Against the Law

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In every moment lived as a U.S. imperial subject, the past acts upon the present in ways that determine whether the lights come on or not, and why. Whether there is food. Whether one can pay for it. Whether one lives or dies. This presence of the past across the landscapes of U.S. empire is the result of complex intersections of memory, history, and the law. This essay is an attempt to understand some of these intersections, and in particular, to describe ways in which the law transports the unsettled past into the present in U.S.-dominated spaces in the Pacific.

In U.S. law, the concept of *stare decisis,* valuing precedent, ensures continuity, a cohesive system of laws. At the same time, valuing precedent means that law serves as a vehicle by which history—not just of the law, but of society as a whole—reaches the now. One of the effects of this principle, I argue, has been that a body of laws that validated the ownership of human beings as chattel, even after that principle has been disrupted, minimized, disappeared, has continued to have consequences across the landscape of U.S. imperialism. Here, I want to investigate some of the profound implications, and limitations, associated with the fact that U.S. law continues to serve as a determining force in Guam (Guåhan) in the long the aftermath of the Spanish-American War. I engage this subject from the perspective of a resident of another imperialized space—Puerto Rico (Borikén)—classified by the federal government as an "unincorporated territory," with the implications of that status for sovereignty and citizenship.

The case of *Davis v. Guam,* which Arnold "Dave" Davis initiated in 2017, focused on the voting rights of the CHamoru. Cases related to voting rights are important because they point to ways in which a given population constitutes, *or is able to*

constitute, power. In looking closely at this case and related cases in parts of the Pacific region where U.S. law is dominant, I argue that law created with the intention of mitigating the effects of legal slavery in the United States—specifically the Fourteenth and Fifteenth Amendments—when applied to territories claimed by the United States, as it has been in subsequent legal decisions related to Guam, Hawai'i, and American Sāmoa, creates a straitjacket limiting the rights of indigenous people. These constitutional amendments were two of the "Reconstruction Amendments," incorporated into U.S. law in the aftermath of the Civil War in an attempt to protect the rights of formerly enslaved people. With their careful, race-neutral language, these amendments bore the heavy burden of pushing back against an entire order that had evolved from the law's earlier sanctioning of human beings as property, including the horrific violence required to maintain it. As Supreme Court Justice Ketanji Brown Jackson pointed out in oral arguments in the case of *Merrill v. Milligan*, the Fifteenth Amendment was all about making literal amends for slavery based on race and attempting to turn back the pernicious effects of white supremacy.[70] However, it used race-neutral language instead of specifically identifying the group that had been harmed. This set up the Fifteenth Amendment as a tool that could be used equally by whites to assert their "equality," an act that, as I will show, has had the effect of further disenfranchising marginalized citizens of U.S. territories.

There exists an extensive body of scholarship addressing, from various angles, the ways in which U.S. law has carried forward traces, both large and small, of the originary notion of property as a legal category that could include human beings in the context of U.S. society.[71] My focus in this essay is not on the history of the law in a U.S.

[70] Now *Allen v. Milligan,* 599 U.S. 1 (2023). Oral arguments in the case took place on October 4, 2022.

[71] Two examples include Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Norton, 2018), and Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (New York: The New Press, [2010] 2020).

domestic context, however, or on how a particular body of laws and its evolutions continue to impact U.S. society per se. I am interested, rather, in what happens to the discourse and exercise of rights when certain laws that were designed to address civic dangers related to race in the United States are applied *outside of* the United States in places that became U.S. territories through imperial aggression.[72] In what follows, I will explore a narrow slice of these much larger conversations about race, indigeneity, history, imperialism, and the law through a close reading of *Davis v. Guam,* a case that Michael Lujan Bevaqua and Elizabeth Ua Ceallaigh Bowman have succinctly described as "another example of federal interference in local affairs" (138),[73] as well as cases cited in that decision that provide the foundation for it. Although *Davis v. Guam* has received little sustained scholarly analysis to date, it is important not only because it illuminates the issue of how U.S. law relates to the specific context of Guam, but also because it sheds light on the general problematic of the U.S. Constitution as applied in imperial contexts.

The *otherness* contained in the Constitution consists of two groups: those who are sovereign and those that the Constitution identifies as enslaved, then formerly enslaved. The Supreme Court decision in *Morton v. Mancari,* which relates to Native Americans, articulates the distinction between these groups. It states that Indians are not a "a discrete racial group"—in the situation in question in this case, race was not the basis of the preferential hiring, but rather, "members of a quasi-sovereign tribal entities whose

[72] This subject intersects the extensive body of scholarship about the Insular Cases, a series of Supreme Court cases that address issues related to U.S. territories acquired through imperial expansion. The Insular cases were, to put it bluntly, intended to justify US colonial domination on the basis of racism. See, for example, Christina Duffy Ponsa-Kraus, "The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories." *Yale Law Journal* 131, no. 8 (June 2022): 2449–2758.

[73] Michael Lujan Bevacqua and Elizabeth Ua Ceallaigh Bowman, "Guam." *The Contemporary Pacific* 30, no. 1 (2018): 136–144.

lives and activities are governed by the BIA [Bureau of Indian Affairs] in a unique fashion" were favored. The Justices therefore decided that the issue at hand was not a *racial* issue, but rather an issue of representation based on history and sovereignty that transcended definitions of race as they have developed in the United States. In other words, indigenous people living within the boundaries of the continental United States, including Alaska, are not sovereign because they are a separate race; instead, they are sovereign because they are imagined by the federal government as existing outside U.S.-based concepts of race. As strange as this tenet may be, the Court has not extended the status of being *beyond race* to Pacific Islanders or Puerto Ricans—because their societies and cultures have never been construed as sovereign under U.S. law. That is, the Constitution does not contemplate the governability of peoples perceived as non-sovereign *and also* not connected to the legal category of property within the United States. In other words, it does not imagine or provide for the existence of non-sovereign groups that have come under the jurisdiction of the United States through imperial acts/imperial violence, such as the populations of Guam, Hawai'i, the Northern Marianas, and Puerto Rico.[74] Through the application of the law, I argue, U.S.-based concepts of racial difference, and specifically the U.S. style of racism that has emerged

[74] As a *Harvard Law Review* "Comment" describing the case noted,

> [I]n Davis v. Guam, the Ninth Circuit held that a Guam statute restricting the right to vote in a plebiscite to "Native Inhabitants of Guam" violated the Fifteenth Amendment by using ancestry as a proxy for race. In its reasoning, the court claimed to leave unresolved whether, in nonvoting contexts, "Native Inhabitants of Guam" constitutes a political classification rather than a racial one. Political status would not only insulate policies that preference Guam's indigenous population from the strict scrutiny "applied to race-based affirmative action laws," but could also grant Guam wider self-governance over its indigenous peoples by using ancestry-based classifications as policy tools. However, the court's logic itself precludes that possibility by implying that political status is inappropriate in Guam's context. (693)

"Constitutional Law — Territories — Ninth Circuit Holds That Guam's Plebiscite Law Violates Fifteenth Amendment — *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019)." *Harvard Law Review* 133, no. 2 (December 2019): 683–690.

