeeking, *Citizenship, Self-Determination, and Cultural Preservation in American Sam...*

⁹⁹ See Fanachul Podcast, *Addressing America's Colonies Problem Through a Civil Rights Lens*, FACEBOOK ...

¹⁰⁰ *Id.* One organization in particular, Right to Democracy (formerly known as the “We the People Proj...

¹⁰¹ Compare 2021-22 Special Issue (Print and Online), COLUM. HUM. RTS. L. REV., https://journals.libra...

¹⁰² See, e.g., Ausage Fausia, *Fono Passes Resolution Supporting Latest Fed Court Ruling on Birthright ...*

¹⁰³ See *supra* note 101 and accompanying text.

¹⁰⁴ Levinson & Sparrow, *supra* note 37, at 2.

of this “emerging field” be appreciated and accounted for before they become more deeply embedded in discourse on law and empire across time and space, potentially foreclosing more expansive decolonial possibility.

See, e.g., Blackhawk, *supra* note 2, at 8-9.

106 See *id.* at 20-21.

III. THE LAW OF THE TERRITORIES: SHOULD IT EXIST?

The final Part of this Essay foresees that the present momentum of the Law of the Territories will propose an alternative path to conversation with meaningful practical and theoretical value. “Field” or not, the conversation coalescing as the Law of the Territories tends toward inquiry that is equally detached from the lived realities of the communities for whom it prescribes change as it is from the larger questions of sovereignty and political membership that ought to connect it to broader public-law discourse. The persistent narrowness described in Part II privileges, though perhaps inadvertently, inquiry that assumes the rightfulness of judicially enforced U.S. constitutional integration over alternatives that might tend toward greater political autonomy or independence. While the Law of the Territories’ present momentum is elevating important critiques of the *Insular Cases* as “central documents in the history of American racism”—critiques that are certainly worth reemphasizing—it is ultimately working to obscure the most challenging and complex realities of territorial sovereignty and self-determination. Ignoring the varied and nuanced problems of territorial and Indigenous self-governance across the American empire in favor of pursuing top-down judicial coherence for the five unincorporated territories risks shaping the political future of territories, and the future of U.S. constitutional law, in ways that are likely to mimic the detached paternalism that spawned the *Insular Cases* from these very pages more than a century ago.

Responding to this risk, this Part suggests three profitable redirections—two of which are already recognized and ongoing, and a third that is somewhat more novel. First, scholarship on the territories should continue to take stock of its connectivity to the broader contemporary public-law conversation—for example, by fostering the growing recognition of ties to the fields presently regarded as federal Indian Law and tribal law. Second, as some are already doing,¹⁰⁷ scholars should deprioritize abstract formalist questions and favor work that is directly focused on concrete legal puzzles that shape life in the territories. Finally, the field should excavate and engage directly with a previously underappreciated historical artifact: the use of the term “The Law of the Territories” in the mid-nineteenth century to refer to a public-law conversation as old as the country and touching its most fundamental questions of land, citizenship, and rights.

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107 See *infra* notes 127-133 and accompanying text.

A. The Territories, Indian Law, and Public-Law Conversation

The work of refashioning the academic discourse surrounding U.S. territories should begin by situating it more thoughtfully within the growing body of work on law and empire that has been reshaping the boundaries of contemporary constitutional and political theory. Prominent scholars like Rana, Blackhawk, Erman, and Ablavsky are already emphasizing the centrality of U.S. territories to the broader discussions of sovereignty, empire, and constitutional development. Newer scholars like Alvin Padilla-Babilonia and Nazune Menka are adding fresh texture to those conversations by centering the territories in projects to illuminate patterns of law and governance that would remain invisible if overseas imperialism were relegated to a narrow field of study.¹⁰⁸ These are just a few of the growing cadre of scholars who are increasingly pushing the legal academy to recognize that the condition of unincorporated territories is nothing aberrant or *sui generis*. Rather, that conversation recognizes that

constitutionally, politically, and socially, the activities of territorial settlement and expansion are “at the heart of what forged Americans into a distinctive people” at the Founding.¹⁰⁹ In constitutional law specifically, this discourse appreciates that with the Constitution largely silent on matters related to the federal government’s power to expand the political community by acquiring new territory, the legal processes of territorial expansion have been primary sites of contestation over the document’s meaning and fundamental commitments—contestation in which Native nations and