from legalized slavery, have gone on to shape life in the territories that the United States claimed during the course of its imperial expansion. As a result, in the context of U.S. empire, the legal discourse of rights *itself* deforms the exercise of rights on the part of imperial subjects.[75]

The origins of the controversy in the case of *Davis v. Guam* are rooted the Guam government's efforts to determine the will of the people in terms of their political status vis-à-vis the United States. The principle of self-determination is a cornerstone of international law, one that has been codified in United Nations Charter, for example, yet it has proved extremely challenging to put into effect in imperial contexts. After Guam's Commission on Self-Determination was created in 1980 with the goal of determining the will of the people of Guam via a plebiscite,[76] a majority in 1982 voted for

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[75] Referencing *United States v. Guam* (2017), Rose Cuison Villazor makes a key point that applies as well to *Davis v. Guam*:

> …[A] federal court would once again need to examine where the rights of indigenous peoples in the U.S. territories fit within the broader principles of equal protection and individual rights that are guaranteed under federal statutes and the U.S. Constitution. Determining how to resolve the tension between these two seemingly competing rights in the U.S. territorial context is not easy. Both implicate compelling claims that raise equality and social justice issues. On the one hand, the history of race discrimination underscores the importance of using equal protection principles to shield individuals against government oppression in property. On the other hand, the ongoing efforts to decolonize the U.S. territories and address the harms of imperialism demonstrate the need to protect the rights of indigenous groups. (128)

See "Problematizing the Protection of Culture and the Insular Cases," *Harvard Law Review Forum* 131, no. 6 (2018): 127–135. Response to *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*.

[76] See https://www.guampedia.com/commission-on-self-determination/. A 1960 United Nations document, the "Declaration on the Granting of Independence to Colonial Countries and People," promoted self-determination for colonized places "whose people have not attained a full measure of self government." The 1960 UN declaration regarding self-determination was followed by Resolution 1541, which spelled out the options for achieving self-government: free association with an independent state based on the people's free choice to do so; integration with a state; or being a sovereign independent state. Equality was the clear aim of these options, from the UN's stated perspective.

commonwealth status (73%), and accordingly, during the late 1980s and the 1990s, Guam repeatedly submitted legislation to become a commonwealth.[77] However, the U.S. government argued that Guam's bill "included incompatible aspects of independence, free association, commonwealth and statehood."[78] In 1997, the legislature of Guam created the Commission on Decolonization, intended to amplify the work of the Commission on Self-Determination. Although it "was inactive for several years during the 2000s," the Commission on Decolonization was reactivated by Governor Edward Calvo in 2011[79] to act "in the interest of the will of the people of Guam, desirous to end colonial discrimination and address long-standing injustice of [the CHamoru] people."[80] The focus of the Commission on Decolonization was "to educate the people of Guam of the various political status options available, should Guam be allowed to pursue a change in its political status and relationship with the United States,"[81] but more than this, it was meant to "determine the intent of the native inhabitants of Guam as to what they desire for their future political relationship or status with the US."[82]

In 2000, the Guam legislature created the Guam Decolonization Registry with the goal of registering all residents of Guam who conformed to the definition of a citizen of Guam as per the original 1950 Guam Organic Act, which defined those who thereby had the right to become a U.S. citizen:

> Guam Organic Act conferred U.S. citizenship on (1) all individuals who, as of April 11, 1899, were inhabitants of Guam and either were Spanish subjects or had been born on the island; (2) all individuals born on Guam on or after April

[77] Via the Guam Commonwealth Act.

[78] See https://www.guampedia.com/guam-commonwealth-act/.

[79] See https://www.guampedia.com/commission-on-decolonization/.

[80] *Davis v. Guam,* Court of Appeals Decision, 9.

[81] See https://www.guampedia.com/commission-on-decolonization/.

[82] Ibid.

> 11, 1899, who were subject to the jurisdiction of the United States; and (3) the descendants of those individuals.[83]

The vast majority of these now-U.S. citizens (approximately 98.6%) were CHamoru.[84] Subsequently,

> [I]n 2000, the Guam legislature also passed a law calling for a plebiscite to determine the "political status" preference of the native inhabitants of Guam, those who were recorded in the Registry. The 1997 Plebiscite Law also called for a "political status plebiscite"during the next primary election, in which voters would be asked:
>
> In recognition of your right to self-determination, which of the following political status options do you favor?
>
> 1. Independence
>
> 2. Free Association
>
> 3. Statehood

Moreover,

[83] See 48 U.S.C. 1421l; Pub. L. No. 630, ch. 512,

§ 4(a), 64 Stat. 384 (1950) (repealed 1952). The Organic Act's citizenship provisions were in effect only until 1952, when Congress repealed and replaced them with the Immigration and Nationality Act of 1952, 8 U.S.C. 1407. See Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 279-280 (1952); Appellee's Br. 6-8.

[84] See John M. Gore, Acting Assistant Attorney General, and Diana K. Flynn and Dayna J. Zolle, Attorneys, Department of Justice, Civil Rights Division, Appellate Section – rfk 3718, "Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee and Urging Affirmance" in *Davis v. Guam*. https://www.justice.gov/crt/case-document/file/1015166/download/.

> Voting in the plebiscite was to be limited to "Chamorro [sic] People," defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no affirmative steps to preserve or acquire foreign nationality."… The Commission on Decolonization was then directed to "transmit [the results of the plebiscite] to the President and Congress of the United States and the Secretary General of the United Nations."[85]

These efforts to determine the political will of the CHamoru created controversy among the usual suspects. When Arnold "Dave" Davis, a white ex-military resident of Guam, attempted to register with the Decolonization Registry and thus for the plebiscite, he was denied. Consequently, in 2011, Davis sued the government of Guam in local court for discrimination based on the Fourteenth and Fifteenth Amendments,[86] after approaching the Department of Justice under President Obama and being denied. The local judge dismissed Davis's suit for "lack of standing and ripeness" because no plebiscite was on the calendar. ("Standing," a prerequisite for bringing a lawsuit, requires that a person or entity has suffered a real, concrete injury, or an "injury in fact," while "ripeness" refers to there being an actual controversy to decide in that moment.) Davis appealed this decision to the Ninth Circuit Court, the federal court that hears cases related to Guam, the Northern Mariana Islands, and Hawai'i, as well as Alaska and other western U.S. states. This time the judge found that Davis's rights were, in fact, currently being infringed.

The decision of the Ninth Circuit Court provides a comprehensive overview of the legal stakes in this case:

> The purpose of the Commission on Decolonization was to "ascertain the desire of the Chamorro [sic] people of Guam as to their future political relationship with

[85] *Davis v. Guam,* Court of Appeals Decision (2019), 10.

[86] Ibid., 14–15.

> the United States."...It was charged with writing position papers on the political status options for Guam and with conducting a public information campaign based on those papers.