See, e.g., Padilla-Babilonia, *supra* note 2, at 943-57; Alvin Padilla-Babilonia, *The Imposition of...*

109 RANA, *THE CONSTITUTIONAL BIND*, *supra* note 2, at 43.

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MASTHEAD (/masthead) ABOUT (/about-the-law-journal) CONTACT (/contact) The (domestically) coalescing as the Law of the Territories journal is a way that contributes to, and grows alongside, this more expansive law-and-empire scholarship. With few exceptions, territories scholarship’s dogged pursuit of internal doctrinal coherence and a long-awaited escape from the *Insular Cases*’ purgatory feeds the perception that the territories’ legal conundrums—and overall subordinate condition—now from a small number of doctrinal relics living comfortably apart from the rest of an otherwise coherent and anticolonial constitutional tradition. Even though scholars like Blackhawk have used the term “the Law of the Territories” as a marker in projects that are consciously *rejecting* the narrow siloing of colonial legacies described in Part II, the emerging field’s present momentum risks corrupting the foundation of this new scholarship by reinscribing the very features responsible for the siloing that Blackhawk and others have been working to overcome.

110 Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1005-06 (2014). Scholars like T. Alex...

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To the degree that current Law of the Territories scholarship displays a salvageable antiparochial trend, it might begin by exploring in greater depth the connections between the emerging field and federal Indian law—connections that scholars have already noted at high levels of generality. There are many promising starting points for this sort of work. In her historic *Harvard Law Review* Foreword, *The Constitution of American Colonialism*, Blackhawk lists “the law of the territories” immediately after federal Indian law when canvassing what she regards as the misapprehended “component parts of American colonialism” within American law. As Blackhawk explains, the artificial siloes of legal taxonomy enable constitutional-law scholars to regard the puzzles and problems in these fields as *sui generis* rather than as part and parcel of constitutional law writ large.¹¹¹ She goes on to link “the law of the territories” to Indian law as “seemingly disparate, but ultimately connected ‘external’ constitutional fields” that she proposes to bring within her own new field: the constitutional law of American colonialism.¹¹² Addie C. Rolnick, who has bridged many of those same siloes in reframing constitutional tensions at the intersection of race-antidiscrimination jurisprudence and Indigenous or collective rights, proposes weaving together ideas from “Indian law, the law of the territories, international law, and race law.”¹¹³ Rolnick adds, as a descriptive matter, that “Federal Indian Law, law of the territories, and civil-rights law” can be viewed as “distinct bodies of U.S. law.”¹¹⁴ Ponsa-Kraus, whose work is universally cited by those who have addressed “the law of the territories,” recently used the term for the first time to allude to “parallels between the law of the territories, federal Indian Law, and civil rights law.”¹¹⁵ Jennifer M. Chacón locates a “visible doctrinal thread that connects immigration law with the law of the territories and Indian law”: the plenary-power doctrine.¹¹⁶

111 Blackhawk, *supra* note 2, at 6.

112 *Id.* at 21 (framing the law of American colonialism as a “new field”).

113 Rolnick, *supra* note 2, at 2660-63.

114 *Id.* at 2663.

115 Ponsa-Kraus, *supra* note 94, at 2458 n.26.

116 Chacón, *supra* note 19, at 9.

These scholars—all leading voices in law-and-empire scholarship—thus suggest that the Law of the Territories might be regarded as a companion or analogue to the field of federal Indian law, and, more specifically, as a space that adds dimension to an existing relationship between Indian law and “civil rights law.”¹¹⁷ The analogy is a natural one to the extent that the Law of the Territories’ imagined core questions are, at a high level of generality, (1) questions of public law and (2) questions that concern the

117 See also Menka, *supra* note 108, at 143 (“Despite this current era of federal policy being one of f...

structure and organization of the federal government's relationship to other governments it regards as subordinate.¹¹⁸ However, further contours of the analogy remain largely unexplored.