The plebiscite could not go forward, however, because Dave Davis sued the government of Guam for disenfranchising him.[87]

As it adjudicates Guam's efforts to parse and respond to its colonial status, *Davis v. Guam* illuminates a paradox of the U.S. as a republic in its exercise of imperial power.[88] Dave Davis's claim that he was being discriminated against was based in the Fourteenth and Fifteenth Amendments of the U.S. Constitution; as noted above, these apply to Guam via the U.S.'s Organic Act of Guam (1950, since amended), which serves

[87] The following is from the Court of Appeals Decision in *Davis v. Guam*:

> Congress has provided that the Fifteenth Amendment "shall have the same force and effect [in Guam] as in the United States." 48 U.S.C. § 1421b(u); *accord Davis II*, 785 F.3d at 1314 n.2. That Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. The Fifteenth Amendment is "comprehensive in reach," and applies to "any election in which public issues are decided or public officials selected." *Rice*, 528 U.S. at 512, 523, 120 S.Ct. 1044 (quoting *Terry v. Adams*, 345 U.S. 461, 468, 73 S.Ct. 809, 97 L.Ed. 1152 (1953)).
>
> Guam argues that the Fifteenth Amendment is inapplicable to the plebiscite because that vote will not *decide* a public issue. It notes that the 2000 Plebiscite Law requires Guam to transmit the results of the plebiscite to Congress, the President, and the United Nations but will not, itself, create any change in the political status of the Territory. That is so. But, despite its limited immediate impact, the results of the planned plebiscite commit the Guam government to take specified actions and thereby constitute a decision on a public issue for Fifteenth Amendment purposes. (14–15)

[88] The case was denied certiorari by the U.S. Supreme Court on May 5, 2020. See https://www.scotusblog.com/case-files/cases/guam-v-davis/

as the basis of Guam's government, a government that "has only those powers conferred upon it by Congress."[89] (Guam's Organic Act states that "the second sentence of section 1 of the Fourteenth Amendment" and "the Fifteenth Amendment" apply to Guam.) The Organic Act contains a bill of rights that states, "No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied,"[90] and contains the provision that "the second sentence of section 1 of the Fourteenth Amendment" and "the Fifteenth Amendment" shall apply to Guam.[91] Therefore, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[92] These laws, written in the aftermath of the Civil War to protect formerly enslaved people from discrimination by whites, and applied to Guam by the United States' imperial government, provided the foundation of Davis's claim that in being prevented from voting in a plebiscite intended

[89] The original Guam Organic Act can be found here: https://www.loc.gov/law/help/statutes-at-large/81st-congress/session-2/c81s2ch512.pdf. Citations are from the amended Act (http://aceproject.org/ero-en/regions/pacific/GU/guam-the-organic-act-of-guam-and-related-federal/at_download/file). This reference is on p. 10).

[90] Ibid., 13.

[91] Ibid., 14–15.

[92] This is the language of the U.S. Constitution. It seems important to emphasize that the only way that the people of Guam obtained U.S. citizenship was through a walkout of Guam's Congress in 1949. This Congress had been established in 1917 by U.S.-appointed governor Roy Smith and was composed of "Chamorro men appointed by the governor, but their role in the governance of Guam was only advisory." The Guampedia site emphasizes that "[t]his did not, however, prevent Chamorros from utilizing the Congress as a platform to discuss civil rights, citizenship and grievances against the naval government." In setting up the Guam Congress, in fact, Smith had been responding to many petitions sent to the U.S. Congress by native Guamanians, "calling for self-government and citizenship." See https://www.guampedia.com/organic-act-of-guam/

to gauge the political will of a colonized people, his rights as a white "American" were being violated.[93] The racial elements here are nothing new; they are, rather, a reiteration of racial dynamics that date back to the Reconstruction-era United States. As Katherine Murray has pointed out,

> Guam was deemed an "unincorporated territory" on the basis that incorporating territories inhabited by "alien–races" would present difficulty for "Anglo–Saxon" society. Yet now that Guam is occupied by a significant number of settlers from the states, mainly officers in the military and their families, the United States is committed to ensuring absolute equality. Any efforts made by the Guam legislature to advance the political aspirations of its indigenous inhabitants have been struck down in the name of racial equality. This played out in *Davis*, where the Ninth Circuit struck down a nonbinding plebiscite on the basis that voting was a fundamental right that cannot be denied based on race and can only be limited by "citizenship, civil capacity, and residence."[94]

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[93] A political science analysis of the case (as distinct from a legal analysis) finds the following:

> Colonized demoi, such as Guam's Chamorro people, are widely considered to be owed self-determination.…This demotic bounding decision would "flow downstream," impacting non-members' individual rights, potentially including their right to vote.…But in *Davis v. Guam*, decisionmakers deemed Chamorro demotic interests irrelevant and individual voting rights inalienable. Voting rights thus "flowed upstream" unimpeded, obviating the possibility of Chamorro decolonization.

Aaron John Spitzer, "Approaching the Boundary Problem: Self-Determination, Inclusion, and the Unpuzzling of Transboundary Conflicts." *Journal of International Political Theory* 18, no. 2 (first published online, June 3, 2021). https://doi.org/10.1177/17550882211020386

[94] Katherine Murray, "America's Footnote: International Intervention Required to Decolonize Guam." *University of Miami Inter-American Law Review* 56, no. 1 (2024): 33–72, 70. https://repository.law.miami.edu/umialr/vol56/iss1/4.

Yet this moment is connected to a history of sovereignty and ethnic/racial difference that stretches back even farther than the Reconstruction Amendments, indeed to the origins of the U.S. Constitution itself, in particular the clause of that document known as the Territorial Clause (Article IV), which has formed the basis of the federal government's self-arrogated ability to make laws for Guam, Puerto Rico, and other "territories" it has claimed over the course of its imperial history, including the lands occupied by Native Americans on the North American continent that it came to dominate as a result of war and settler colonialism. The Territorial Clause, as well as the Constitution in general, make clear that the Constitution contemplates governing only two types of spaces: territories within the continent that were occupied by Native Americans, and states. Thomas Jefferson acknowledged this fact explicitly: "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union."[95]

It is critical to keep in mind that the Territorial Clause was written by the United States's founders specifically to account for Native American territories that they believed, and planned, the new nation would come to dominate and incorporate in the course of expansion *on the North American continent.* Even in these very early days of the Republic, Thomas Jefferson and others understood that expansion would be critical to securing the power of the new nation; likewise, they understood that Native Americans would need to be somehow subdued in order for this expansion to occur. Native American populations have *therefore* been incorporated into U.S. legal discourse as sovereign nations within a nation in certain keyways that are based not on "race," but on a right to self-governance based in a prior acknowledgment by the U.S. government of a sovereignty linked to "special treatment" that had long been granted Native American tribes, as the case of *Morton v. Mancari* makes clear. In this case, which

[95] See *DeLima v. Bidwell,* 182 US 1 (1901).