Scholars might continue the project of appraising the Law of the Territories' aspirations and inchoate problems as a prospective field by articulating the concepts and questions capable of *distinguishing* it from federal Indian law.¹¹⁹ While there is no accepted definition of what constitutes a "field" of legal study, any claim to that label requires, at a bare minimum, "a distinct set of important, interesting and unanswered legal questions which are amenable to research by the law profession."

If those invested in this recent move toward the Law of the Territories aspire to produce anything resembling Indian law's staying power, then it ultimately must locate *principles* that attach to a jurisdiction's status as a territory. The legal academy and legal profession have been made to recognize the lasting distinctiveness of concepts like tribal sovereignty, the Indian trust relationship, and the enforcement of treaty rights—concepts that are illegible in today's landscape of unincorporated territories.¹²¹ It may well be that the Law of the Territories promises similarly distinctive and durable concepts, and the field's durability may turn on whether future scholarship can successfully articulate what they are. Recent scholarship expressing various forms of high-level skepticism about analogies between Law of the Territories and Indian law validates the need for a closer inspection of these supposed connections and, ultimately, the notion that the Law of the Territories makes sense as a discrete field even on very different terms.¹²²

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B. Avoiding the Formalist Conference Trap

Scholars must also be vigilant about the Law of the Territories' troubling inclination to prioritize doctrinal consistency and theoretical coherence over the real-world legal problems of the communities it describes. At a minimum, scholars should actively interrogate the ways in which excessive formalism has led to an outsized focus on cohering judicial doctrine around whether or not the Constitution "follows the flag." Echoing similar problems that once plagued the field now known as federal Indian law, today's Law of the Territories scholarship exhibits a troubling inclination to privilege the pursuit of top-down, judicially imposed coherence for its own sake. In constructing debates that pit "territorial exceptionalism" against constitutional uniformity, the emerging field approaches the *Insular Cases* on strikingly formalistic terms—at the expense of meeting the territories' actual legal problems as they are experienced and articulated on the ground. As Phillip P. Frickey observed of Indian law scholarship before the 1990s, such formalistic and ungrounded doctrinalism invariably leads to systemic problems by encouraging judges to interpose familiar but ill-fitting legal principles from other contexts.¹²³

Yet for the Law of the Territories, the problem is much more fundamental than insufficient realism or an overemphasis on courts. What is most revealing about this emerging field's practical disconnects is the widespread recognition that overturning or repurposing the *Insular Cases* may not have *any* immediately discernible effect on the actual substance of the colonial relationships at stake.¹²⁴ Nevertheless, the scholarship remains focused on overwriting an incoherent area of *Plessy*-era doctrine whose continued survival "devalues the importance of constitutional rights" writ large.¹²⁵ This framing encourages engagement with the *Insular Cases* because of the potential "momentous symbolic significance" of judicial interventions that would "bring attention to the plight of the territories," even if they do little to ameliorate it.¹²⁶

118 The analogy is also intuitive to the extent that those who see the Law of the Territories as ...

119 The relationship between federal Indian law and U.S. (https://www.fedindianlaw.org/scholarly-atten...

120 Eric Ruben & Joseph Blocher, *You Can Lead a Horse to Water: Heller and the Future of Second Amendm...*

121 See generally Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV...

122 See, e.g., Charles & Fuentes-Rohwer, *supra* note 2, at 163-66.

123 See, e.g., Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of...*

124 See Ponsa-Kraus, *supra* note 94, at 2538-39 ("[I]t is true that overruling the *Insular Cases* would...

125 Steve Vladeck, *American Samoans Are the Latest Victims of These Ignorant Supreme Court Rulings*, MS...

126 Ponsa-Kraus, *supra* note 94, at 2539.

Accordingly, the Law of the Territories appears headed for a coherence trap: traditional theoretical questions—such as which Supreme Court decisions make up “the *Insular Cases*,” how many discrete points of law they implicate, and whether the “standard account” of their meaning is correct—risk crowding out more urgent questions that are responsive to lived realities. Indeed, framing the field’s central object as helping judges to fashion more logically satisfying doctrine presupposes that coherence and symmetry are either prior to or more important than realizing the self-
 unduly narrow vision for the possibility of reform—and for good reason. Even if we accept the firm consensus that the existing doctrinal and political status quo is fundamentally untenable, the *Insular Cases* now undergird 125 years of divergent legal and institutional relationships at every level of government in various locales across the world. Lighting a way out (or, realistically, many ways out) will require an accounting of the real-world institutional dynamics that shape and constrain the territories’ prospects for meaningful choice and negotiation—dynamics that inevitably determine the possibility of future consent-based relationships.