addresses a hiring privilege given to Native Americans in the Bureau of Indian Affairs, the Court stated that the privileges afforded Native Americans were *not "a 'racial' preference*, but instead, in this instance, 'an employment criterion reasonably designed to further the cause of Indian self-government' that was intended to help "[fulfill]…Congress's unique obligations towards the Indians," related to the Fifth Amendment.[96] The U.S. government could instantiate in law such connections between the U.S. republic and these still sovereign nations within a nation precisely because the Founders and the Constitution they created could envision a contiguity between what it meant to be "of the United States" and what it meant to be "Indian." However, they were unable to imagine a connection with "others" who were descended from Africans, or who were of a native group that they had not pictured as belonging to the "American" nation. This is evident in the fact that they did not class Black men as citizens of any nation, while Native Americans were citizens of their own nations. The hugely consequential problematic of U.S. federal laws in questions of citizenship and sovereignty in the Pacific came to the fore in *Fitisemanu v. United States* (2021), a case heard by the Tenth Circuit Court, the federal appeals court that covers 6 midwestern and western states.[97] At stake here was constitutional (not statutory) birthright citizenship for those born outside the boundaries of the United States—in other words, for *all those born in U.S. territories*. John Fitisemanu is an American Sāmoan who moved to Utah. American Sāmoans do not have birthright citizenship; if they move to the United States, as U.S. *nationals* (they are not citizens), they will not be able to vote or to serve on juries, among other rights enjoyed by citizens. Their passport will be stamped with the

[96] See *Morton v. Mancari,* 417 US 535 (1974).

[97] The case is identified as Nos. 20–4017 & 20–4019, appeal of 426 F. Supp. 3d 1155, argued before the Tenth Circuit on September 23, 2020.

information that they are, in a sense, "second-class."[98] (American Sāmoa came under the control of the United States when the U.S. "annexed" portions of it, and then essentially intimidated the local government into giving up control at the turn of the 19th century.) The government of American Sāmoa, positioning itself against Fitisemanu, argued that it opposed automatic birthright citizenship for American Sāmoans on the grounds that such citizenship could irreparably harm the unique culture of those islands. Instead of having its people be granted birthright citizenship, the government of American Sāmoa wanted to *enjoy self-determination* and have the latitude to decide what relationship American Sāmoans would have to the United States. The U.S. government argued the same side of the case, claiming that American Sāmoans are not American citizens by birth, and that they are therefore in a key aspect stateless *precisely because they want self-determination to decide what their relationship to the United States will be*.

Fitisemanu, by contrast, argued that *all* people born in territories have birthright citizenship because of the Fifteenth Amendment's guarantee of voting rights without respect to color. The U.S. Constitution gives everyone in the territories birthright citizenship, he stated; there is nothing in the Constitution to the contrary. This was the argument that had prevailed before the U.S. District Court for the District of Utah.

[98] The oral arguments before the Tenth Circuit are available here: https://www.courtlistener.com/audio/71814/fitisemanu-v-united-states/. See also Staff Consortium, "Case That Sees Dept. of Justice Denying Birthright Citizenship in U.S. Territories Likely to Be Appealed to Supreme Court," *Virgin Islands Consortium,* September 24, 2020, https://viconsortium.com/vi-us/virgin-islands-case-that-sees-dept-of-justice-denying-birthright-citizenship-u-s-territories-heard-wednesday-case-expected-to-be-appealed-to-supreme-court.

When the U.S. government appealed that decision to the Tenth Circuit Court, however, in the recording of oral arguments, one of the appeals judges can be heard insisting that if American Sāmoans were granted birthright citizenship in the United States, they would have *dual citizenship*. He seemed not to grasp the point that for American Sāmoans there cannot be dual citizenship, because *there is no other country.*[99] American Sāmoans, as part of a non-independent territory of the United States, have either U.S. citizenship or essentially no citizenship. In the end, the appeals court found in favor of the U.S. government.

This decision is relevant to the situation of Guam and Puerto Rico, in which citizenship is statutory. If the U.S. were to revoke statutory citizenship at any point, there is a theoretical possibility that these groups would be rendered stateless, and thereby, in certain crucial ways, rightless. At the same time, the deeper incursion of structures of imperial government into the daily lives and identities of people with their roots in these spaces—which are marginalized from the perspective of the imperial government—undeniably does have the potential to change deeply held cultural norms and values. Rights vis-à-vis the imperial government do seem to come with the erosion of traditional identities.

Issues of race and racism on the part of the imperial government underlie its denial of certain rights to those outside the boundaries of the imagined community of the nation, as in cases such as *Fitisemanu*. At the same time, U.S. legal structures (laws and jurisprudence) make a show of a kind of race neutrality that in fact functions, ironically, as a way to *enforce* historic inequities in imperial contexts, as we see in *Rice v. Cayetano*. This was a U.S. Supreme Court case focused on the voting rights of native Hawai‘ians that formed a key precedent for the decision in *Davis v. Guam,* and it helps to shed light on the issues and assumptions contained within the U.S. government’s

[99] Ibid.

position on the rights of people native to the territories. In 1999, Harold "Freddy" Rice, a Hawai'ian not of native ancestry (that is, ancestry not dating back to the era of the Hawai'ian monarchy)—someone not unlike Dave Davis—sued the government for the right to vote in the elections for the Board of Trustees of the Office of Hawaiian Affairs, arguing that the voting was too narrowly restricted, in violation of the Fourteenth Amendment's equal protection clause and the voting rights guaranteed by the Fifteenth Amendment. At issue, essentially, was the nature of the historic relationship between the U.S. government and native Hawai'ians. To what extent would the U.S. government listen to the descendants of the sovereign people whom it had overthrown, now that they had been ostensibly incorporated into the United States body politic?

In deciding the *Rice* case, Justice Anthony Kennedy referenced the history of the Fifteenth Amendment in the attempt to roll back racial discrimination in the nineteenth-century United States:

> .... the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race. *"[B]y the inherent power of the Amendment the word white disappeared"* from our voting laws, bringing those who had been excluded by reason of race within "the generic grant of suffrage made by the State."... The Court has acknowledged the Amendment's *mandate of neutrality* in straightforward terms: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is."[1]

Kennedy's fundamental idea here is that because "the word white disappeared," a "mandate of neutrality" ensued. However, his claim is blind to the fact that the concept of *whiteness* does not so easily vanish from laws that were, from their very origin,

[1] My italics. *Rice v. Cayetano,* 528 US 495 (2000), 15.

designed specifically to protect white interests. Although laws are powerful exemplars of what linguist J.L. Austin referred to as "speech acts," or utterances that *make* things happen, in this context the disappearing of a word is not enough to roll back race-based prejudice and discrimination.[2] This problem is reflected in the way that Kennedyemploys the word "qualifications." *What are these qualifications?* How are they being defined? How does a non-ancestral Hawai'ian share the same "qualifications" as an ancestral Hawai'ian? "Neutrality" is not a forceful weapon against historic acts of oppression and their ongoing social consequences, particularly when the term itself is used to presume an equality that does not exist.

Kennedy goes on to write, "Ancestry can be a proxy for race. It is that proxy here." He continues, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." This line betrays the heart of the argument.[3] The notion that "race" is a demeaning term that erodes a person's "worth" shows just how heavily invested the Court is in equating *race* with *Blackness*. And it indicates the way in which race-based slavery in the United States remains at the heart of that nation's legal constructions. That the Court characterizes race as a negative signifier diminishing human worth is a construction owing to the post-Emancipation revaluing of Black bodies/selves as essentially *worthless* once they were no longer vulnerable to the specific valuations of the slave system, as well as a tacit acknowledgement of the looming shadow of white supremacy.