This Collection can help us imagine what it might look like for the Law of the Territories to unyoke itself from the abstract formalist inclinations that once plagued federal Indian law. It contains work that strives to meet the pressing legal puzzles of the territories at sites of real-world harm and injustice. It highlights the value in bringing closer to the emerging field’s theoretical center underappreciated scholarship that has pushed beyond the uncertain doctrinal meaning of the *Insular Cases* to help us understand a wider range of institutional actors shaping the territories’ heterogeneous legal relationships to the metropole. This work is concretely valuable whether or not we view the Law of the Territories as its own field. Notable examples include Andrew Hammond’s *Territorial Exceptionalism and the American Welfare State*,¹²⁷ Tom C.W. Lin’s *Americans Almost and Forgotten*,¹²⁸ and Line-Noue Memea Kruse’s *The Pacific Insular Case of American Sāmoa: Land Rights and Law in Unincorporated US Territories*.¹²⁹ There is also great promise in the work of newer scholars like Emmanuel Arnaud¹³⁰ and Cori Alonso-Yoder,¹³¹ who have illuminated evolving sites of power in federal-territorial relationships that affect matters of enforcement in criminal prosecutions and in immigration law and policy. That work pushes us not only to look outside the “judicial sphere” to other branches of the federal government,¹³² but also to look to territorial institutions and operational problems that are intimately bound up with, if not determinative of, the territories’ actual functional autonomy.¹³³

The takeaway from this Essay surely is not that scholars ought to put down the pen altogether on the *Insular Cases*, their nakedly racist underpinnings, or even doctrinal engagement with them in judicial spaces. To the contrary, the nascent Law of the Territories needs more and better work about judicial engagement with the *Insular Cases* and the many possible universes that might result from upending them. Indeed, many of those works discussed here as representing broader and more positive scholarly trends have expanded the conversation even while continuing to comment on the *Insular Cases*. There is a place for scholarship that repeats or reemphasizes well-traveled critiques, but that work becomes counterproductive when it marginalizes conversations that help make sense of the territories’ mired legal condition in all its complexity, a task already impeded by the glaring absence of Indigenous perspectives and authorship.

¹²⁷ See generally Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH....

¹²⁸ See generally Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249 (2019) (explo...

¹²⁹ See generally LINE-NOUE MEMEA KRUSE, *THE PACIFIC INSULAR CASE OF AMERICAN SĀMOA: LAND RIGHTS AND ...*

¹³⁰ See, e.g., Emmanuel Arnaud, *Colonizing by Contract*, 124 COLUM. L. REV. 2239, 2239-52 (2024).

¹³¹ See, e.g., Cori Alonso-Yoder, *Imperialist Immigration Reform*, 91 FORDHAM L. REV. 1623, 1625-43 (20...

¹³² See Ramos, *supra* note 58, at 31-32.

¹³³ The contributions discussed in this paragraph are not the only examples of work that exhibit this ...

Finally, scholars should explicitly hold up the contemporary Law of the Territories against largely forgotten nineteenth-century academic commentaries that were published under that very same heading. Only one contemporary scholar has observed that this is not the first time “the Law of the Territories” has surfaced as a topic of interest in American legal thought.¹³⁴ In the 1850s and 1860s—several decades before the *Insular Cases* and the advent of the modern law journal—the Law of the Territories was an academic heading that housed some of the deepest and most fundamental questions about state formation, the nature of the constitutional community, and the complex relationship of territorial sovereignty to political membership in circumscribing the powers of the federal government. Indeed, the nineteenth-century Law of the Territories monikered what would soon prove itself to be the weightiest constitutional debate of its time.