Kennedy dismisses the importance of ancestry by suggesting that honoring it is literally disrespectful on the part of society. He lectures native Hawai'ians on where their dignity and worth *should* come from: "An inquiry into ancestral lines is not consistent

[2] J.L. Austin, *How to Do Things with Words* (Clarendon Press, 1975).

[3] *Rice v. Cayetano*, 18.

with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens." The concept of a collective based in ancestry is deemed suspect when measured against the collectivity established by the Constitution, as the Court focuses on an abstract source of belonging that the Justices in the majority argue facilitates the modern idea of the nation as an "imagined community," although they do not use that phrase, in which a shared historyis based on selective remembering.[4] This approach becomes clearer as the language of the decision unfolds:

> The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions.[5]

But what would be an appropriate response to a situation that was shaped by extralegal acts? By the annexation of a sovereign nation? By the *Requerimiento,* the unilateral possessory document that Spanish sailors with Columbus read aloud in their foreign tongue to people they met for the first time in Borikén, Ayiti, Guanahaní, or mumbled through thick beards from the decks of their ships upon dropping anchor? "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," Kennedy continues. "…Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The State's electoral restriction enacts a race-

[4] See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalisms* (Verso, 1983).

[5] *Rice v. Cayetano,* 528 US 495 (2000), 20.

based voting qualification."[6] This idea returns us to the problem associated with a central paradox of the Enlightenment—its proclamations of freedom and human dignity in the context of slavery and acts of deliberate oppression. This paradox has never been resolved in the United States, a republic whose founders were deeply and ironically invested in its intertwined ideals and oppressions. The nation's later imperial acts illustrate that the contradiction has also created untenable problems for those who have been declared lesser precisely because of their ancestry.

Kennedy goes on to address the difference under U.S. law between ancestral Hawai'ians and Native Americans:

> Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort. Of course, as we have established in a series of cases, *Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs*.[7]

Acknowledging the validity of legal demands based on race and ethnicity appears terrifying to the interests embodied by the Court in this context *because of white supremacy*; implicit in these readings of the law is the idea that race *will* be weaponized to create oppression. In the case brought by Freddy Rice, the only issue is that a non-native Hawai'ian is trying to get some of what native Hawai'ians have—thus, in the guise of neutrality and fairness, the white non-native person attempts to claim *everything*.

This is the arrogance and hubris that is instantiated in the law when it speaks of making whiteness disappear. In fact, in the imperial context, the law reproduces the hierarchies around which it was made *simply by claiming universal values*. We see also

[6] Ibid., 21.

[7] My italics. Ibid., 22.

that for the supposed effect of neutrality and fairness to take place, race must be quite carefully separated from *sovereignty.* This is because the acceptable basis of rights is not identity per se, but rather a particular history that the law will recognize based on what—as a result of its own history—is encoded there as valuable. And it is, specifically, *sovereignty that can be conceived as connected to the mythos of the United States as a nation* that is recognizable as valuable in this context.

Kennedy concludes, "The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."[8] But how is this premise always "demeaning"? Why does it seem frightening and wrong that some people in an imperial context, such as Freddy Rice and Dave Davis, are different in their "qualifications" than others? It's evident that the lens of imperialism would be more appropriate for the law's view of these situations than the notion of an imaginary race neutrality. The effect that imperialism has on legal and political discourse, and on lived reality, should be a factor shaping legal thought on these matters, but it is not. Instead, the same old language and thinking are trotted out in which those in power naively apply the Founders' half-realized ambitions stated as fact, along with the attempt to make amends for slavery, to all subsequent law, including that applying to the effects of U.S. imperial aggression. "Race cannot qualify some and disqualify others from full participation in our democracy," Kennedy states. "All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others."[9]

This is missing the point, however. Meanwhile, *affect* appears to be a euphemism here; *affect* is the watering down of a century of imperial violence. "Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the

[8] Ibid., 27.

[9] Ibid.

whole citizenry," Kennedy writes—but the Justices are getting ahead of themselves. There is no whole citizenry—the "imagined," or perhaps imaginary, community breaks down in the aftermath of imperial conquest. Referring to the white petitioner, Kennedy asserts—and thereby makes it law—that "Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote." And this is the essence of "white privilege"—that "we" should get to meddle in everything. Betraying a naive application of the sweeping rhetoric of the nation's founding ideals (based as they were on the most profound contradiction imaginable, that between slavery and freedom), Kennedy sweeps toward a grand conclusion:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. *As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose.*[10]

Simply presuming a shared purpose, however, does not cause it to exist. Kennedy ends with, "One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii."[11] Once again, the words of the opinion beg the question: *How* did the Constitution become the "heritage" of all Hawai'ians? We know the answer: via the forceful removal of their own prior governing body.

In the *Rice* case, not only the majority opinion in favor of Freddy Rice, but also the minority opinion in favor of the State of Hawai'i's special treatment of native Hawai'ians, evince a method of approaching U.S. territories gained via imperial strategies that is divorced from historical and lived realities. It is as if the Justices have

[10] My italics. Ibid, 27–28.

[11] Ibid., 28.

never left their chambers, as this patronizing citation makes clear: "As our cases have consistently recognized, Congress' plenary power over these peoples has been exercised time and again to implement a federal duty to provide native peoples with special 'care and protection.'"

In sum, *Rice* explicitly reflects the idea that "race" in U.S. society is a negative identifier. The rationale for this view lies in the ways that whites in the United States have used the concept of race to oppress and marginalize groups that they constructed as different from themselves via the tools of law and other social structures.[12] Indeed, the concept of race itself has a specific history and usage dating back to the white need to justify African slavery.[13] What U.S. law and legal discourse does recognize as, if not strictly positive, then permissible, is the discourse of sovereignty. In other words, current U.S. legal structures are set up not to recognize politicized identity in one sense (race), but to recognize it in another (sovereignty, albeit a particular type of sovereignty). Thus, identity connected to the individual body is denigrated, while identity related to a body *politic* is recognized.

As the decision in *Rice* makes clear, however, even as the Court recognizes a concept of identity based on sovereignty as a persuasive factor in granting distinct political rights including within the continental United States, by one means or another, it withholds sovereignty from those in the U.S. territories acquired through illegal

[12] The slave plantation is obviously a primal scene in this process. After the outlawing of slavery and the end of Radical Reconstruction, certain laws quickly began to emerge in the United States that took the place of legal slavery as a way to enforce social difference based on race, including laws related to segregation, vagrancy, convict leasing, and others.

[13] For a discussion of this issue, see "The Invention of Race," Center for Documentary Studies, Princeton University, https://exchange.prx.org/pieces/218457?m=false. For a longer conversation about these issues, see *Seeing White,* Season 2, https://sceneonradio.org/seeing-white/, Season Two, Scene One Radio. See also Ruth Wilson Gilmore, "Race and Globalization," Chapter 5 in *Abolition Geographies* (London: Verso, 2022), 107–131, and Kenton Card, dir., *Geographies of Racial Capitalism with Ruth Wilson Gilmore,* 2022. https://www.bfdnyc.com/.

overthrow of a previously recognized government, as in the case of Hawai'i, or through imperial expansion via war and negotiations with foreign powers, as in the case of Guam, Puerto Rico, and other U.S. territories. In *Rice,* the U.S. Supreme Court acknowledged that native Hawai'ians were aligned with "Native Americans" in the properness of their claims to sovereignty, yet dismissed indigeneity as a basis for voting rights.[14]

On a certain fundamental level, the U.S. Constitution cannot encompass imperialism; there simply are no provisions in U.S. law that define a relationship between the United States government and overseas territories acquired via imperial aggression, because the Constitution makes no provision for the existence within its scope of territories that are *not* administered in the same way as sovereign Native Americans. Arguably, then, the case is grounded not in an actual reading of the Constitution, but rather in racial animus as applied to the people of the territories based on what the justices themselves understood by the term *race*. This is ultimately the fatal flaw in these cases—they reflect *U.S.-based concepts of racial identity,* and they apply these concepts to contexts with radically different histories. When representatives of the U.S. government laid claim to the "territories"— previously either sovereign spaces or colonies—they apparently had only two legal options. They could have left these spaces alone, independent, or administered them in the only way conceived of by the Constitution, which would be to act, essentially and implicitly, *as if all places shared the specific social history of the United States vis-à-vis "otherness."*

As a result of this unacknowledged conglomeration of social influences, for the Supreme Court, treating "the early Hawaiians as a distinct people, commanding their

[14] Citing *Davis v. Guam,* Addie C. Rolnick has written, "Off the radar of Indigenous-rights and racial-justice lawyers, non-Native people and conservative voting-rights groups have successfully used *Rice* to undermine the rights of Indigenous peoples in the U.S. territories." See "Indigenous Subjects," *Yale Law Journal* 131, no. 8 (June 2022): 2390–2758. https://www.yalelawjournal.org/article/indigenous-subjects.

own recognition and respect" is not a good thing. Instead, the Court argues, it leads to a racist act that violates the Constitution. Reconstruction-era civil rights laws were intended to stop white Southerners from discriminating against newly free people of color, indeed people of color in general, in the South. The Southern states that had seceded were required to adopt the Fourteenth and Fifteenth Amendments as a condition for readmission to the union. Now, they are being used against native Pacific islanders attempting to cast off the oppressions of U.S. imperialism. "Ancestry can be a proxy for race," Justice Kennedy wrote. But is race really at issue here? Is race an appropriate way to think about the dynamics occurring in Guam, or is this terminology/template applied because it is the only one that the U.S. Constitution understands and permits, due to the particulars of U.S. history? In fact, it seems that the idea of "race-based discrimination" is not precisely relevant—it is indeed the opposite of what is happening in this context.

Thus the Hawai'ian sovereignty movement and the related decision about the voting rights of native Hawai'ians in *Rice* suggest at least two things. One is that U.S. territories are at a significant disadvantage under federal law. There is no way for the Constitution to recognize the residents of these territories (at least while they reside there) as meriting the full rights and privileges that are guaranteed to other citizens via the Constitution. These rights may be amplified, but they will always remain partial. That is the way the legal framework is set up on an existential level. These cases also reveal explicitly that in adjudicating the situation of the peoples of territories and former territories alike, the Supreme Court itself is applying racial bias—in claiming that race should not be a consideration in voting, it is making an argument that itself is founded in racial animus.

The Ninth Circuit Court's decision in *Davis v. Guam* confirms and expands the conclusion in *Rice* that "[a] basic premise of [U.S.] representative democracy is 'the

critical postulate that sovereignty is vested in the people.'"[15] But this is precisely the problem. Sovereignty in an imperial context has a disenfranchising effect, as this case illustrates. In other words, there is a fundamental clash here between democracy and sovereignty. Michael Lujan Bevacqua has written,

> The concept of sovereignty is, at its foundation, that which provides a distinction between inside and outside, those who count and those who don't, those who govern and those who are governed. Sovereignty is generally articulated as the foundation, or a legal/theoretical cover, for an existing order, a force that reaffirms that very order. It is a concept that emerges to naturalize, or provide a rationale for, power relations; and which provides the framework for transforming power and violence into authority and legitimacy.[16]

This formulation makes clear how empire obviates the possibility of true democracy in a structural, but also in a conceptual, sense, as sovereignty by the already powerful restricts imagining. The law *is* the law of the colonizer. *Race* and *sovereignty* are the lenses that the Constitution sees through, but when they are brought together, they may become incompatible. A key part of this problem in the context of empire is that one group making up "the people" has not had access to true sovereignty since the advent of imperial control of their homeland *by virtue of the very fact that they have been, without their consent, governed by U.S. law.*

The decision in *Davis v. Guam* states,

> The (Fifteenth) Amendment nullifies sophisticated as well as simple-minded modes of discrimination….So, in addition to facial racial distinctions,

[15] They cite *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995).

[16] See Michael Lujan Bevacqua, *Chamorros, Ghosts, Non-voting Delegates: GUAM! Where the Production of America's Sovereignty Begins*. University of California–San Diego, PhD dissertation, Department of Ethnic Studies, 2010, 41–42. https://escholarship.org/content/qt9x72002w/qt9x72002w.pdf

> classifications that are race neutral on their face but racial by design or application violate the Fifteenth Amendment.[17]

Thus the law claims that excluding white voices *is the same as* excluding the voices of those whom white power structures have dominated. But the concept of race as it is understood in U.S. law is entirely dependent on the specifics of the United States's history. The law does not ask, How do the CHamoru and other Pacific Islanders understand and express notions of belonging, difference, and heritage? Does the concept of race in the Western sense have any similarities to it? More broadly, how relevant are Western notions of the law in this regard to other cultures and societies? Instead, a group that has not had true popular sovereignty due to Western imperialism is being denied that sovereignty on the basis of a law founded on the principle of popular sovereignty. And it is being denied that sovereignty in key part as a result of how that group was perceived by turn-of-the-century white Americans, when the Spanish-American War brought Guam under the aegis of the United States.

This issue is compounded each time the Ninth Circuit mentions an issue with pre–Civil War discrimination on the basis of race:

> In *Guinn*, … the Supreme Court invalidated an Oklahoma constitutional amendment that established a literacy requirement for voting eligibility but exempted the "lineal descendant[s]" of persons who were "on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation."….That classification, like the one at issue here, was facially tethered to specific laws—the voter eligibility laws in existence in 1866 before the Fifteenth Amendment was ratified. In that year, only eight northern states permitted African Americans to vote.[18]

[17] *Davis v. Guam,* Court of Appeals Decision, 21.

[18] Ibid., 39.

Discrimination against African Americans is used here as a weapon against self-determination for colonized people. The court gives no solution to this problem, nor, indeed, any suggestion that it recognizes the issue as a problem at all. Its only solution is that everyone must learn to work together—an offensive notion, considering that the native people in question were invaded by those who now seek to control them once again, this time not with arms but with laws.