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In a series of essays fashioned into an 1859 treatise titled *The Law of the Territories*, Sydney George Fisher, a Philadelphia lawyer and popular essayist, employed the term to designate the manner in which the federal government used its “plenary” power over its territories—and its power to acquire new territory in the first instance. Fisher paid specific attention to the uncertain constitutionality of that power and noted that it formed the backdrop to some of the most fundamental contestations over the Constitution’s scope, structure, and meaning. These contestations were present at the Founding and would soon precipitate the U.S. Civil War.¹³⁵ Other contemporary commentators employed the term in much the same way.¹³⁶ Fisher would formulate many of its component questions in terms that are familiar to contemporary scholars: for example, whether there exists a “plenary power over the territories” and whether “principles of the Constitution . . . dwell under the flag.”¹³⁷ But it viewed those questions as asking something quite different than whether and on what terms the people residing in those territories could access formal constitutional equality. Rather, to Fisher and his contemporaries, the Law of the Territories was a broader proving ground for the contested nature of the constitutional community, the formation of the state, and the relationship of territorial sovereignty to political membership in circumscribing the powers of the federal government.

The material disputes of the time largely concerned the federal power to outlaw slavery in U.S. territories—the aim of the Missouri Compromise before the Supreme Court declared it unconstitutional.¹³⁸ The constitutional liminality of the territories was central to these disputes not simply because it shed light on the colonial character of people residing there, but because it forced confrontation on antecedent questions: To what extent should the Supreme Court allow republican principles like “equality before the law” to bend in order to accommodate the “noble work of building up an empire of political liberty for the great Saxon race,” or to prevent the prize of native expropriation, won by “bold and hardy men,” from being “cultivated . . . by and for the Negro?”¹³⁹ Would “invok[ing] the ancient and long-exercised, but now denied and derided [plenary] power of Congress over the Territories” create a “dangerous weapon” imperiling the “equal rights” of all citizens—in this case, the equal right to property in chattel slaves?¹⁴⁰ More fundamentally, would the Constitution be understood primarily as a “union of republican states” or as a document that guarantees that “the people have equal rights?”¹⁴¹ How should the Constitution conceive of the relationship between rights and citizenship? And to the extent rights may be located in citizenship, are “the rights of American citizens in American Territories less worthy of respect?”¹⁴²

134 See Padilla-Babilonia, *supra* note 2, at 992 n.346.

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135 See FISHER, *supra* note 6, at 51; see generally *id.* (discussing factors that the author predicted m...

136 See generally JOEL PARKER, PERSONAL LIBERTY LAWS, (STATUTES OF MASSACHUSETTS), AND SLAVERY IN THE ...

137 FISHER, *supra* note 6, at 51, 53.

138 See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451-53 (1857).

139 Fisher, *supra* note 6, at 27, 49.

140 *Id.* at 31-32.

141 *Id.* at 32, 48.

142 *Id.* at 58.

143 60 U.S. (19 How.) 393 (1857).

144 *Id.* at 438-52.

146 FISHER, *supra* note 6, at 51; see, e.g., Booth, *supra* note 145, at 19 & n.94; Graber, *supra* note 14...

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These questions that were thought to comprise the Law of the Territories in the 1850s came to a head in *Dred Scott v. Sandford*.¹⁴³ There, the U.S. Supreme Court ultimately declared the Missouri Compromise unconstitutional on the ground that the federal government lacked a plenary power to restrict slavery in the territories.¹⁴⁴ Ironically, Fisher's troubling 1859 volume maintains contemporary relevance in legal scholarship that is not in conversation with the emerging Law of the Territories.¹⁴⁵ It has been cited, instead, in connection with work aimed at the slavery and race implications of make a distinction between [the Southern people] and the North in regard to the national domain, then the great republican principle of equality before the law would be violated."¹⁴⁶ This is, of course, a reminder that *Dred Scott* itself—contrary to what it stands for in popular memory—is as much a case about the federal government's uncertain powers over people in U.S. territories as it is about the racial boundaries of citizenship. More than that, it is a reminder that *Dred Scott* draws us back to the dynamic but inextricable link that has always existed between questions of territorial sovereignty and questions of political sovereignty, both within and outside the geographic United States. While *Dred Scott's* most controversial citizenship holding would be overwritten by the Fourteenth Amendment, its territorial-sovereignty puzzles are little more resolved today than they were 150 years ago. And those sovereignty-membership dilemmas are likely to endure regardless of whether the Supreme Court ceremoniously overturns the *Insular Cases* in the manner that most litigants and academics have so far urged.