The *Davis* decision goes on to say,

> Nor is Guam's argument that the classification here is political supported by the Supreme Court's recognition that classifications based on American Indian ancestry are political in nature. Laws employing the American Indian classification targeted individuals "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."….Both the Supreme Court and we have rejected the application of *Mancari* for Fifteenth Amendment purposes with respect to non-Indian indigenous groups, namely those in Hawaii and the CNMI [Commonwealth of the Northern Mariana Islands] respectively.….Nothing counsels a different result in this case.[19]

Sovereignty is at issue again, the only difference being that the U.S. government at one time recognized Native American sovereignty. Specifically for this reason, Native Americans are not considered a "race" under U.S. law, and therefore it is acceptable to accord these groups special status. But CHamoru sovereignty has never previously been recognized by the United States legal system, and it is for precisely this reason, apparently, that the Court implicitly argues that it never will be. The language of the decisions makes clear that U.S. sovereignty, once asserted, can easily function antidemocratically, further privileging the already privileged.

[19] Ibid., 40.

What the Guam Decolonization Commission tried to do, essentially, was to turn back the effects of imperialism—but it was prevented by the machinery of U.S. constitutional law, which deemed ancestry not a viable category around which to organize voting rights, because, as the *Rice* case states, it can be used "as a proxy for race." The United States thus implicitly insists that the population of a place it has colonized must be forever under the sway of its laws. And these laws, shaped around the issue of chattel slavery, and adjusted in such a way as to become supposedly race neutral, thus turn into a trap for colonized people who are attempting to reimagine themselves without the presence of the colonizer. Consider this paragraph from the decision to grant summary judgment to Davis—meaning that the appeals court decided there was not even a fact in controversy, and therefore it would go ahead and determine the outcome of the case without further arguments:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."... Further, "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[20]

The Fourteenth Amendment refers to the denial of equal protection of the laws. But what does "equal" mean in the context of imperial possession?

The basis of Davis's suit in the Fifteenth Amendment is clear: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." But again, in the case of Guam, and U.S. territories in general, that right is abridged in the very act of enfranchising the imperial subject. Until social parity has somehow been achieved,

[20] *Davis v. Guam,* No. CV 11-00035, 2017 WL 930825, at *6 (D. Guam Mar. 8, 2017), Decision and Order Granting Plaintiff's Motion for Summary Judgment. See https://law.justia.com/cases/federal/district courts/guam/gudce/1:2011cv00035/8773/149/

there is no way to enfranchise Dave Davis without infringing on rights of the territorial subject; otherwise, the rights of the white/historically dominant group become unduly weighted. And a central problem is that the very way that social parity would be achieved is through laws created or authorized by the United States government, creating the catch-22 that we might call a constitutional crisis.

According to the Ninth Circuit decision in Davis's favor, "A basic premise of our representative democracy is 'the critical postulate that sovereignty is vested in the people.'"[21] This is precisely the problem. Sovereignty in an imperial context has a disenfranchising effect. The Fifteenth Amendment deployed in an imperial setting effectively silences native people.[22] U.S. sovereignty in Guam has meant that Dave Davis's voice is actually much louder than the voices of those who have been subject to colonial and imperial powers. His voice, as this case has unfolded, has been the only one that counts. And with the Supreme Court's denial of certiorari, meaning that they will let

[21] They cite *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995).

[22] As Katherine Murray writes,

> There are currently no safeguards in place to protect the rights of Guam's indigenous population, and based on this ruling it looks like there might never be. Congress has struck down every piece of legislation that attempted to grant special rights to the Chamorro people. As Guam argued in *Davis*, if the United States is to fulfill the "international obligations that it inherited in 1898 and continues to acknowledge today, there must be some mechanism to begin to catalog the plurality of views on the subject." Unlike a state already admitted to the union, the federal government has compelling and continuing obligations to the *original* "native inhabitants" of its unincorporated territories.288 Because the future political status of the native inhabitants of Guam is an unsettled question, the United States is obligated to solicit the views of the native inhabitants of Guam, just as it is obligated to do with Native American tribes. The proposed non–binding plebiscite limited to ascertaining and transmitting the desires of the "Native Inhabitants of Guam" was narrowly tailored to that end and was completely non–binding. Yet even this minor measure giving Guam's indigenous population an outlet to express their political aspirations was struck down. The Supreme Court denied certiorari, leaving the Chamorro with no recourse within the United States system. (69–70)

See "America's Footnote: International Intervention Required to Decolonize Guam."

the lower court's decision stand, Davis has now "won the day."[23] As Julian Aguon, who represented Guam in the case, has noted,

> It will now be even harder for colonized people to exercise any measure of self-determination (at least where an act of voting is involved) because the mere act of designating who constitutes the colonized class could collapse, in a court's eyes, into an act of racial categorization. It will now be even more difficult to determine the collective desire of a colonized people because we cannot even name those people in order to ask them.

The idea of the United States as a representative democracy has always been in certain ways a fiction, and under U.S. law, to stretch the meaning of *a voter* across oceans, to colonies/territories, proves completely incompatible with the original provisions of the Constitution. Empire is, by its nature, repressive. The U.S. Constitution is not equipped to adequately manage the issues it raises. It only knows how to narrowly enfranchise and monitor. It cannot include sufficient safeguards to ensure human rights, perhaps because it was set up to only selectively treat people as human. When the U.S. contains within its sphere of influence other potentially sovereign powers, it is unable to provide democratic representation. But at the same time, it is unable to acknowledge sovereignty for anyone but Native Americans, whose population it has decimated while acknowledging their right to self-governance, perhaps because the U.S. government in its early years was forced to accept the sovereignty of nations that existed before it did.

What is the way out of this trap for the colonized? Guam's example suggests that it may not lie in negotiating with the U.S. government, because the tools of the U.S. government are the tools of continued repression. This appeared very clearly when

[23] As the Center for Individual Rights website headlined its announcement of the denial of certiorari. See https://www.cir-usa.org/cases/davis-v-guam/

Guam used the Insular Cases to argue for the CHamoru plebiscite. The federal District Court judge in Guam had written, in the Motion Granting Summary Judgment,

> Defendants argue that "Plaintiff's attempt to characterize his ability to vote in the plebiscite as a 'fundamental' right is misguided from the start because the 'right to vote' does not necessarily mean the same thing in an unincorporated territory as it does in a state, or other integral part of the 'United States,'" citing to the Insular Cases….The court finds Defendants' argument to have no merit.[24]

Then, referring in circular logic to U.S. law, she states:

> The Insular Cases held that United States Constitution applies in full to incorporated territories, but that elsewhere, absent congressional extension, only fundamental constitutional rights apply in the territory."…Congress has explicitly extended the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to Guam when it enacted the Organic Act of Guam….Accordingly, Defendants' use of the Insular Cases doctrine to support their argument in this case fails.[25]

Imperialism, then, might be viewed as a constitutional crisis that the language of these legal decisions has no choice but to attempt to conceal. The judge continues,

> The court recognizes the long history of colonization of this island and its people, and the desire of those colonized to have their right to self-determination. However, the court must also recognize the right of others who have made Guam their home. The U.S. Constitution does not permit for the government to exclude otherwise qualified voters in participating in an election where public issues are decided simply because those otherwise qualified voters do not have the correct

[24] *Davis v. Guam,* No. CV 11-00035, 2017 WL 930825, at *6 (D. Guam Mar. 8, 2017), 24.