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And so we should ask: Why is it that this antebellum conversation about the uncertain legal condition of territories in early America continues to live entirely outside the emerging concept of the Law of the Territories? And how is it that the constitutional significance of federal power over territory has waxed and waned from the forefront of public-law debate to near-total invisibility—so much so that today's Law of the Territories cannot yet recognize itself in one of the most consequential public-law debates in American history?

At present, it remains unclear whether and to what extent the Law of the Territories would regard the uncertainties surrounding the United States's pre-1898 territorial acquisitions as directly relevant to contemporary study of the relationship between the federal government and the five populated unincorporated territories formally under U.S. rule today. It is difficult to understand why the emerging Law of the Territories has not yet forced meaningful engagement with the sizable contemporary scholarship that considers the subordinate condition of western territorial subjects in early continental America. Consider the most recent book by Judge Jeffrey S. Sutton, *Who Decides?*, a work that expounds rather eloquently the old-world colonial existence of early U.S. territories and their disenfranchisement—but only from the perspective of the settler state. To Sutton, the territories' experience as colonies subject to a supreme plenary power “echoe[s] the experiences of the first thirteen states” that fought to throw off the yoke of British colonial subjectship and eventually adopt their own Constitution under one federal sovereignty:

147 Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* 102-03 (...)

Noblesse oblige went only so far in the British Empire. Parliament did not treat the residents of its colonies in the same way it treated British citizens, often failing to heed their complaints, always denying them a way to protect their interests: the right to vote. [The right to vote] of course was the central complaint that triggered the Revolution, a lack of representation of the American colonies in Parliament and “the long train of abuses and usurpations” that resulted. A comparable problem arose in the American Empire—often ignored, often frustrated by a lack of representation in the national government, a lack of local authority over their own affairs, and a lack of local understanding by the federal appointed officials who ruled them.¹⁴⁷

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(<https://pdf.campbell.org/essays/territories/territories.html>) that this condition still holds true for several million Americans today. Indeed, this book, which is ostensibly about pluralism in the American legal tradition, fails to acknowledge that the United States still has territories, let alone that their present constitutional puzzles might be relevant to our understanding of these long-running dilemmas about the nature and scope of the constitutional community and the classes of persons entitled to invoke the document’s limitations on governmental power. That this incongruence can go unnoticed is evidence enough that the emerging Law of the Territories currently presupposes that the core legal questions facing places like Puerto Rico belong to specific doctrinal issues born of a discrete historical anomaly. Forcing critical engagement between modes of territorial relationship dating back to the founding and new modes blossoming around the globe today would, if nothing else, expose the enduring relevance of colonial dynamics in the formation of the American political experiment as we understand it today. And it would open within the emerging Law of the Territories new space to explore how the imperatives of territorial expansion and Native conquest have shaped “internal” constitutional reality for settler-insiders as much as they have shaped the “external” subjugation of colonized places and peoples.

Whether it proceeds under the banner of “the Law of the Territories” or not, there is clearly unrealized possibility in today’s conversation about overseas imperialism in the U.S. constitutional order. The time is ripe to recover the lost continuities between today’s Law of the Territories and that term’s past expression, even if only to appreciate the former’s present limitations. In addition to seeking out today’s overseas colonies’ distinctive and consequential legal questions where they matter on the ground, scholars in this area should seek an expansive account of how this specific set of imperial territories connects more generally to the construction of American governance and state formation across time and space. Should it exist, the field of the Law of the Territories ought to facilitate comprehensive study about the differential structures of governance across American territory. It should explore the enduring foundational questions about how American federalism and statecraft emerged over time, giving shape to what is presently imagined as the “internal” political community and the “external” peoples over which it exercises power. Ironically, then, it may be that only by returning to its own distant past can this “emerging field” raise questions of lasting significance about the multiplicity of peoples, principles, and institutions that have forged the constitutional system we have today. At a minimum, it is an inviting starting point for imagining how the current wave of academic interest in U.S. territories could unwind the existing imperialism of categories to transform the study of American public law.