[25] Ibid., 24–25.

> ancestry or bloodline. Having found that the classification is racial, this court finds that the Plebiscite statute impermissibly imposes race-based restrictions on the voting rights of non-Native Inhabitants of Guam, in violation of the Fifteenth Amendment. Further, the court also finds that the Plebiscite statute violates the Fourteenth Amendment.[26]

In a colonized context, who has the right to claim self-determination? What *is* self-determination? Self-determination for *whom?* In *Davis v. Guam,* the notion of belonging is used as a sword, not a shield. So how should "justice" be defined?

Legitimacy in U.S. law is based on consent. Consent of the governed is necessary to the power of the Supreme Court's decisions. Empire gives the lie to this notion of the consent of the governed, and countless rhetorical moves have therefore been made to cover up the fact that the relationship began with violation. The issue of the Guam plebiscite shows the limits of decolonization that lie within the U.S. Constitution, such that the Constitution itself, even as it does not contemplate empire, becomes an instrument that enforces it. The Constitution, for all that it has served as the fundamental document in U.S. law, as it is applied, reveals that in an imperial context, it can serve to magnify injustice, to deaden independence, and thus to maintain empire. This effect occurs whether the Constitution is selectively or wholly applied, as the *Rice* case demonstrates.

In sum, developments in the law related to voting rights for the indigenous citizens of U.S. overseas territories make evident that the elements of the U.S. Constitution that were written in the aftermath of the Civil War in an effort to secure the full benefits of citizenship for African Americans, when applied to indigenous people, end up reinforcing the inequalities that colonialism and imperialism set in motion and/or amplified. As the courts attempt to resolve issues that have arisen in relation to

[26] Ibid., 25.

the rights of properly sovereign people in U.S. "territories," they help expose the fact that the U.S. Constitution is not a document that contemplates the existence of overseas territories at all.

Moreover, the ways in which federal courts have interpreted U.S. law to apply to conflicts arising in the Pacific in particular show that provisions in the Constitution intended to promote equality have had the opposite effect when applied to residents of U.S. empire. The Reconstruction Amendments were attempts to resolve the problem raised by the fact that legal slavery had been an intrinsic influence on the foundational laws of the nation, and therefore persisted once slavery was no longer a viable, accepted means of organizing social life in the nation as a whole.[27] When they are applied across imperial geography, to territories and former territories, they serve as weapons wielded against marginalized groups, who are thereby further marginalized. The Fifteenth Amendment was specifically focused on making literal amends for race-based slavery and turning back the pernicious effects of white supremacy. But because the men who wrote it used race-neutral language instead of specifically identifying the group or groups that had been harmed, this Amendment became a tool that has been used by whites in order to assert their so-called "equality," a fact that has had the effect of further disenfranchising marginalized members of the population. Without the explicit approach to sovereignty that we find in the U.S. government's relationship to Native American nations, the choice is consistently framed in these imperial contexts as one of the indigenous culture versus the rights associated with the imperial society. The implication on the part of the federal (imperial) government is that the rights it offers are highly valuable—more valuable, indeed, than any culture based in Polynesia, for

[27] This is clear simply in a reading of the Constitution, including the Three-Fifths Compromise, for example, as well as the fact that slavery remains legal as punishment for a crime under the Thirteenth Amendment. A recent call to eliminate this provision from an organization dedicated to "ending mass incarceration appears here: Erica Bryant, "It's 2024, and Slavery Isn't Over in the U.S.," *Vera Institute*, June 18, 2024. https://www.vera.org.

example, could be. The fact of domination via empire seems therefore to be embedded in U.S. law, and thus U.S. sovereignty becomes a mode of internal suppression that ends up mandating the continued vitality of empire. The tragedy of *Davis v. Guam* is that it cements this fact.[28]

And yet—another possible future appears in the following vignette:

> *On September 2, 2019, approximately two thousand people gathered for the Fanoghe March at Adelup Point, the largest march for CHamoru self-determination in Guåhan's history. The march was held in response to an unfavorable court ruling in Davis v. Guam that denied the CHamoru right to hold a Native inhabitants plebiscite on the political status of Guåhan.*[29]

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[28] William J. Fife, III, and Beylul Solomon offer an alternative formulation:

> [I]t could be argued that Indigenous land rights are fundamental rights and should be safeguarded akin to "protected classes," not subjected to race-based legal analysis as it is not inherently racial discrimination, as discussed by Professor Rose Villazor in *Davis v. Guam* and in her testimony before the Full Committee Hearing on the *Insular Cases* Resolution. If Indigeneity is a protected class with fundamental land rights and not predominantly race-based in order to survive strict scrutiny, the *Rice* and *Davis* standards regarding voting rights and race-based analysis would not apply and could co-exist with Indigenous land rights. (106)

See "Indigenous Rights: A Pathway to End American Second-Class Citizenship," *Review of Law and Social Justice* 32, no. 1 (2023): 59–132.

[29] My italics. The citation is from Kristin Oberiano and Josephine Faith Ong, "Envisioning Inafa'maolek Solidarity:

The Importance of CHamoru-Filipino Mutual Relations for a Decolonized Guåhan," *Critical Ethnic Studies* 7, no. 2 (Fall 2021). https://manifold.umn.edu/read/ces0702-11/section/55b1c179-af46-4b4a-afd5-3203a422b4b5. Oberiano and Ong go on to note that,

> The march also took place in the context of a 10.3-billion-dollar US military buildup on federally controlled lands, approximately one-third of the island. The Fanohge March sought to unite a coalition of organizations, political leaders, and the general community to demonstrate the wide support for CHamoru self-determination and celebrate the resilience of the CHamoru people through speech, song, dance, and chant. Among the six *maga'taotao* (honored individuals) who led the Fanohge March were two Filipina women, Nerissa Bretania Underwood and Maria Teehan, who have worked in solidarity with CHamoru self

determination since the founding of the Organization of People for Indigenous Rights (OPI-R) in the 1980s. Following their example, a group of Filipino women from Guåhan also carried a sign that read Filpin@s for CHamoru Self-Determination.

The purposeful presence of Filipino activists and advocates in support for CHamoru self-determination upended the narrative proposed by the plaintiff of the *Davis v. Guam* case, Arnold "Dave" Davis, who labeled the US Court of Appeals for the Ninth Circuit decision a win "for all the folks in Guåhan who were locked out of this vote, especially those of Filipino ethnic origin." Under the guise of White benevolence and racial equality, Davis, a White military veteran, spoke for the Filipino population of Guåhan to bolster his settler claim that the CHamoru quest for political self-determination was racist and discriminatory. He also capitalized on contemporary tensions between CHamorus and Filipinos, ignoring the role US militarism has played in framing their complex history.

Significantly, Davis's comments also erased the existence of CHamoru-Filipino solidarities that we have witnessed as founders of Filipinos for Guåhan, a community organization that supports CHamoru self-determination.