CONCLUSION

Although the future of this under-interrogated “emerging field” dubbed the Law of the Territories is highly uncertain, it is clear that significant interventions are necessary. If scholarship on the U.S. territories is to contribute meaningfully to key debates in American legal thought—particularly those surrounding self-government, indigeneity, race, citizenship, and borders—it must critically reassess its current trajectory and realign itself both with more expansive principles and closer engagement with the realities of the territories themselves.

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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, 35–36 (2023).

Tom C.W. Lin, *Americans, Beyond States and Territories*, 107 MINN. L. REV. 1183, 1187 (2023).

Timothy M. Ravich, *Cabotage and Deregulatory Anomalies*, 87 J. AIR L. & COM. 571, 573 (2022).

Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2401 (2022).

Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 Yale L.J. 2449, 2541 (2022).

Anthony M. Ciolli, *Territorial Constitutional Law*, 58 Idaho L. Rev. 206, 209 (2022).

James T. Campbell, *Aurelius’s Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and “The Law of the Territories,”* 131 Yale L.J. 2542, 2642–43 (2022).

Introduction to the Special Issue on the Law of the Territories, 131 Yale L.J. i, i (2022).

Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 587 (2022).

Anthony M. Ciolli, *Territorial Paternalism*, 40 MISS. COLL. L. REV. 103, 106 (2022).

Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2660–63 (2022).

Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1718 (2017).

Introduction, 130 HARV. L. REV. 1617, 1626 (2017).

PRINT ARCHIVE (/archive) ANTHONY M. CIOLLI, *Microaggressions Against United States Territories and Their People*, 50 S.U. L. REV. 54, 60 (2022).

(<https://papers.ssrn.com/sol3/cf.cfm?cfdid=1844444>)

MASTHEAD (/masthead) ABOUT (/about-the-yale-law-journal) SUBMISSIONS (/submissions) CONTACT (/contact)

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).

(/pdf/CampbellYLJForumEssay_bv3bid4q.pdf)

(<mailto:Justin.Burnworth@pace.edu>) Justin Burnworth, *The Curious Case of Justice Neil Gorsuch*, 44 PACE L. REV. 1, 31 (2023).

(<mailto:Justin.Burnworth@pace.edu>)

(<mailto:Justin.Burnworth@pace.edu>)

(<mailto:Justin.Burnworth@pace.edu>) The Law of the Territories: Anthony M. Ciolli, *Representation of United States Territories on the Federal Courts of Appeals*, 98 N.Y.U. L. REV. ONLINE 320, 320 (2023).

(<mailto:Justin.Burnworth@pace.edu>)

(<mailto:Justin.Burnworth@pace.edu>) Nazune Menka, *Native Nation Resistance to the Machinations of Settler Colonial Democracy*, 59 HARV. C.R.-C.L. L. REV. 141, 142 (2024).

(<mailto:Justin.Burnworth@pace.edu>)

(<mailto:Justin.Burnworth@pace.edu>) &body=https://www.yalelawjournal.org/forum/the-

(<mailto:Justin.Burnworth@pace.edu>) Rachel Valentina Sommers, *Introduction to the Special Issue on the Law of the Territories*, 131 YALE L.J. i, i-iii (2022).

(<mailto:Justin.Burnworth@pace.edu>)

(<mailto:Justin.Burnworth@pace.edu>)

(<mailto:Justin.Burnworth@pace.edu>) should-it-exist Cori Alonso-Yoder, *Plenary Power: Teaching the Immigration Law of the Territories*, STETSON L. REV. (forthcoming) (manuscript at 3).

Emmanuel Arnaud, *Colonizing by Contract*, 125 COLUM. L. REV. 2239, 2248 (2024).

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